CHAPTER II

FRAUD AND CRUELTY IN MATRIMONIAL RELATION
FRAUD :

An endeavour to alter rights, by deception touching motives or by circumvention not touching motives, is a fraud. Fraud is sometimes used as a term synonymous with covin, collusion and deceit, but improperly so. Covin is a secret contrivance between two or more persons to defraud and prejudice another of his rights. Collusion is an agreement between two or more persons to defraud another under the forms of law, or to accomplish an illegal purpose. Deceit is a fraudulent contrivance by words or acts to deceive a third person, who relying thereupon, without carelessness or neglect of his own, sustains damages thereby. The cases of intentional and successful employment of any cunning, deception, or artifice, used with a view to cheating or deceiving another are also included in the actual or positive fraud.

Fraud being a legal term, is a constituent of a number of civil actions. In civil law, fraud is actionable as the tort of deceit. It is the universal rule that fraud vitiates contract. To sustain an action of deceit there must be proof of fraud and nothing short will suffice. Fraud is proved when it is shown that a false pretence has been made knowingly or without belief in its truth or recklessly.

careless whether it be true or false. In *Barnard v. Iron* the Court held, "Where a party intentionally or by design misrepresents a material fact or produces a false impression, in order to mislead another, or to obtain an undue advantage of him, there is a positive fraud." Fraud must relate to facts when it is occurred. According to Pollock, to constitute fraud, (i) it must be such an appropriation as is not permitted by law; (ii) it must be with knowledge that the property is another's and with design to deprive him of it and (iii) it is not in itself a crime, for want of a criminal intent; though it may become such in cases provided by law. Fraud in all its shapes is as odious in law as in equity. The difference is that, as the law courts are constituted and as they have equipped with vast experience of centuries, it is desirable that the cases of fraud should be tried by law courts. Of course the law courts cannot deal with the fraud otherwise than to punish him by the infliction of damages. But the manifold varieties of fraud against which specific relief, of a preventive or remedial sort, is required for the purpose of substantial justice, are the subjects of equity and not of law jurisdiction. But this technical distinction is no more in existence since 1873 when Supreme Court of Judicature was enacted by British Parliament. Both in India and in England as well as in other

3. 85 Tenn, 139 2 S.W. 21.
common law countries, the law courts are deemed to be courts of law and equity. Therefore, all sorts of reliefs arising out of tort of fraud or deceit are available from the same court.

Street has defined 'deceit' as a false representation made by the defendant knowingly or without belief in its truth or recklessly, careless, whether it be true or false, with the intention that the plaintiff should act in reliance upon the representation which causes damage to the plaintiff in consequences of his reliance upon it.

In the case of fraud or deceit the following ingredients must be present:

1. False representation with calculated intention to mislead another. This includes concealment of the truth whereby the plaintiff is prevented from getting information which he otherwise have got, is sufficient misrepresentation.

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II. Knowledge of falsity in the statements i.e. the defendant must have made the statements knowingly or without belief in its truth or recklessly, careless, whether it be true or false.

III. Intention to deceive the plaintiff. The cunning artifice must be aimed at that the plaintiff shall act upon the statement.

IV. Reliance of the plaintiff on the statement of the defendant.

V. The plaintiff must have sustained damage.

The damage will be for pecuniary loss. The plaintiff is entitled to recover all the actual damage directly flowing from the fraud.

The principles discussed above are the general principles relating to fraud or deceit. Let us now discuss how far they are applicable to matrimonial relations being vitiated by fraud or deceit. Marriage is a legally recognised institution of the union between a man and a woman. Law

7. Supra note 2 (Derry V. Peek.)

is invariably the legal culture of a particular society which has its own social culture. In fact, legal culture of a society is the superstructure on the infrastructure of social culture. The historical development of legal culture shows that legal culture of society used to take shape on its social culture for a particular period according to social needs and desires. As soon as the period was over, new social culture developed and according to necessity new legal culture came into scene. In Roman law, Hindu Law, Islamic law, women used to be treated as chattel. The banner of this social culture was carried on up to the middle of the twentieth century through the rigorous feudal age. Hindu marriage was a polygamous one. Rationality in Hindu Law could not be infused because of manifold hindrances. One of these hindrances was that Hindus were dominated for about eight hundred years by Muslim rulers who did not intend to interfere with the personal laws of the Hindus. Similar approach was taken by the British rulers. But in Europe, during the eight hundred years of Black Age, churches took over the law-making power and supernatural law developed. During this period rationality was infused into law and monogamy marriage was strictly followed in all the Christian dominated states in Europe. As law was then a supernatural law, the canon law being absolutely based on supernatural law, could not efface the distinction between men and women. Society was then a gemeinschaft which was based on domination--submission. Upon the burial of the gemeinschaft society, gesellschaft society was
built up which had broken the chain of domination-submission. This Society had freed the womenfolk from captivity. With the change of the society, law has altogether changed. Law is now, not master but servant of the society. It is the instrument of social change. Therefore, all the legal problems appearing in late twentieth century, which is the peak-point of human civilization, deserve pragmatic approach to be dealt with the social philosophy of the seventeenth, eighteenth and nineteenth centuries and upto the mid twentieth century is absolutely non-applicable to new social order. In absence of the positive law, it is the bounden duty of the jurists of the applied jurisprudence to deal with social problems with pragmatic approach and to interpret law in the perspective of the new social culture warranting social justice. The judges of the day who play the role of jurists of applied jurisprudence must not roam in the forlorn legal field of past centuries to interpret law, to determine new jural relation, to ascertain right and co-relative duty relationship. They are to be aware of the assignment of new task imposed upon them by the society embracing progress, equality, solidarity, humanity and restoration of human dignity. The functional jurisprudence is now mainly dependent upon the administration of social justice by the judiciary. With this new philosophy of law and justice, fraud in matrimonial relation should be considered.
There are seven major Acts relating to matrimonial causes in India viz. The Indian Christian Marriage Act, 1872; The Indian Divorce Act, 1869; The Special Marriage Act, 1954; The Hindu Marriage Act, 1955; The Foreign Marriage Act, 1969; The Parsi Marriage and Divorce Act, 1936; and the Dissolution of Muslim Marriage Act, 1939.

Of these seven major Acts, the Acts namely the Indian Divorce Act (Sec. 10), The Hindu Marriage Act, 1955 (Section 12(1) and the Special Marriage Act, 1954 (Section 25) lay down the same rule that a marriage may be annulled by a decree of nullity on the ground of fraud or force amongst other grounds viz. non-consummation of marriage owing to impotency of the Respondent; the marriage being in contravention of prohibitory degree; the Respondent being pregnant at the time of marriage by some person other than the Petitioner. Limitation for filing a suit is one year from the date of discovery of fraud.

In view of the legal principles relating to fraud or deceit in matrimonial relation and the aforesaid provisions of positive law, let us now examine the following legal and social problems.

(A) A is a girl aged about 22 years suffering from insanity since 1975. She has been under the treatment of a Psychiatrist since 1975. Her violent nature is to some extent controlled by the application of medicine. A's father 'B' negotiated
A's marriage. Ultimately the marriage was settled with 'D', the son of C. According to tradition the marriage was settled at the initiation of B and G. At the time of interview of A, she was under the influence of medicine and nothing could be detected. B made a representation to G that his daughter was physically and mentally fit to discharge the matrimonial duties. The factum of insanity of A was fraudulently suppressed to C and D. Had it been disclosed to C, C would not have agreed to give his son in marriage to A. However, marriage was solemnized between A and D on 25th May, 1988. D incurred Rs 50,000/- to the said marriage. On 25th June, 1988 A became violent and damaged certain properties belonging to C and D. A was examined by a doctor. Doctor referred the case to a Psychiatrist. The Psychiatrist having examined 'A' opined that she had been suffering from insanity.

(B) A is a married man having two children and wife alive. The wife and children of A live at Burdwan. A lives in Calcutta and has a business there. A declaring himself as a bachelor married B, a maiden. B's father 'C' spent about Rs 1,00,000/ on the occasion of the marriage of his daughter. Jewellery, furniture, utensils and other valuable articles were presented to 'B' at her marriage. For a year A and B lived together as husband and wife. Thereafter 'B' discovered that by fraudulent concealment of his previous marriage A had fraudulently married 'B'.

(C) A, a maiden girl of twenty years became pregnant by one of her friends in January, 1988. In March, 1988 A's parents
first detected the pregnancy of 'A'. Without wasting time, A's parents by concealment of 'A's pregnancy gave her in marriage to B in June, 1988. After two months A gave birth to a child. B's father had spent Rs 20,000/- at the marriage of his son.

In all the aforesaid three cases ingredients of fraud or deceit are present viz. concealment of material facts, false representation of facts, knowledge of falsity of statements with intention to deceive the Petitioner, Petitioner or his/her parents' reliance upon the statements of the Respondent's parents' fraudulent act or deceit yields pecuniary loss to the Petitioner. The law of tort of fraud or deceit concerns the effect of fraud. In each of the three cases the effect is two-fold viz. (i) It vitiates the marriage relation. The aggrieved party is at liberty to accept the marriage or avoid the marriage by a decree of nullity; (ii) The aggrieved party has suffered loss and injury i.e. an entire marriage expenses as a direct result of such fraud. Again if the aggrieved party is the wife, she has lost her most valuable maiden personality. Under the existing law the Petitioner is entitled to a decree declaring that the marriage is a nullity and further decree for recovery of damages. But the second relief is fully dependent upon the grant of the first relief. If the aggrieved party does not want annulment of marriage, she is not entitled to any damage on the ground of fraud. The grant of second relief to the Petitioner while their marriage subsists will produce two results: (i) The aggrieved party has waived her/his right and (ii) it will aggravate
their future relation. As soon as the aggrieved party is deter-
m\ined to annul the marriage by a decree of nullity, he or she
is entitled to all reliefs flowing from fraud or deceit and
there cannot be any legal impediment in granting damages along
with the decree of nullity; rather refusing to grant the decree
of damages will produce injustice to the Petitioner. It is the
social, moral, ethical and legal duty of every person not to
defraud or deceit another. If any violation of this rule pro-
duces pecuniary loss to the other party, the former is under
legal obligation to make good of it. Here, a celebrated judg-
ment of Fuld J of the Court of Appeals of New York may be
referred to. It was a case on the ground of deceit. The plain-
tiff alleges that the defendant upon leading the plaintiff to
believe that he intended to marry her, arranged a sham marriage
ceremony in New Jersey—with a bogus judge, pretended witnesses
and faked papers—and that the plaintiff accepting the bona-
fides of the defendant and the legitimacy of the ceremony
proceeded to live with him as his lawfully wedded wife. The
complaint recites that the defendant, advising the plaintiff
that they were there to be married, persuaded her, to go with
him to New Jersey and participate in what he told her, and she
in good faith thought, was a genuine marriage ceremony, that,

following such ceremony the parties returned to New York City where, among other places, they lived and cohabited as husband and wife until, approximately nine months latter, the defendant announced to the plaintiff (for the first time) that the ceremony had been a fake, that they had not been legally married and that he planned to marry someone else. Substantial damages were sought for the injuries assertedly suffered by the plaintiff.

The Court of appeal held that there is no question that an action for deceit will lie where the defendant has induced the plaintiff to "marry" and cohabit with him on the fraudulent representation that he was unmarried and we perceive no reasonable basis for differentiating between a defendant's fraud with respect to his capacity to marry leading to a bigamous relationship and his fraud with respect to the celebration of a pretended or bogus marriage between the parties—leading to an equally void relationship. The distinction sought to be drawn by the Appellate Division between the two types of cases—namely that, in those cases sustaining a cause of action for fraudulently inducing a bigamous or other marriage duly solemnized in accordance with law but void or voidable for facts collateral to the solemnization, the gravamen of the wrong is not the unfulfilled promise of marriage and fraud and deceit in connection therewith but, rather... the fraudulent consummation of marriage, impresses us as both elusive and unreal. As one commentator aptly observed, "The Plaintiff would appear to be an effectively unmarried and seduced in one case as to the other." (Glasser, Torts, 1963, Survey of New York
State Law, 155 Yr. L. Rev. 339, 343). In both cases the defendant is charged with taking affirmative fraudulent steps which result in damage to the plaintiff and, certainly, the circumstance that proof may be more easily obtained to establish the marriage ceremony in the case of a bigamous marriage can have no possible bearing on the sufficiency of the pleading."

So far as the procedural aspect of the suit is concerned, two pertinent questions may come up:

1) Whether the petitioner is entitled to two reliefs viz. decree of nullity and decree of recovery of damages in a matrimonial action?

2) If the petitioner's parents had spent money for her marriage, is she entitled to obtain decree for recovery of such amount which he/she did not spend?

The answer to first question is simple. Under Order 2, Rule 2 of the Code of Civil Procedure the petitioner is bound to seek all the reliefs arising from the same cause of action.

In order to avoid unnecessary litigations for the sake of mere technicality and to administer social justice, fiction may appropriately be applied to answer the second question.

Law is an instrument and not an end. Justice is its function and its validation. Justice is one kind
of value because justice produces value. Values arise from the necessity in all human activities for the exercise of choice among alternative courses of action. This leads to the property of selectivity as among alternatives. In this perspective the application of fiction is to be considered. What is fiction? A fiction is a deliberate, conscious, practical, fruitful and legitimatized error. The chief characteristics of the fiction are

a) Its arbitrary deviation from reality.

b) Its tentativeness: It is a point transition for the mind, a mere temporary halting place for thought.

c) The express awareness that the fiction is just a fiction; in other words, the consciousness of its fictional nature and the absence of any claim to actuality. Fictions are assumptions made with a full realization of the impossibility of the thing assumed.

d) The requirement that it be useful. A fiction is a means to an end, it is an expedient. When there is no expediency, the fiction is unscientific. Every fiction may justify itself, it must perform a service. The fiction is a legitimatized error i.e. a fictional conceptual construction that has justified its existence by its success.

In an action for a decree of nullity of a marriage and for recovery of damages, the plaintiff can state that his or her father gifted a specified amount to him or her on the occasion of the marriage and the said gifted amount was spent by the father as an agent of the plaintiff. The plaintiff's father, in such cases, may be made a proforma respondent and on the basis of legal fiction the Court can presume that the amount of marriage expenses belonged to the plaintiff and can pronounce judgement upon the action.

Unfortunately both in India and in U.K. as well as in other common law countries, the pleading of the plaintiff in a suit for a decree of declaration that the marriage is a nullity on the ground of fraud is conspicuously silent about the recovery of damages. Therefore, there has not been a single judicial pronouncement on the subject. Constant social action and interaction give rise to thesis, antithesis and synthesis of legal problem. Judgement producing value is always a synthesis and again synthesis is always for the common good and happiness. When a harrowing legal problem is placed before the minister of the government of law for redress, it requires research insight and analytical outlook to find out the motif by means of which the problem can be solved. But the lack of methodological approach may bring about erroneous conclusion. This differentiation is due to deviation from scientific methodology of treatment of a particular subject of legal problem. That is why, sharp difference is often nakedly
manifested in drafting of pleading concerning legal problem by different legal craftsman on the same syndrome. The litigants are rarely responsible for such craftsmanship. In such subjective condition once the motif is ascertained by pragmatic approach, the differentiation is obliterated. On account of the faulty craftsmanship of the lawyers and their lack of methodological approach, the issue was never raised in Court for adjudication. Therefore, the issue is still open. There is no precedent standing as an impediment in granting both the reliefs in a single suit on the basis of fraud. There is enough scope to develop this particular subject in matrimonial action to prevent the occurrence of fraud on the creation of matrimonial relation. Therefore, in a proper suit, on proof of fraud and pecuniary losses, the Plaintiff is entitled to the following reliefs:

(i) Declaration that the marriage is a nullity.

(ii) Recovery of marriage expenses.

(iii) Recovery of articles and goods lying with the defendant or recovery of its money value.

(iv) Recovery of punitive damages for loss of maiden personality.
CRUELTY IN MATRIMONIAL RELATIONS:

DEVELOPMENT OF THE CONCEPT OF CRUELTY:

A divorce on the ground of cruelty seems to be grounded on the law of nature, for as marriage was instituted by God in a state of innocence, it must of consequence be for the mutual comfort and help of each other; and therefore a cruel and severe usage frustrates one of the ends of the State. Cruelty in matrimonial relations has a long history. It is originally a canon law derived from Roman Law and administered by ecclesiastical courts. Law was very much rigid. In case of severe violence and physical brutality, the decree of divorce could be granted to the aggrieved spouse. With the social pressure, the U.K. Government had to pass Matrimonial Causes Act, 1857. Section 27 of the Act runs as follows:

It shall be lawful for any husband to present a petition to the said Court, praying that his marriage may be dissolved on the ground that his wife has, since the celebration thereof been guilty of adultery and it shall be lawful for any wife to present a petition to the said Court

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11. Ayliffe: Parergon Juris Cosomice Anglicani (1726) p. 229
praying that her marriage may be dissolved, on the ground that since the celebration thereof, her husband has been guilty of incestuous adultery, or of bigamy with adultery or of rape or of sodomy or bestiality or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et thoro, or of adultery coupled with desertion without reasonable excuse for two years and upwards." The Act was opposed by moralists and theologists. But the influence of Roman Cannon law prevailed in England upto the quarter of the nineteenth century.

Early Cannon law defined cruelty as a deadly hatred between the spouses evidenced by violence causing danger to life. The English Court went on interpreting the word cruelty on the earlier definition given by common law. In Holmes V. Holmes Sir George Lee observed, "I was of opinion that nothing could be offered in bar to her living with her husband, but such facts as would entitle her to a divorce, in case she had brought a suit against him to be separated for cruelty. In this case she had charged nothing but words, except the single fact of his dragging her by the hair, which happened after she had separated herself from him and that was not a cruelty sufficient to entitle her to a divorce: and it was not suggested that he had ever beat her or put her in any danger while they lived together."

The next important case enunciating principle is *Evans v. Evans*. Lord Stowell held, "The causes must be grave and weighty and such as show an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self preservation must take place before the duties of marriage which are secondary both in commencement and in obligation: but what falls short of this is with great caution to be admitted."

Lord Stowell further held, "What merely wounds the mental feelings is in few cases to be admitted where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, perulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty: they are high moral offences in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on the one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection: must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence."

But in Russel V. Russel the House of Lords while accepting the second passage of observation, rejected the first observation and interpretation of Lord Stowell and affirmed that the basis of cruelty was injury to health, the state of personal danger.

In Oliver V. Oliver Lord Stowell held, "words of menace importing to actual danger of bodily harm will justify the interposition of the Court, as the law ought not to wait till the mischief is actually done". Russel extended the rule from violent battery causing severe physical injury to injury to health. Oliver extended the rule further to the words of menace.

In Kirkman V. Kirkman Lord Stowell held, "the persons of both parties, however, must be protected from violence and I can not accede to what has been said in argument that the Court should wait till there has been actual violence of such a nature as may endanger life. It is not a pause till a tragic event has taken place. Words of menace if accompanied with probability of bodily violence, will be sufficient."

14. (1897) A.C. 395 H.L.
15. (1801) 1 Hag. Con. 361 at 364.
16. (1807) 1 Hag. Con 409.
In Hulme V. Hulme the Court held, "when the husband threatened to cut off his wife's arm and to run her through with a hot poker, illustrated the terror which threats could produce especially in a society where there was little to stop the husband carrying out his threat."

In Holden V. Holden threat of violence was considered to be saevitias which tended to bodily harm and as such fell within cruelty.

We find that up to the first quarter of the nineteenth century, although violent conduct was extended to injury to health and threat of violence by menace words, yet the consideration was confined to the conduct of the parties. This conduct rule could not yield desired result and as such the Court of England, instead of being confined to conduct rule, leaned towards realization of the consequences of conduct because it seemed more important than the nature of conduct itself.

In Durant V. Durant the Court took the view that an act of violence, of insufficient gravity to constitute cruelty by itself, might be made the basis of a decree.

18. [1819] 1 Hag Con 455 at 458 : 161 E.R. 614
if supported by non-violent conduct of a serious nature.

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In Saunders v. Saunders Dr. Lushigton on the allegation of the wife that her husband spat in her face observed:

"Is it possible to imagine that when a husband was proved himself to be bitterly insensible to all those feelings which he ought to entertain towards his wife, so brutal, so unmanly that he would, when his passion was excited, restrain himself within the bounds of law, and that his wife would be safe under his control? Threats of personal ill usage have been deemed sufficient to justify a separation. I am of opinion that such an outrage as this is more than equivalent to any threat, for it proves a malignity of feeling which would require only an opportunity to shew itself in acts involving personal danger, but never surpassing in cowardly baseness."

Age to accept non-violent cruelty started in the United Kingdom from 1825. The following non-violent acts amongst others were considered by the English Court to constitute cruelty:

(1) Any conduct towards the wife which leads to any injury, either creating danger to her life or danger to her health, that too must be taken as regarded as

21 cruelty.

(2) **violence** to the children of the marriage in the presence of the mother was capable of being cruelty, despite the absence of violence to the mother herself.

(3) Husband treating his wife in such a way that passers by were led to believe her a prostitute constituted cruelty.

(4) **Wilful communication of venereal disease.**

(5) Non violent conduct is as tantamount to threat of violence.

(6) Husband was a dissolute rake, daily intoxication was accompanied by persistent blatant adultery with a number of women often in his house. The wife's health was unable to bear constituted cruelty.

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22. Tomkins V. Tomkins [1858] 1 S.W & Tr. 168 : 164 ER 678 per Cress Well J.O.
25. Knight v. Knight [1865] 4 S.W & Tr 1031 - do -
26. Swatman V. Swatman [1865] 4 S.W & Tr. 1351 - do -
(7) Producing the result of injury to health is all important. The mode of producing the result, in other words the nature of the conduct, is not a major significance.

(8) There must be danger to life, limb or health, bodily or mental or reasonable apprehension of it, to constitute legal cruelty.

(9) Injury to health need not be proved in cases of violence or bruises or cuts did in fact amount to injury to health.

(10) What has been developed, is a legal criterion in the form of judicial discretion—in all the circumstances of the particular case, are the causes, grave and weighty. So mental distress is only to be regarded as legal injury to health when it is grave and weighty in the discretion of the judge.

(11) Once it has been proved that the cruel conduct was voluntary, protection is given to the innocent spouse in the form of a decree of divorce a mensa et thoro.

28. Russel V. Russel (1897) p. 315 et seq. Definition of cruelty was given by Lope L.J.
29. Pranhold V. Pranhold (1952) 1 TLR 1522 (C.A.) Per Holson L.J.
12. It is not necessary to inquire from what motive such treatment proceeds, it may be from turbulent passion, sometimes causes which are not in consistent with affection. If bitter waters are flowing, it is not necessary to inquire from what source they spring.

13. Malice is not essential to cruelty.

14. The act of cruelty to be judged objectively. The test is not whether a spouse is cruel but whether his conduct as affecting the victim is cruel from a reasonable man's point of view. The non violent acts of cruelty have been liberalised in India to a great extent.

TORTIOUS LIABILITY IN MATRIMONIAL CRUELTY.

Not all the inter-spousal cruel acts are actionable in tort but only a few of which violent acts of cruelty i.e. infliction of battery upon the person of a spouse is a must. Some other non-violent acts of cruelty

31. Squire V. Squire 1348 21 (MLR) 88.
32. 1969 2 All E.R 994, 1009.
33. (I) Calling wife a prostitute amounts to cruelty 73 (CWN) 502.
affecting health, mind and personality of a spouse is actionable. But according to Anglo-Saxon jurisprudence and common law the inter-spousal liability in action of tort is immune.

(II) Cruelty may be subtle, brutal, physical, mental, by words, gestures, silence, violence or non violence. 1970 (Bom) 312.

(III) Wilful and unjustifiable interference by one spouse in the sphere of life of the other is one species of cruelty. AIR 1968(Mys.) 115.

(IV) Assault causing grievous hurt by a paramour of the wife, at the instance of wife creating reasonable apprehension in the mind of the husband that it will be harmful or injurious for him to live with wife (1980) ICHN 110.


(VI) Husband used to beat wife, would not permit her to talk to neighbours and threatened to kill, if she would talk to neighbours and threatened to kill, if she would talk. AIR 1981(H.P) 65.

(VII) Extreme mental distress detrimental to health. AIR 1978(Punj.)140.
The reasons shown by the common law are (i) institution of marriage is made by God; (ii) merger of personality between

(VIII) Wife left for father's place leaving a child 2 months old in the custody of husband. She refused to come back to matrimonial home and to accept the child, in consequence whereof the child died. The act of the wife amounts to cruelty. AIR 1979(Punj), 98.

(IX) Insulting conduct indulged in by wife in public against husband amounts to cruelty. AIR 1970(Mys) 252.

(X) Wife's attitude towards husband is disrespectful. Wife used foul and abusive language towards husband, his parents and relations. The acts amount to cruelty. AIR 1979 (J & K) 4.

(XI) Wife's refusal to have normal sexual intercourse and bear children causing mental ill health to husband amounts to cruelty. AIR 1980(Kart) 8; 1983 M.L.R(Cal)155.

(XII) Wife did not visit her husband confined in hospital seriously injured for a long time without a valid excuse. It amounts to cruelty. AIR 1980(DI.) 213.

(XIII) Cruelty need not be of such a character as to cause damage to life, limb or health or as to give rise to a reasonable apprehension of such a danger- AIR 1981(M.P) 65.
husband and wife with the husband alone representing the marital unity at law made the prospect of the suit for

(XIV) Cruelty may extend to conduct which may cause pain and injury to the mind so as to render the matrimonial home very unhappy. AIR 1968(Mys). 115.

(XV) False allegation of unchastity and adultery against the wife is cruelty. AIR 1967(Punj)397; AIR 1966(M.P) 205; AIR 1976(Bom).212.

(XVI) Inordinate sexual demands is cruelty, if it injures the health of the spouse. AIR 1965(All) 280.

(XVII) Wife completely depriving husband of sexual relationship, threat of wife to kill or get the husband dismissed and submitting a petition to Lt. Governor containing scandalous allegations regarding demand of dowry—held mental cruelty. 1982 M.L.R(Delhi) 179.

(XVIII) Petition by husband for divorce on the ground of cruelty---False charge of adultery made by wife at the time of cross-examination and in her deposition amounts to cruelty. 1982 M.L.R(Delhi)277.

(XIX) Petition by husband for divorce on the ground of cruelty. Wife frequently visiting her parents without co consent treating the husband very badly, lodging complaint
personal injury between husband and wife unthinkable. This is based on fiction and (iii) there will be inundation of suits against him in police, giving beatings to husband with broom or lathi and abusing him - constitute cruelty. 1985 M.L.R(Cal) 187.

(XX) The perversed sexual practices like cunnilingus and fellatio which the wife did not approve would definitely amount to physical cruelty. 1985 M.L.R(All) 338 and 1985 M.L.R (Guj.) 326.

(XXI) Refusal to prepare tea for friends of husband, lodging of false report of non-bailable offences against husband and his relations; getting pregnancy terminated without consent of husband all amount to cruelty. 1985 M.L.R (All) 338.

(XXII) An imputation against the character of any spouse alleged by other spouse without foundation, based on mere suspicion such allegations amounts to mental cruelty. 1986 M.L.R(Cal) 125.

(XXIII) Coming of husband in drunken state at late in the night and causing annoyance not only to wife but even to land-lady and visitors, the consistent demands of money by husband from wife, the squandering away of money amount to cruelty(mental). 1986 M.L.R 194 (Rajasthan).
with trifling matters affecting marital relation in the society i.e. such litigation is unseemingly distressing and embittering.

Common law prescribes that if you have broken your wife's spectacles, you will be liable in tort, but if you have broken your wife's knee, you have no liability. In Phillips v. Barnet, the Court held, "no action in tort for assault lies between husband and wife." In Railston v. Railston the Court held "no action in tort for libel lies between the husband and the wife." In Gottliffe v. Edelston the Court held, "a wife cannot sue the husband in tort for negligence." On the

(XXIV) A letter written by wife wherein she has addressed husband as "Butcher", "Bastard", "Kafer", "Shameless creature", "mean fellow" etc. is a cruelty of the gravest kind. 1986 M.L.R(Delhi) 388.

(XXV) Wife's father, if at the behest of the wife made false complaint in writing against husband to Police is a cruelty. 1986 M.L.R.(Delhi) 310.

(XXVI) The act of aborting the foetus in the very first pregnancy by a deliberate act without the consent of husband would amount to cruelty. 1987 M.L.R(Delhi) 93.

34. "1896 1 QBD 436.
35. "1936 2 K.B. 238
36. "1930 2 K.B. 378
same analogy or principle the husband's suit for recovery of land under wrongful occupation of the wife as a trespasser was dismissed. In between 1882 (Married Women's Property Act) and 1962 Law Reforms (Husband and Wife), a married woman could sue her husband in tort for the protection and security of her own property but not otherwise. The husband suffered disability to enjoy similar rights. The Law Reforms (husband and wife) 1962 has abolished the said distinction. The reasons for inter-spousal immunity shown by the common law cannot be said to be logical. The institution of marriage was never made by any supernatural power. The union between a man and a woman is based on the doctrine of necessity in accordance with the purpose of the society to solve the legal problems of succession, inheritance, adoption etc. which emerged with the inception of private property. Law and property were born together as religion and magic were born together. The idea of supernatural concept of institution of marriage has been discarded altogether by the people of the twentieth century just as the dictum of the Church that the sun moves round the earth has been rejected and disproved. The second reason of oneness in husband and wife is illusory and absurd proposition. Husband and wife are separate entities. This moderate theory was in vogue in Hindus and Muslims in the past. The British Government, in order to remove this grave injustice under the garb of merger

38. Shipman V. Shipman [1924] 2 C.L. 140.
rule had to reform property law, election law etc. Therefore, the British common law based on merger rule, is an unjust law. The third reason is that it will inundate the courts with increasing suits of a trifling nature between husband and wife and consequently the peace, harmony, stability and integrity will be seriously affected. The reason does not go deep into the mental faculty and constitution of women with analytical approach. Barring a negligible number, most of the women, on account of their natural instinct, want a matrimonial home with their inherent creativity. Chastity is their pride. Motherly feeling produces high values in the society. When a woman marries a man and goes with him to the matrimonial home leaving parents, brothers, sisters and other near and dear ones, she does not go there to dislodge the family and marital relation. Men are polygamous in nature. There must be a good understanding and adjustment between a man and a woman including the other inmates of the matrimonial home. Woman, by her natural phenomena, can bear more trouble and pressure than her male counterpart. When the trouble and pressure exceeds their limits under compulsion, serious discrimination, apathy, persecution, the shackle breaks and woman comes out of the matrimonial home in tears. The mental faculty and constitution of a woman does not suggest that they are destined to go to court with trifling matters with a view to disrupting marital relation. This reason is also absurd, baseless and unfounded.
The concept of inter-spousal immunity was exported to the United States of America. It prevailed there for centuries as common law rules. But with growing social pressure and movement for emancipation of women from bondage and humiliating status, the Emancipation of Women Act was passed. In this century the American Courts and Society have rejected the inter-spousal immunity rule altogether and have made the law humanized. Now it is the rule of U.S.A that the spouses are liable to tortious acts amongst themselves and a suit to that effect is maintainable. In Self V.Self it was held by the California Court of Appeals that because the reasons for the rule of inter-spousal immunity for torts no longer existed and because of certain legislative changes in recent years that rule should be abandoned. The Court decreed the suit for damages for intentional violent injury caused to one spouse by another. In Klein V.Klein the Court held that an action in tort for damages filed by the wife against the husband on the ground of negligence was maintainable. In the said case it was argued that to permit tort actions based on negligence to be maintained between spouses would cause the Courts to be inundated with trifling suits, would tend to destroy conjugal harmony and because of the possibility of insurance, would encourage collusion, fraud and perjury. The Court

40. Supreme Court of California, 1962, 26 Cal. Rptr. 102, 376 2d. 79.
held that the said arguments were not convincing as similar arguments were advanced in Self case as reasons for maintaining the old rule as to intentional torts and such arguments were found not to be convincing. The Court further held "It is of course fundamental in the law of torts that any person proximately injured by the act of another, whether the act be wilful or negligent, should in the absence of statute or compelling reasons of public policy, be compensated. The possibility of fraud or perjury exists to some degree in all cases. But we do not deny a cause of action to a party because of such a danger."

In an appendix to the majority opinion in Mosier v. Carney the Supreme Court of Michigan lists opinions from 32 jurisdictions in which the husband-wife immunity has been abolished in whole or in part. The classifications that the Court used are:

1) Those jurisdictions in which the courts have permitted inter-spousal suits in general;
2) Those which permit inter-spousal suits when the marital relation has been, or in the process of being dissolved, or permit suits a third party even though the suit is predicated upon a spouse's negligence;
3) Those which permit suits for antenuptial torts;
4) Those which anomalously permit wives but not husbands to sue;
5) In New York, where interspousal suits are authorised by statute, but not if the defendant is insured, unless the policy so states.

In Silverman v. Silverman the alleged facts are

41. 138 N.W. 2d 343 1965.
42. Supreme Court of Errors of Connecticut, 1368, 145 Conn. 663, 145 A. 2d 826.
that the plaintiff May Silverman, the wife of the defendant Abraham Silverman, while a passenger in her husband's automobile, sustained injuries as a result of the negligent operation of the car by the couple's unemancipated minor son Irving. The suit was decreed. Husband defendant preferred appeal. The Court held that the negligence of the son should be imputed to the father. $ 6225.78 was allowed in favour of the Plaintiff.

In U.K and U.S.A. legal disability was created against women by ecclesiastical law but in India Hindu law did never create such disability against Hindu women. Hindu women could hold and enjoy her Stridhana (both Youtuka and Ayoutuka) property which was her absolute property and the husband had no interest therein. A Hindu woman could acquire separate property by gift, purchases, lease, will etc. The status of Hindu women was higher than those of their European and American counterparts. Similarly, Mohammedan women could acquire, hold and enjoy her separate property including her dowers. The status of Mohammedan Women was also higher than those women in Europe and America. This distinction is confined to property relation only. Otherwise in one respect, so far as the nature of marriage is concerned, the Christian marriage being monogamous, their status as wife was higher than their Hindu and Mohammedan counterparts, for the latter's marriage was poligamous. Of course after the Hindu Marriage Act 1955, the Hindu marriage is monogamous but there is no change in
the polygamous nature and character of Muslim marriage. The Anglo-Saxon rule or Canon rule of oneness in husband and wife and the fiction did never apply in India over Hindus or Muslims. Therefore, the inter-spousal immunity rule has no application in India where social, political, cultural, economic and religious conditions are palpably different. Union between a man and a woman under socially recognised marriage is based on equality, equal status, equal dignity, equal treatment. These are constitutionally guaranteed rights in India. A husband living in the family of his in-laws is never expected or imagined to become violent against his wife. But as the social condition demands, the wife leaving aside her parents, lives in the house of her husband. Invariably there must be an implied or quasi contract between the husband and the wife that so long the wife will live with her husband, she will live honourably and husband stands as a guarantor for the protection of the wife's life, property and personality. In such contractual relation husband enjoys certain rights viz. right to sexual intercourse, right to get company and service of the wife. But these rights are not unfettered. They are always subject to discharging co-relative duties such as food, lodging, protection of life and property of the wife and affording equal status, dignity and honour. Similarly the wife enjoys the rights of food, lodging, life and property with equal status of husband, dignity and honour in the matrimonial home subject to discharging her co-relative duties to her husband such as offering sexual intercourse, company and service. The indicator in
determining the matrimonial disputes is to ascertain as to whether the correlative duties are being properly performed by the parties, if the answer is in the negative then who is the violator? While living in the company of the husband, if the wife's inalienable right is invaded by the husband, causing the wife injury to body and mind affecting her health and mental equilibrium, the husband will be liable in two ways: (1) There will be a tortious liability of the husband to pay compensation to the wife in the event of the marriage being dissolved by a decree of divorce. The dissolution of marriage must be an essential criteria for granting relief of compensation, for no spouse is expected to live together as husband and wife after the decree for damages being passed in favour of one spouse against another. Law of tort does not prescribe remedial relief for damage only. Other remedies in the nature of declaration, injunction, restoration etc. are available. The wife instead of seeking dissolution of marriage and recovery of damages, may take an injunction order restraining the husband from getting her out of the matrimonial home, mandatory injunction for payment of maintenance to her for her livelihood, declaration of her right to residence at the matrimonial home, injunction restraining the husband from interfering with property including her person and (2) the contractual liability to compensation for breach of contract. Let us elucidate the principles of inter-spousal liability in tort with the help of a few examples. Examples cover both violent and non-violent acts of cruelty.
(A) While A, a husband and B, a wife living together as husband and wife, A inflicted battery upon the person of B so violently that B's left leg was fractured. Now the question is this as to whether mere decree of dissolution of marriage by a decree of divorce will be tantamount to the social, moral, ethical and legal duties and responsibilities being discharged towards the unfortunate B. Were 'A' as a tort feasor is liable in tort to pay compensation to 'B'. Any physical torture amounts to battery and for battery i.e. violent trespass to person will make the tortious liability complete. If the effect of physical violence culminates in mental and physical illness, the husband will also be liable to pay compensation for the same.

(B) While A, a husband and B, a wife living together as husband and wife, A developed illicit and sexual relationship with other woman i.e. adulterous relations in utter violation of the standard legal norm of the society. When 'B' came to know 'A's adulterous character, she was terribly shocked resulting in insomnia or schizophrenia, loss of appetite and other health complications. This is the effect of cruelty seriously affecting the health and personality of B. B is not only entitled to a decree of divorce but also exemplary compensation for the affected ill-health and mental distress.

(C) A, a husband and B, a wife while living together as husband and wife, A contacted Syphilis and Gonorrhea from outside. A, thereafter communicated and contaminated the germ
thereof to 'B' through sexual intercourse. The effect of the act by A is that B became a victim of venereal disease with enduring physical illness coupled with severe pangs, agony and inexplicable suffering. B apart from her right to obtain a decree of divorce, is also entitled to obtain exemplary compensation for the communication of venereal disease to her body. Intention, malice, mistake or ignorance cannot be the ground of defence. Venereal disease is not a virus disease but a germ carrying and germ producing disease. Unless a person has made sexual intercourse with one venereal diseased person, he or she can have no venereal disease. Therefore, law presume, that a man having venereal disease must have knowledge of the disease as he knows that without proper care if he had sexual intercourse with a call-girl or a girl of ill-repute, there will be every chance of the hated disease being communicated to him.

One thing should be borne in mind that the right to alimony pendenti lite or permanent alimony springs from the matrimonial statute. It depends upon the financial condition of the party praying for alimony. On the contrary, damage in the nature of compensation is derived from the law of tort. It does not depend on the financial condition of the wronged person. Therefore, while granting damages in favour of a spouse against another on the ground of cruelty, the award of alimony or quantum of alimony should not stand in the way of assessment of damages.
Since all the reliefs available to a spouse against another arise from the same cause of action, the Plaintiff in a matrimonial suit is entitled to seek all reliefs including damages for tortious acts. The refusal to grant decree of damages in a matrimonial suit will produce injustice and the judgement will be deemed without value. Dennis Lloyed, a reputed jurist of the late twentieth century in his book entitled "The Idea of Law", has vigorously shown how legal injustice crops up.

Legal injustice then may be done when a case is decided in a sense contrary to what the law itself lays down.

The second form of legal injustice is perpetrated when the law is not duly administered in that spirit of impartiality which it requires.

The third kind of injustice will arise when the law, though perfectly impartially administered according to its tenor, is itself unjust, if judged by whatever value system may be applied to test the substantial justice of the legal rule. The philosopher Hobbes propounded the rather startling thesis that whatever rule the law lays down must ipso facto be just. The argument appears to be totally untenable, for there seems no conceivable reason as to why we should not be entitled to evaluate the substantial justice of a legal rule by some external criterion, though this does not necessarily

imply, as we have already seen, that such a criterion must be one of absolute universal and unchanging validity. Hobbes really was seeking to treat all laws as just by definition but this is a purely arbitrary piece of terminological legislation which has been rightly rejected by most philosophers and lawyers and by the verdict of common sense. It is true that the celebrated English Chief Justice, Sir Edward Coke, once attempted to equate law with moral principle and natural law, when he described "the common law as the perfection of reason." This however was no more than a rhetorical flourish which in any event was peculiarly apt in view of the barbarous state of the common law in the seventeenth century. A just law, then in the sense, is a perfectly intelligible conception if we understand it as meaning simply a law, valid in itself, conflicts with the scale of values by which we choose to judge it. Moreover, this idea may be perfectly and properly applied to not only individual laws, which offend our senses of human values, but also to a whole legal system which may be condemned, for example, as being directed solely to furthering the interest of a particular group or as outrageously repressive towards other group, whether constituting a majority or a minority of the population as a whole.

Equity, therefore, in this sense, is the antithesis of formal justice, or at any rate a supplement to it, rather than part of the concept of justice. However, in a broader sense, we may regard equity itself as a kind of
justice and formal justice may then be intelligibly treated as unjust if it complies with the rigid logic of its own requirements but fails to temper its conclusion in a spirit of equality with the particular circumstances of the case." Rawls also posits a theory of justice as fairness and says that injustice can arise in two ways,(i) either when the existing arrangements deviate from the publicly accepted standard that are more or less just,(ii) or when it conforms to the sense of justice of the dominant class which is itself unreasonable and unjust.

Now the subjective condition of the Indian society may be taken into consideration to understand injustice in the perspective of the theory of injustice propounded by Dennis Lloyd and Rawls. Indian Society was invariably a feudal society based on the yard stick of domination-submission. Structure of the society was such that at the top of the pyramid there was the overlord i.e. king or emperor. Below the overlord there were lords known as zamindars. Between zamindar and families on the grass root, there were certain ranks of rent Collectors known as Gatidars and Pattanidars. The rings of the administrative chains from overlord to family symbolized domination—submission. The family was headed by the Karta. He was the president of the government of his family. No outside interference was tolerated. His word was last and final. Such a family used to be dominated by elderly male member of the family. There was no protection of women in such society. With the abolition of Zamindary system after independence of India on
15th August, 1947, the land revenue system of India was greatly changed through Land Reforms. Family has been newly defined. The rapid industrialisation has paved the way of extinction of feudal society. The newly born capitalist society with its own norms regulate the behavioral pattern of the society. The capitalist society has given the women their due equal status with their counterparts. But in the transition period, the remnant mass of feudal thought, ideas, treatment, still considered to be the governing factor to regulate the relation between man and woman, between husband and wife. This social contradiction produces constant disputes and problems over the status of women in the pro-independent era. This status-dispute or status-problem of Indian women who are always unequal in point of economic condition is the central point of contradiction giving rise to multiple social problems. There is always a keen competition of becoming rich with unearned money. This is the main vice of mixed economy. Corruption in the society is rampant. The law enforcing agency is a crippled one. People are unable to get their due without bribe. Bribe and corruption are the main sources of parallel black money market. Extra legal terroristic intervention in every walk of life has destroyed the basic value of democracy. Family life is not spared from such illegal intervention. Marriage is not taken as an ideal union between husband and wife but it is taken as a source of unjust enrichment by unearned dowry or forced dowry. Although the dowry system has been abolished by the Dowry Abolition Act, 1961, yet machineries not being set up to enforce the law, people show least regard
to antidowry law. Without dowry no marriage is possible. Persecution of married women and even causing their death by the nefarious means including burning is on the increase. Male dominated society is a mere spectator of such criminalities. In this subjective condition of the society, the cruelty in matrimonial relation should be considered objectively, so that the healing balm may cure the disease. Courts often say that since there is no law or rule, they are unable to give redressal relief to an aggrieved party. To shut the door of the temple of justice on the ground of absence of positive law is not only unjust but it betrays the basic human rights and human values. Judges, by exercising their inherent power and especially justice, equity and good conscience and natural law can create substantive right or the adjective law in protecting the basic human rights from threatened onslaught, aggression and naked invasion. Court cannot deny justice on the ground that in absence of positive law there is no precedent in the given society in enunciating rule as to govern the particular social problem nor can it roam into the English decisions of the seventeenth, eighteenth, nineteenth centuries to apply the same in the last quarter of the twentieth century without considering the social, political and economical background of the principle. If this is done blindly, it will produce vices instead of virtue. In this perspective the aphoristic deliberation of Mr. Justice A.P. Ravani of the Andhra Pradesh High court in Surat Municipal corporation V.
Ramesh Chandra Santilal Parikh & Others is quoted here. The learned Judge observed, "It is the teaching of the Upanishads, 'Let noble ideas come to us from all the sides.' Therefore, there is nothing wrong if one turns to a foreign author and tries to enrich his knowledge. But it appears that in the instant case, as it happens in many such cases, the reliance on English Law betrays the colonial hangover and lack the awareness of the constitutional mandate and that of the socio-economic philosophy underlying the constitution. Teachings of Dicey and for that matter principles laid down by the English and American courts, have little value while resolving questions which arise in our country." In Northman V. Barnet Council a female teacher, in violation of the terms of contract of her service to continue up to the age of 65 years, was dismissed from her service at the age of sixty-one years. The instant case provides us a glaring example of discrimination against a woman on the grounds of her sex as others could possibly be. Lord Denning in his judgment observed, "Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this Court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach' ........... In all cases now in the interpretation of statutes

44. AIR 1986(Gujarat)50.
45. 1978/1 WLR 220.
we adopt such a construction as will "promote the general legislative purpose" underlying the provision. It is no longer necessary for the judges to wring their hands and say, there is nothing we can do about it. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use this good sense to remedy it---by reading words in, if necessary so as to do what Parliament would have done, had they had the situation in mind.

A judge must not sound empty vessel. He must not be the servant of the unjust law. He is the master of the situation. He must act according to the demand of the situation. It is his duty to remove injustice, to fill up the gap between the social necessity and the Acts of Parliament, to protect the right of the individual even in absence of statutory provision through judicial activism. Even, if need be, the judges by application of fiction can treat the spouses to be bachelor and maiden and render the spouses their respective due according to justice, equity and good conscience and on the established and settled rule as to trespass to person.

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