CHAPTER IV

GENDER DISCRIMINATION IN THE LAW OF DIVORCE AMONG CHRISTIANS

As has already been found in the earlier chapters, though the laws relating to marriage and divorce are the customary law in certain parts of India, the Indian Divorce Act came to be applied to the whole of India probably because it was considered superior and beneficial to the Indian Christian Community. It had also acted as the entry point for the English law and practice into India. But the operation of the Act has played havoc in certain areas where earlier the customary law had its grip over the community. In certain areas where the customary law has been retained and the Church commands respect and obedience, it is ignored as in the case of Travancore and Cochin. So is the case among the tribal Christians of North-East India where the customary law still reigns supreme. Even when the Divorce Act was given effect to by the legal system the Church disregarded its application and did not permit second marriage after the divorce. The discrimination writ large on the various provisions of the Act is not tolerated by the community and it wants to modulate its stand in tune with the twentieth century concepts of man and wife.
In this context it is worthwhile to examine the background in which the Indian Divorce Act came to be enforced in the whole of India and to identify the discrimination inherent in the various provisions.

The Indian Divorce Act, 1869 extends to the whole of India except the State of Jammu and Kashmir. As originally enacted, it extended to the whole of British India, and so far only as regards British subjects within the dominions of Princes and States in India in alliance with her Majesty. But when India became independent, the State of Jammu and Kashmir was excluded from the application of the Act, and the Act came to be extended to the whole of India, except the Part B States. But in 1951, it came to be extended to the

1. See Section 2 of the Indian Divorce Act, 1869 as modified by subsequent amendments.


Part B States as well. It applies only to persons professing Christian religion. It was intended to be an Act to "amend" the law relating to divorce and matrimonial causes of Christians, and to confer jurisdiction upon the High Courts and District Courts in matters matrimonial and it was not intended to be a comprehensive legislation on the subject.

It was not a comprehensive one with reference to England either. The Courts in India were ordained to regulate the proceedings under the Act in accordance with the provisions of the Act and the Code of Civil Procedure. In case of absence of provisions in the Act and the C.P.C to govern a situation, Section 7 of the Act mandates the Courts in India to follow, so far as possible, the practice of the

5. See Preamble to the Indian Divorce Act, 1869.
6. See supra notes 86-90 of Chapter III and the accompanying text.
7. See supra note 91 of Chapter III and the accompanying text.
8. See Section 45 of the Indian Divorce Act, 1869.
Court for Divorce and Matrimonial Causes in England. 9

Therefore, the decisions of the Probate and Divorce Court in England must be taken to be a guide to the Courts in India, except when the facts of any particular case, arising out of peculiar circumstances of Anglo-Indian life, constitute a situation such as the English Court was not likely to have had in view. 10 And the principles and rules are not merely rules of procedure such as the rules which regulate appeals but are the rules of quasi substantive rather than of mere objective law, 11 and it includes the requirements of a certain degree of evidence and other cognate matters. 12 Therefore, a proper appreciation of the application of the provisions of the Indian Divorce Act, 1869 in India requires an examination of the law in England and its development through the centuries.

9. See Section 7 of the Indian Divorce Act, 1869. Also see infra notes 45 to 47 and the accompanying text.


11. A.V.B (1898) 22 Bombay 612 at 615. Also see Miller v. Miller (1925) 52 Calcutta, at 566.

From early Saxon times, side by side with the civil law, there existed ecclesiastical law, even when the Court had jurisdiction in both civil and ecclesiastical matters. There was an intimate union of Church and State, a union in which the royal authority constantly upheld the authority and national position of the Church. The superior clergy took a major role in legislative activities and in the administration of justice as well as in general government. With the defeat of King Harold at the battle of Hastings in 1066 A.D, by William le Batard (the conqueror) with the support of the Pope, the practice of dealing with ecclesiastical and temporal affairs in the same court was abolished and the bishop and the Archdeacon had his own Court. 13 And the marriage law of England became the canon law. 14 The substantive law that was administered in the Church


courts, (Courts Christian) was, first and foremost, the Holy Scriptures in the so-called "Vulgate" version, the one made by St. Jerome in the fourth century. And a mass of specific regulations announced by various councils, both general and local, as well as the decrees of Popes, had all the aspects of legislation and were treated as laws. All the compilations and collections were, from the sixteenth century on, known as the Corpus Juris Canonici, (the Body of Canon Law) formed the basis of the law administered in the Church courts. 

"The ecclesiastical Courts had, certainly from the twelfth century undisputed jurisdiction in matrimonial causes. Questions as to the celebration of marriage, as to the capacity of the parties to marry, as to the legitimacy of the issue, as to the dissolution of marriage, were decided by the ecclesiastical Courts administering the canon law".

16. Ibid. at 104.
Difficulties began to develop between church and state. In 1164 A.D., King Henry II wanted to abolish many of the privileges of the clergy, and forbade appeals to Rome. But later, the King had to give up his efforts. In 1532 A.D., King Henry VIII forbade marriage case appeals to the Pope in the Statute of Appeals. This was followed by the Act of Submission of the Clergy. Finally, when the King could not get an annulment of his marriage by the Pope, he proclaimed himself 'Supreme Head in Earth of the Church of England', in the year 1534. By another Act, it was provided that dispensations for marriage could be given only by the Crown, but at the same time, there was to be no departure from the true faith of the Catholic Christian Church. The Church courts became royal courts after Henry VIII, but retained their independence of the Common Law Courts. The older Canon Law was not repudiated, but a new canon law was built up on it.

20. 26 Henry VIII C.1.
22. See supra n.15 at 105.
"The influence of the Canon Law on English law in general is a Chapter of English legal history that has not yet been written. Further investigation of the interrelation of the law of the Courts of King and of the bishop is certain to give fruitful results." 23

The Statutes subordinated the Church to the State, and the Church Courts to the law of the land. 24 But it would be wrong to suppose that the Church was to lose her liberty in toto. The position that emerged out of the conflicts was that the state law was to have predominance, over the Church law only when there was a conflict between the two. Otherwise, the Church law was to have its sway. 25

The right of the Church to have her own courts and her own law remained unchallenged. 26 But an Act of 1836 had paganised marriages by providing for marriages before a civil Registrar. 27 With certain exceptions, the matrimonial law of the Church survived until 1857. The Matrimonial Causes Act,

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26. Ibid. at 19.
27. See 6 & 7 Will. IV c.85. S.1.
1857\textsuperscript{28} established a new temporal (civil) court to exercise jurisdiction in all matrimonial causes. Thus, marriage, which had once been a sacrament was now becoming merely a civil contract in England and the logical sequel was that it could no longer be held to be indissoluble. This led to the introduction of divorce a vinculo by a temporal Court.\textsuperscript{29} And the Church lost the last remnant of her jurisdiction in matrimonial causes in England. The Established Church not only lost her jurisdiction in marriage cases, but also in her ministry and in her attempts to revise her canon law. She had to look to Parliament for its assent for needed changes even in canon law.\textsuperscript{30}

But a closer look into these developments would show that the substantive law on marriage and the basis of its validity still continued to be the canon law. It can be found that the Matrimonial Causes Act, 1857\textsuperscript{31} did not substantially differ from the substantive law contained in

\textsuperscript{28} See 20 & 21 Vic. c.85.

\textsuperscript{29} Gorham v. Bishop of Exeter 20 Rob. Eccles. 1 in the Arches' Court on appeal to Privy Council 1850, 14 L.T. (o.S) 521.

\textsuperscript{30} See supra n.25 at 13.

\textsuperscript{31} See supra n.28.
canon law as the Act was not a comprehensive legislation on the law of marriage and it only made certain amendments to the then existing canon law as is evident from its Preamble which reads:

"An Act to amend the law relating to divorce and matrimonial causes in England.

Whereas it is expedient to amend the law relating to divorce, and to constitute a court with exclusive jurisdiction in matters matrimonial in England, and with authority in certain cases to decree the dissolution of marriages. Be it therefore enacted....." 32

And the Courts continued to apply the principles of Canon Law for deciding the validity or otherwise of a marriage. In 1866 Lord Penzance in his judgment said:

"Marriage as it is understood in Christendom is the voluntary union for life of one man and one woman

32. See the Preamble to the Matrimonial Causes Act, 1857; Rayden's Practice and Law in the Divorce Division. 2nd Edition. (1926) at 403.
to the exclusion of all others". 33

The statutory provision and the position of law remained the same even after the enactment of the Judicature Act, 1873. 34 This Act finally vested the jurisdiction in matrimonial causes in the High Court of Justice (Matrimonial, Probate and Admiralty Division). 35 The various Acts that followed did not effect major changes in the substantive law. And the Supreme Court of Judicature (Consolidation) Act, 1925 specifically provided—

"The jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by rules of Court, and where no special provision is contained in this Act or in rules of Court with reference thereto,

33. Hyde v. Hyde and Woodmansee, L.R (1866) 1 P.D. at 130-133. Also see supra n. 3 of Chapter III.

34. See Section 23 of the Judicature Act, 1873. (33 & 37 Vic. C.66).

35. See supra n. 25 at 83.
any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the Court to which it formerly belonged. 36

And such jurisdiction formerly belonged to the Ecclesiastical Courts in England. Therefore Lord Merriman laid down that the principles which the Court must follow were, in nullity cases, those of the old Ecclesiastical Courts and that neither the statute nor the common law of England had interfered with the pre-Reformation canon law. 37

If one goes through the entire statutory law of England from 1857 to 1925, it can be seen that the civil law had not specified any ground for declaration of nullity of marriage and those grounds remained the same as those provided under the laws of the Church. The statute came into being for the purpose of conferring exclusive jurisdiction on certain courts and to provide for grounds of divorce which the Church had not recognised.

36. See Section 32 of the Supreme Court of Judicature (Consolidation) Act, 1925. (15 & 16 Geo. 5. C.49).

The Indian Divorce Act, 1869 is to be understood and interpreted in the background of the development of the law in England, as explained above. The Bill was framed by Mr. Whitely Stokes.

The Draft of the Bill was submitted to the several High Courts for their opinion and the communications received from the Judges at Calcutta and Bombay were laid before the Council of the Governor-General. The Bill was originally introduced by Sir Henry Maine on the 24th December, 1862. Mr. Maine, in moving for leave to introduce the Bill, stated that its object was to give effect to the policy embodied in the High Court Act passed in 1861 and the Letters Patent issued by Her Majesty for constituting the High Courts. The object of the High Courts Act, he said, seemed to have been, not so much to create new branches of jurisdiction, as to constitute and re-distribute the power already existed. The 9th Clause gave power to the Government to confer on the High Courts such matrimonial jurisdiction as it thought fit. But the Government did not attempt to confer on the High

38. 24 & 25 Vict. C. 104.
Courts such jurisdiction as was exercised by the Divorce Court in England. The Secretary of State had, therefore, requested the Governor-General to introduce a measure, conferring jurisdiction on the High Courts here similar to that exercised by the Divorce Court sitting in London. The Bill, after having been for seven years before the Council of the Governor-General, received the assent of the Governor-General on 26th February, 1869.

It was specified that the object of the Bill was to place the matrimonial law administered by the High Courts, in exercise of their original jurisdiction, on the same footing as the Matrimonial Law administered by the Court for Divorce and Matrimonial Causes in England. In other words, the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England established under the Matrimonial Causes Act, 1857 and in regard to which further provisions were made by the Matrimonial


40. See supra n.2 at 1.

41. See supra n.39.

42. See supra n.28.
Causes Act, 1859,43 and the Matrimonial Causes Act, 1860.44 It was further specified that by vesting the High Court with powers of the court for Divorce and Matrimonial Causes in England, it was not intended to take away from the courts within divisions of the Presidency not established by Royal Charter any jurisdiction which they had in matters matrimonial.45 For example, a suit based on the ground of non-observance of the essential ceremonies of marriage has still to be instituted in the ordinary court of civil jurisdiction and not in the High Court.46 Whereas, when a marriage was solemnised outside India, the matrimonial courts in India have no jurisdiction to grant a decree of nullity.47 In such cases, the jurisdiction of the civil court to entertain a suit for declaration that the marriage is a nullity, is not barred by the provisions of the Act.48

43. See 22 and 23 Vic. C.61.
44. See 23 and 24 Vic. C.144. But all these enactments were repealed by the Supreme Court of Judicature (Consolidation) Act, 1925. (15 & 16 Geo. 5 C.49).
45. See the text of supra n.39.
47. See Section 2 of the Indian Divorce Act, 1869.
48. Bhagavan v. Choloffe. I.L.R 1959(1) Cal 84. The Civil Court can grant such a relief under Section 42 of the Specific Relief Act, because it involves the adjudication of a status.
Moreover, the jurisdiction of the matrimonial courts under this Act does not extend to entertain a suit for a declaration that a certain marriage is valid. 49 Further, when a marriage is void under the provisions of Sections 4 and 5 of the Indian Christian Marriage Act, 1872, again it is the ordinary court of civil jurisdiction that should be moved for a decree of nullity of marriage and not the matrimonial court under the Indian Divorce Act, 1869. But in the course of an adjudication of a matrimonial dispute, if the validity of a marriage is challenged otherwise than under the provisions of the Indian Divorce Act, the matrimonial Court is not precluded from looking into the validity or otherwise of a marriage. 50 In short, the Indian Divorce Act, 1869 is not to be construed as a comprehensive legislation in these matters.

The Draft of the Bill had been prepared to give effect to the Secretary of State's instruction, 51 but some variations from the English Statutes in respect of procedure

51. See supra n.39 at 173.
have been adopted. For the purpose of uniformity in procedure in the several branches of jurisdiction, the Bill provided for adoption of the procedure of the C.P.C, instead of the Rules of Her Majesty's Court for Divorce and Matrimonial Causes in England. When the Bill was finally enacted into law, Section 7 provided:

"Section 7:— Court to act on principles of English Divorce Court— Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the court for Divorce and Matrimonial Causes in England for the time being acts and gives relief; Provided that nothing in this Section shall deprive the said Courts of Jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded".

Now, therefore, it emerges that the courts in India are to grant relief based on the principles and rules of the Court for
Divorce and Matrimonial Causes in England; and the English Courts, in turn, are to follow the principles and practice of the old Ecclesiastical Courts. In other words, the Courts in India are to grant relief in matrimonial causes (under the Indian Divorce Act, 1869) on the basis of the principles evolved by the old Ecclesiastical Courts in England.

Now a question would arise as to what extent those principles can be applied here. In all matters which are provided for in the Code of Civil Procedure, the Courts must regulate their procedure in accordance with the provisions contained therein, and not with the Rules and Regulations of the Court for Divorce and Matrimonial Causes in England. But in the absence of any provision on the subject in the Code of Civil Procedure, Section 7 of the Act enables the Courts in this country to follow, as nearly as may be,

52. See supra n.36 and 37 and the accompanying text.
53. See Section 45 of the Indian Divorce Act, 1869.
54. Abbott v. Abbott and Crump. 4 B.L.R, 0.C.51.
the practice of the English Courts, and the decisions of those courts are to be taken as a guide to the Courts in India, under the Indian Divorce Act, 1869. And the Bombay High Court applied the English Divorce Rules in 1895. The principles and rules contemplated under Section 7 of the Act are not merely the rules of procedure such as the rules which regulate appeals but are the rules and principles which determine the cases in which the court would grant relief to the parties appearing before it, or refuse that relief—rules of quasi substantive rather than of mere objective law, including the requirement of a certain degree of evidence and other cognate matters. Thus, it can be found that the legislative authority was aware of the principles and rules upon which the Court in England then acted and gave relief.

56. The Rules and Regulations of the English Court of Divorce were issued on 26.12.1865 and it came into effect from 11.1.1866.

57. See supra n. 10 at 260.

58. Mayhew v. Mayhew (1895) 19 Bom. 293.

59. See supra n. 11.

60. See supra n. 12.

make the Indian law on divorce flexible and not static. In other words, intention of incorporating this provision in the Act was that the law here should develop alongside with the English law. The Madras High Court went to the extent of holding that the Court may apply not only the principles and rules of law but also statutory provisions and statutory rules in force relating to matrimonial causes in England. But the Calcutta High Court had taken a different view that Section 7 does not empower the Court to import the entire law of procedure prevailing in England. Later, the Madras High Court fell in line with the note of caution expressed by the Bombay High Court, and held that Section 7 cannot be read as interfering with or extending the grounds of dissolution of marriage provided under Section 10 of the Act.

64. Steedman v. Wheeler (1944)1 Cal 248.
65. See supra n.12.
to dwell on the applicability of English law in these matters. While considering the scope of Section 7, the Supreme Court held that the rules laid down by the House of Lords would provide the principles and rules which the Indian Courts should apply to cases governed by the Indian Divorce Act. But the Court asserted that it was unthinkable that legislation whenever made by the Parliament of a foreign state should automatically become part of the law of another sovereign state. According to it legislation by incorporation can never go that far. Whatever interpretation of Section 7 was permissible before the 15th August, 1947 when British Parliament had plenary powers of legislation over Indian territory, no interpretation which would incorporate post 1947 British law in Indian law is permissible. Now, therefore, the intention of the legislative authority to develop the Indian law alongside with the English law cannot be fulfilled due to change.

69. See supra n.62.
of sovereignty. Though the law in England has been amended over and again to cope with the changing times, the Indian law remains still and sterile, still wedded to the concepts of the bygone century. And this is so inspite of the categorical ruling of the Supreme Court not to use Section 7 of the Divorce Act as a vehicle to import English law.

As regards divorce, the grounds enumerated in Section 10 of the Indian Divorce Act, 1869 remain still the same. It provides:-

"When husband may petition for dissolution:- Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnisation thereof, been guilty of adultery.

When wife may petition for dissolution:- Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnisation thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;"
or has been guilty of incestuous adultery,
or of marriage with another woman with adultery,
or of rape, sodomy or bestiality,
or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et toro, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

Contents of petition: Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded. 70

Adultery committed by the wife after the solemnisation of the marriage is the sole ground on which a divorce can be sought for by the husband under the Act. Yet the term "adultery" has not been clearly defined under the Act.

This situation makes one to undertake a search for its definition elsewhere. And naturally one lands up in the not

70. See Section 10 of the Indian Divorce Act, 1869. (Act No.4 of 1869). Also see infra n.125 and the accompanying text.
so luminous area of the Indian Penal Code. S.497 of which defines adultery for the purposes of I.P.C.

To constitute that offence, the woman with whom sexual intercourse is committed must be or must be known to be or must be reasonably believed to be the wife of another man, and the act of sexual intercourse must be committed without the consent of the man (husband of the woman) and it must not amount to an offence of rape. In other words, under this definition if a man commits the act of sexual intercourse with an unmarried woman, a widow, a prostitute or with the consent or connivance of the husband of the woman with whom sexual intercourse is committed, he is not guilty of adultery. This definition applies only to male offenders and the woman cannot be said to be guilty of adultery. And therefore this concept of adultery is of no use for the husband to invoke S.10 of the Indian Divorce Act. It has to be different from the adultery in S.497 I.P.C.

71. See Section 497 of I.P.C. It further provides that in such cases the wife shall not be punished as an abettor.
It is generally argued that since the Indian Divorce Act authorises a husband to present a petition for the dissolution of the marriage on the ground of adultery of his wife, the term "adultery" in Section 10 must be construed in a wider sense.72

There is another argument to the effect that the English concept of adultery should be accepted for application in India. And this argument is fortified with the plea that under Section 7 of the Indian Divorce Act, the Courts in India are to apply the principles and rules laid down by the Matrimonial Courts in England in respect of matters which are not covered by the Indian Divorce Act. Under the English matrimonial law, adultery consists in the voluntary sexual intercourse of a married person with a person other than the husband or the wife.73 For adultery to be the foundation for divorce, it must be voluntary. When the party is compelled by force or ravishment; or wife has carnal

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73. Crawford v. Crawford. (1886) II. P.D. 150. Also see Long v. Long and Johnson (1890) 15 P.D. 218.
knowledge of a man not her husband through error or mistake, she believing him to be her husband; or when, the wife marries another man through a belief that her former husband is dead and during the continuance of this belief lives in matrimonial intercourse with the latter, the offence justifying a divorce is not committed. Nor where the wife is forced against her will to have sexual intercourse or is incapable of understanding the nature of the act could she be found guilty of adultery. In such cases the husband's petition for divorce on ground of adultery should be dismissed. 74 And where the Court was satisfied that the wife had been raped by a man unknown, and as a result she gave birth to a child, it was held, there was no adultery and the husband's petition for divorce was dismissed. 75

A divorced woman cannot be held guilty of adultery; but she could also be held to have committed adultery, it was so held, if she knows that the man with whom she has sexual intercourse is married and that his marriage subsists at that time. 76

74. Long v. Long and Johnson (1890) 15 P.D. 218. Also see Yarrow v. Yarrow (1892) 66 L.T. 383.

75. Clarkson v. Clarkson (1930) 143 L.T. 775.

76. Abson v. Abson (1952) 1 All. E.R. 370.
In the absence of a clear definition of adultery committed by wife, in fact, the husband in India is at a disadvantage so far as the invocation of S.10 for divorce is concerned. Even if the English concepts are accepted, it seems, his position is not improved inasmuch as there are many exceptions engrafted to the definition of adultery committed by wife even in English law.

Under Section 10 of the Indian Divorce Act the wife may present a petition for dissolution of marriage on the ground of change of religion and remarriage by the husband after the solemnisation of marriage or on the ground of incestuous adultery\(^77\) committed by the husband, or if the husband is guilty of bigamy with adultery (which means adultery with a woman with whom the bigamy is committed). The bigamy and adultery must be with the same woman.\(^78\) Yet another ground available to the wife is marriage with another woman with adultery. This situation arises where the husband

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\(^77\) See Section 3(6) of the Indian Divorce Act for the definition of incestuous adultery.

\(^78\) Russel's Case (1901) A.C.446. Also see Ellam v. Ellam (1889) 61 L.T 338. For definition see Section 3(7) of the Indian Divorce Act.
has the capacity to enter into more than one marriage and the second marriage would not be legally termed as bigamy. In such a case if the second marriage is consummated, the consummation viz-a-viz the first wife amounts to "marriage with another woman with adultery" and the first (Christian) wife is entitled to a divorce.\(^79\)

Rape committed by the husband is another ground available to the wife. But the term "rape" has also not been defined under the Act. Section 375 of the Indian Penal Code defines rape. But an order of conviction by the Criminal Court is not conclusive and evidence would be allowed to be adduced de novo to enable the wife to establish rape and thus to obtain a divorce.\(^80\) Even on the ground of an attempt to have unlawful carnal knowledge of a girl under the age of thirteen years\(^81\) or even when the husband was convicted of an indecent assault,\(^82\) the wife could get an order

\(^{79}\) See Mrs. A.A. Chitnavis v. Mr. A.S. Chitnavis A.I.R 1940 Nag. 195 (S.B). For definition see Section 3(8) of the Indian Divorce Act.

\(^{80}\) Virgo v. Virgo (1893) 69 L.T 460.

\(^{81}\) Coffey v. Coffey (1898) P. 169; 78 L.T. 796.

\(^{82}\) Bosworthick v. Bosworthick (1901) 86 L.T 121; 18 T.L.R 104.
of divorce. Also, if a husband is guilty of sodomy, or bestiality the wife is entitled to get a divorce. And the terms 'sodomy' or 'bestiality' are not defined in the Act. Section 377 of the Indian Penal Code defines the offence of sodomy and bestiality as voluntary carnal intercourse against the order of nature with any man, woman or animal. The wife is entitled to a decree of divorce if she can prove that her husband has committed sodomy or bestiality with any man, woman or beast.\(^3\) If sodomy is committed by a husband with his wife against her consent he is guilty of sodomy which will entitle the wife to get divorce.\(^4\) Sodomy means non-coital carnal copulation with a member of the same or opposite sex, eg. per anus or os, and if it is committed by the husband against the will of his wife, she is entitled to get a divorce on this ground.\(^5\) Yet another ground of divorce available to the wife is adultery coupled with cruelty on the part of the husband. The term cruelty is

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\(^3\) Statham v. Statham (1929) P.131. C.A; 140 L.T. 292; 45 T.L.R 147.


\(^5\) Grace Jayamanl v. E.P. Peter A.I.R 1982 Kant. 46. (S.B).
also not defined in the Act. In the eye of the law, bodily injury, reasonable apprehension thereof or injury to health are the tests of legal cruelty. Further adultery coupled with desertion for a period of two years or more is another ground for divorce available to a wife.

It is generally argued that under §10 of the Indian Divorce Act while the husband can seek dissolution of marriage on the ground that his wife has been guilty of adultery simpliciter, the wife has to prove that the husband has been guilty of adultery with something more. This position, according to many is discriminatory to women. Firstly, it is very difficult to prove adultery of a husband. If it is to be proved with other conditions it becomes all the more difficult for her to obtain a decree of divorce.

The position of the husband also is not that different. It is argued that since the wife has been given a good number of grounds for divorce whereas the man has been

86. Tourkins v. Tourkins (1858)1 SW & Tr 168; 164 E.R 678.

87. Desertion is defined under Section 3(9) of the Indian Divorce Act.
given only one ground (adultery by the wife) which is comparatively difficult to prove, the provision works out injustice violating man's right to equality. This plea raised recently in *Anil Kumar Mahsi*⁸⁸ has come to be rejected by the Supreme Court. It was argued that sodomy and bestiality are not available to the husband as grounds for divorce whereas they are available to the wife, and this also is discriminatory to men. The Court responded:

"Taking into consideration the muscually weaker physique of the women, her general vulnerable physical and social condition and her defensive and non-aggressive nature and role particularly in this country, the legislature can hardly be faulted if the said two grounds are made available to the wife and not to the husband for seeking dissolution of the marriage. For the same reasons, it can hardly be said that on that account the provisions of S.10 of the Act are discriminatory as against the husband."⁹⁹

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⁹⁹. Ibid. at paragraph 9. But the Court seems to have overlooked another fact that change of religion and contracting of another marriage by the husband is a ground for divorce available to the wife, whereas the same ground is not available to the husband as against his wife.
It seems the central philosophy running through the Indian Divorce Act is based on the Victorian attitude of treating woman as the chattel of man. This becomes evident if one examines certain provisions. The principle embodied under Section 34 of the Act which enables a husband to claim damages from the adulteror of his wife as compensation, is an extension of the tortious liability incurred for trespass. And under S.11 the alleged adulteror has to be made a party to the proceedings. This smacks of the right of the chattel owner to bring an action against trespasser to his property. This view gets strength from the position that the wife is not given such a right by the Act. Further, Section 39 of the Act makes provision for settlement of wife's property for benefit of husband and children, if the wife is found guilty of adultery and either a dissolution of marriage or an order of judicial separation is made by the Court on that ground. Thus a wife stands to lose even her property for committing adultery but a husband is not visited with any such rigours under the Act. The above position of law itself demands the abolition of the Indian Divorce Act lock, stock and barrel.
The Divorce Act is patently discriminatory in another aspect. As discussed above while even a "guilty wife" has been afforded the protection of maintenance consequent on divorce, a woman whose marriage is declared null and void under the Act is not granted maintenance. May be it is due to the accident of history by which the jurisdiction exercised by the Ecclesiastical Courts came to be engrafted to the civil court when the Divorce Act was passed. Since these Courts never used to grant maintenance on the decree of nullity the civil court-successor is also not given the authority to order maintenance. In practice this worked out injustice and as a result of this situation the legislature in England made provision for maintenance even in such cases and the Courts have been enforcing this provision diligently.

However this is not being followed in India inspite of S.7 permitting to import the English practice. Courts in India have generally not resorted to Section 37 of the Act for the granting of permanant alimony in nullity cases.

90. The decision in Leelamma v. Dilip Kumar A.I.R 1992 Kerala 57=1992(1) K.L.T 651 is an emulable exception to the general practice, where the Court granted permanent alimony after a decree of nullity.
And this position is discriminatory to women in India.

In this context, it may be interesting to note that the French Civil Code as applicable in Pondicherry provides for gender egalitarian grounds of divorce. This is evident from the provisions of the Code. Article 229 enacts:

"A husband is entitled to demand a divorce owing to his wife's adultery".

The same ground is made available to the wife also. Article 230 provides:

"A wife is entitled to demand a divorce owing to the adultery of her husband".

Whereas Article 231 is common to both husband and wife. It provides:

"Both parties are entitled to demand a divorce for cruelty, harshness, or serious legal injury, insults of the one towards the other".

The position is not different for the husband and wife under Article 232 which enacts:

"The fact that one of the parties has been sentenced to punishment which affects the person
and is branded with infamy is a good cause of divorce."

And prior to 27th July, 1884, divorce by mutual consent was available, but that provision has since been repealed.

The law of divorce in Goa, Daman and Diu provides the same grounds for both husband and wife.91 Article 4 provides:

"The contested divorce may be obtained only on the following grounds and on no others:

1. Adultery committed by the wife;
2. Adultery committed by the husband;
3. Final conviction of one of the spouses to undergo any of the major penalties provided in Articles 55 and 57 of the Penal Code;
4. Ill-treatment or serious injuries;
5. Complete abandonment of the conjugal domicile for a period of not less than three years;
6. Absence, where nothing has been heard of the absentee, for a period of not less than four years;
7. Incurable unsoundness of mind when at least three

91. But these provisions are not applicable to Catholics. See supra n.38 of Chapter II.
years have elapsed after its pronouncement by judgment, become final for want of appeal, as per Articles 419 onwards of the Code of Civil Procedure;

8. De facto separation, freely consented for ten consecutive years, whatever may have been the cause of that separation;

9. Chronic vice of gambling;

10. Contagious disease found incurable or an incurable disease involving sexual aberration

Para 1:- Divorce, on the ground provided under clause 3 may be sought only if the petitioner has not been convicted as co-accused or abettor or accomplice in the offence which resulted in the conviction of the other spouse.

Para 2:- Where divorce is sought on the grounds provided under clauses 3 & 7 hereof, the defendant shall be represented in the respective suit by the Public Prosecutor and the latter shall also represent in the cases coming under clauses 5 and 6, if the defendant fails to appear or to be represented on the summons being served on him as per the law.
Para 3:- In a case coming under clause 8, the evidence shall be restricted to the fact of separation, its continuity and duration.

Para 4:- In a case coming under clause 10, no suit shall be instituted without the nature and the characteristics of the incurable disease being verified by way of previous examination carried out as per Articles 247 and 260 of the Code of Civil Procedure.  

It is of interest to note that under the Portuguese laws as is in force in Goa, divorce is obtainable even on "mutual consent" as is provided under Article 35. It reads:

"Divorce by mutual consent can be sought only by the spouses who have been married for over two years (substituted by "five" instead of "two" by Art. 1472 of Code of Civil Procedure of 1939) both having completed at least 25 years of age."


But there are certain other conditions to be satisfied by the spouses before a divorce on "mutual consent" could be obtained. Those conditions are set forth in Article 36 of the Code. It reads:

"In order to obtain divorce by mutual consent, the spouses shall file an application, without being in paragraphs, before the court of their domicile, setting forth the respective relief, supported by the following documents:

1. Marriage Certificate, 2. Birth Certificate,
3. Detailed Statement of all their properties with documentary evidence, 4. Any agreement that they may have arrived at, about the custody of their minor children, if there are any, 5. Declaration concerning the contribution that each spouse shall make for the maintenance and education of minor children, 6. Certified copy of the antenuptial contract, if any as well as of its registration, if any." 94

94. See Ibid. at 84.
In the case of the Christians of North East India, the customary law of divorce still holds good. Among the Garos, tradition permits divorce on the part of both the spouses and it involves the payment of a fine by the defaulting spouse to the aggrieved spouse. Divorce may be made on the following grounds:

1. If there is imminent danger to the life and security of any one of them.
2. When a wife or a husband commits adultery with another man or woman (So'mal donna).
3. When a man or woman is insane.
4. When a wife and a husband live in different places and no longer maintain any connection for two years or more.
5. When the husband or the wife is hermaphrodite or if either of them makes himself or herself sterile.
6. When a wife or a husband is cruel and is a cause of fear of harm and injury in the mind of the other partner (bamgija wachagrika).
7. Refusal to maintain the family.
8. When a wife or a husband denies conjugal union.
9. When a wife conceives a child by someone other than her own husband.
(x) Impotency".\textsuperscript{95}

Inspite of the extension of the Indian Divorce Act, 1869 to these areas, it is still the customary divorce that is resorted to here.\textsuperscript{96}

Among the Khasis, divorce is common. If a husband and wife cannot live happily together, they agree to divorce. The common cause for divorce may be barrenness, adultery, ill-treatment, non-maintenance and such others.\textsuperscript{97} Among the Garos and the Khasis, the grounds of divorce available under their customary law do not bring about gender discrimination.

In this context it is interesting to note the judicial response to the discriminatory aspects contained in Section 10 of the Indian Divorce Act, 1869. In 1954, the Madras High Court\textsuperscript{98} justified the different grounds for divorce, made available to husband and wife under Section 10.

\textsuperscript{95} Julius Maram, "Garo Customary Laws and Practices". (1986) at 125-126.
\textsuperscript{96} See supra n.28 of Chapter II and the accompanying text.
\textsuperscript{97} Dr.(Mrs) Helen Giri, "Social Institutions among the Khasis with Special reference to Kinship, Marriage, Family Life and Divorce". Published in the "Tribal Institutions of Meghalaya" at 170.
\textsuperscript{98} Dr. Dwaraka Bai v. Prof. Ninan Mathews A.I.,R 1953. Madras : 792.
It ruled that Section 10 appeared to be based on sensible classification. The Court reasoned that an adultery by wife is different from an adultery by husband as the husband cannot bear a child as a result of such adultery and make it a legitimate child of his wife to be maintained by the wife. But if a wife bears a child as a result of adultery, the child becomes a legitimate child of the husband and the presumption under Section 112 of the Evidence Act would pin him down for maintaining the child. The Court found—

"It is obvious that this very difference in the result of the adultery, may form some ground for requiring a wife, in a petition for divorce not only to prove adultery by the husband but also desertion and cruelty, whereas the husband need prove only adultery by the wife".99

In 1970, a Full Bench of the Madras High Court however opined that the provisions of the Indian Divorce Act, 1869 bring about genuine hardship and that there was urgent need for re-examination of the provisions of the Act so as to render

them humane and up-to-date. Similar views were expressed by several courts. In 1980, the Delhi High Court observed—

"Perhaps when this Act was passed by the legislature in 1869, it was a progressive law. Today one can almost say that it is an archaic law requiring serious reconsideration by Parliament to bring it in line with other laws governing marriages, like the Hindu Marriage Act. We can only express the hope that the legislature would take note of this aspect and amend the law so as to make citizens of India, irrespective of the faith they profess, to lead a happy, full and useful life".  

In the year 1982, the Supreme Court opined—

"It is for Parliament to consider whether the Indian Divorce Act, 1869 should be amended so as to include a provision for divorce by mutual consent".  

At the same time Chinnappa Reddy, J. added—

"......divorce by mutual consent should be available

102. See supra n.68.
to every married couple, whatever religion they may profess and however they were married. Let no law compel the union of a man and woman who have agreed on separation. But the woman must be protected. Our society still looks askance at a divorced woman. A woman divorcee is yet a suspect. If the divorce law is to be a real success, it should make provision for the economic independence of the female spouse. 103

In 1985, the Supreme Court again had another occasion to opine on the need for reform of divorce law thus:—

"Legislative competence is one thing, the political courage to use that competence is quite another. ....We suggest that the time has come for the intervention of the Legislature in these matters." 104

A full bench of the Madhya Pradesh High Court also recommended updating of the Indian Divorce Act, 1869. 105 And the Calcutta High Court in 1989 opined:—

103. Ibid. at 481.
"We are inclined to think that our Parliament or State Legislature (Marriage and Divorce being matters in the Concurrent List) should very seriously consider the question of introducing similar amendments in the Divorce Act, 1869 to bring it in harmonious conformity with other analogous enactments on the subject governing the other communities in India". 106

And in 1990, the Kerala High Court directed the Union of India to take a decision on the recommendations of the Law Commission of India in its 90th Report for making amendments to Section 10 of the Indian Divorce Act, 1869. 107

In 1994 also as pointed out earlier the Supreme Court had an occasion to deal with the issue. However, the Court thought it proper to speak on avoiding of Divorce Act rather than on the need for amending it. It pointed out the availability of other liberal legislation like Special Marriage Act and asserted that in its presence if a person elects to be governed by the Divorce Act, he cannot complain of its rigours later. The Court observed:

"What is further, the individuals not willing to submit to the Indian Divorce Act or any other personal law are not obliged to marry exclusively under that law. They have the freedom to marry under the Special Marriage Act, 1954. Having however, married under the Act and accepted its discipline, they cannot be heard to complain of its rigours, if any". 108

Indeed, there appears apparent discrimination against man also in the Indian Divorce Act. Likewise in certain cases it works out injustice to the women too. It may be that even if Section 10 was looked upon as discriminatory to the husband, it would have been saved by the principle of protective discrimination 109 in favour of the weaker sex permissible under Article 15(3) of the Constitution.

Though the Court claims to have got very valuable assistance from the bar, 110 it appears, it did not get a chance to examine the recommendations made by the Law Commission of India in 1983 in this regard. 111 The Commission was of the

108. See supra n.88 at 403.
110. See para 3 of supra n.88.
view that the provision in Section 10 was blantly discriminatory against Christian women. According to the Commission the women are placed in a much more unfavourable position than the men.\textsuperscript{112} The Commission also disagreed with the decision of the Madras High Court,\textsuperscript{113} and opined that Section 10 of the Indian Divorce Act violates the Constitutional mandate under Article 14. It further opined that Section 10 would seem to violate Article 15(1) of the Constitution, and therefore, there is an urgent need to remove the discrimination that is writ large in Section 10 of the Indian Divorce Act, 1869 and to introduce equal treatment in the matter of divorce for both the sexes.\textsuperscript{114} It stressed the need for reform thus:\textit{-}

"We have come to the conclusion that there is urgent need for amending Section 10 of the Indian Divorce Act, 1869, as to remove the element of discrimination from which that Section definitely suffers.\textsuperscript{115}\textsuperscript{115}

The Commission further incorporated a draft of the amended Section 10, along with its Report.\textsuperscript{116}\textsuperscript{116} Unfortunately, the legislature

\textsuperscript{112} See Ibid. at 3.
\textsuperscript{113} See supra n.98.
\textsuperscript{114} See supra n.111 at 4.
\textsuperscript{115} Ibid. at 17.
\textsuperscript{116} Id. at 18.
has not yet acted upon the recommendations of the Law
Commission.

While matters remained so, the High Court of Kerala
rendered its decision in *Mary Sonia Zachariah*. In this
case, the petitioners challenged the constitutional validity
of Section 10 of the Indian Divorce Act, 1869, on the ground
that the Section is violative of their fundamental rights
guaranteed under Articles 14, 15 and 21 of the Constitution of
India. The petitioner's contention was that the women's
requirement of proving adultery along with cruelty and
desertion to make out a ground for divorce under Section 10,
violates their right to equality and the right to live with
dignity and personal liberty enshrined in Articles 14, 15 and
21 of the Constitution of India and that denial of divorce
on the ground of cruelty or desertion without reasonable
excuse for a period of two years or upwards accepted as grounds
for divorce for Indians of all other religions except
Christians works out discrimination based solely on the ground
of religion. Further Section 10 confers on the husband

117. *Mary Sonia Zachariah* and another v. Union of India
and others. Judgment dated 24.2.1995 in O.P.No.5805
of 1988 and O.P.No.4319 of 1991 (F.B). (Not yet
reported).
a right to get divorce on proof of adultery simpliciter, while the wife is obliged to prove either cruelty or desertion along with adultery to get a divorce. It was contended that this provision is discriminatory against women solely on the ground of sex which is violative of Article 15 of the Constitution.

The Court ventured to explore the history of legislative inertia in the matter and then founds—

"The Act is evidently pre-constitution legislation passed by the British Parliament adopting according to the petitioner mechanically the provisions of the Matrimonial Causes Act, 1857 which was then in force in England. Even after the lapse of a century and quarter the provisions of the Act have remained as such especially Section 10, though there had been some immaterial State amendments to some of the Sections of the Act". 118

It may be pointed out that the Court begins its reasoning with a material error on the genesis of the Indian Divorce Act.

118. See Ibid. at para 12.
It has already been pointed out that the Indian Divorce Act was not enacted by British Parliament.\textsuperscript{119}

Be that as it may, the reasoning of the Court does not appear to be sound. It treats adultery committed by the husband and adultery committed by the wife on the same footing. This thesis was developed by the Court by disputing the correctness of the ratio in Dr. Dwaraka Bai\textsuperscript{120} on the ground that the sensible classification justified by the Madras High Court therein cannot now be justified as it is a classification based on sex. But one cannot deny the vitality of the reasoning of Justice Panchajakesa Ayyar in that judgment. It was with a view to strike a balance between the husband and wife that Section 10 was enacted.

After Mary Sonia Zachariah the balance of Section 10 is gone and now it can be described as discriminatory to men. And the plight of men is further aggravated by the Kerala

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\textbf{\textsuperscript{119} See supra n.38-40 and also see supra n.52 of Chapter III; and 1994(2) K.L.T (Journal) 49 at 54.}
\textsuperscript{120} See supra n.98.
\end{flushright}
High Court's decision in *Mathew v. Annamma Mathew*\(^{121}\) and the Supreme Court's decision in *Kundu v. State of West Bengal*\(^{122}\) to the effect that the parentage test would not be acceptable in India. In the given circumstances, so long as Section 112 of the Evidence Act remaining the same, judicial construction of Section 10 of the Indian Divorce Act, 1869 to treat "adultery" of the husband and the wife at par is nothing but a subversion of legislative intent.\(^{1}\)

Further a look into the judgment in *Mary Sonia Zachariah* would show that the decision has led to a re-writing of Section 10 of the Indian Divorce Act, 1869 whereby several independent grounds of divorce are made available to Christian wives while Christian husbands are left high and dry with only one ground—adultery committed by the wife after the solemnisation of the marriage—and no other. This must be understood in the context of judicial decisions which hold that pregnancy contracted through another man prior to the solemnisation of marriage and even when the fact of pregnancy was concealed, that would be no ground for the husband for any matrimonial relief under the Indian Divorce Act, 1869.\(^{123}\)


\(^{123}\) *Moss v. Moss* (1897) P.263=77 L.T 220.
This situation is brought about by the operative portion of the judgment in *Mary Sonia Zachariah*, which reads:-

"We would accordingly sever and quash the words 'incestuous' and 'adultery coupled with' from the provisions in Section 10 of the Act and would declare that Section 10 will remain hereafter operative without the above words". 124

The net result of the decision is to make that part of Section 10 of the Indian Divorce Act, 1869 to read as follows:-

"WHEN WIFE MAY PETITION FOR DISSOLUTION-

Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnisation thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;

124. See supra n.117 at paragraph 47. (For a text of Section 10, See supra n.70).
or has been guilty of adultery,
or of bigamy with adultery,
or of marriage with another woman with adultery,
or of rape, sodomy or bestiality,
or of such cruelty as without adultery would have entitled her to a divorce a mensa et toro,
or of such desertion, without reasonable excuse,
for two years or upwards. 125

Thus, though Section 10 had remained discriminatory towards Christian women, now by way of judicial decision, it has been made discriminatory towards Christian men. Indeed, the intention of the Court is laudable as it is to give a fair deal to women, but one cannot judge the judgment by good intentions alone. The Court was indeed aware of the limited nature of its efforts but hoped this decision would activate the authorities to go in for a comprehensive legislation. It observed—

"Finally we may observe that what we have done is only a limited attempt at reform of the law and there is real need to have a comprehensive reform."

125. The Courts in Kerala would have to enforce Section 10 as is shown here, in a petition filed by a wife.
We hope that this judgment will have a compelling effect on the Central Government in finalising its proposal for introducing comprehensive reform in the law governing marriages and divorce among Christians in India.\textsuperscript{126}

Apart from the Courts, the Law Commission of India,\textsuperscript{127} public opinion\textsuperscript{128} and academic writers\textsuperscript{129} also consider that the provisions of the Indian Divorce Act are gender discriminatory and that there is urgent need for a thorough reform of the law.

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\textsuperscript{126} See supra n.117 at paragraph 50.
\textsuperscript{127} See supra n.108-112 and the accompanying text.
\textsuperscript{128} See Chapter VI, n.103 and the accompanying text.
\textsuperscript{129} See A.K. Balagangadhar Tilak, "The Indian Divorce Act of 1869 requires amendments to bring it on par with marriage laws of other major religions in India", A.I.R 1995 (Jour) 9 at 11-12.
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