

The Hindu Marriage Act, 1955

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IMPORTANT PROVISIONS of the Hindu Marriage Act, 1955 are examined in this paper with a view to emphasising the points that ; (i) there is an urgent need for introducing a few more reforms in marriage and divorce laws of Hindus, and (ii) a proper redrafting of the said Act is required so that it may genuinely ensure a Hindu couple a better and substantial matrimonial relief in fit cases at an early date ; namely, a suggestion for liberalisation of divorce laws of the Hindus.

The Hindu Marriage Act was passed in 1955, and it was pushed in the lap of Hindu society by the then newly constituted Parliament with the sincere hope and expectation that the Hindu society, in spite of all reservations and hostile attitude towards it by the orthodox section, would accept it in a sporting spirit in due course of time. But the time has shown that it with an ostrich like attitude has refused to accept the obvious merits of the Act too gladly upto now. Why it is so ? Perhaps the answer lies in the fact that in spite of the best efforts of the law makers, the Act has not been successful in guaranteeing the Hindu couple that much of conjugal peace and happiness as was intended to be conferred on them by the legislators at the time of passing of the Act ! There is one more feeling in the minds of the Hindus that though divorce in few cases might be a better solution to help the unhappy couples but in majority of cases it jeopardises the interests of Hindu women and children irreparably when rate of divorce cases increases enormously. It is also an acknowledged fact that divorce not only disrupts family life, but it also imperils the future of innocent children and deprives them of a proper home, education and family environment.¹

There is a general feeling among Hindus that the benefits of the said Act have to be snatched by them anyhow ; because the innocent party to a

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1. "Though divorces may in some cases be a solution to help unhappy couples, interests of women and children will not be safeguarded...this disrupts family life and will imperil future of children..." K. M. Shah (Rajmata Tehri Garhwal). The above views were expressed; while speaking on the Special Marriage Act, 1954.

troubled marriage has to earn a divorce decree from the court and that too by adopting honest and legitimate means. But to what extent the honesty rule is fully observed by a clever lawyer in drafting a matrimonial petition and winning the case on merits alone, in actual practice, needs a thorough probe and research. It has been found too often that the lawyer with a view to winning a case for his client, not only inserts false charges of adultery, cruelty and desertion, *etc...* in the pleadings against the so-called guilty party (when he or she had committed none in fact), but also by ingenious methods produces false evidences to prove them in a court of law.

The divorce suits, it is viewed with great concern, are these days fought not in sincere and true spirits but with a feeling of vengeance for the sake of false prestige and honour or for artificially created family troubles and extra-marital considerations. It is an observation that when too much of manoeuvring is done by the lawyer in presenting and arguing a divorce case, the snatching of divorce decree from the court becomes not only difficult but embarrassing also to the victor in the case.

Marriage amongst the Hindus was a necessary *samskar* and it created an indissoluble union, which was supposed to last from one birth to another. Under the *shastric* law the matrimonial bond could not be terminated by the couples under any circumstance at any time in spite of the fact that their marriage broke down irretrievably or became unworkable for rest of their conjugal life. As a matter of fact, the very concept of separation and divorce was an anathema to Hindu mind except the so-called lower castes of Hindu community. Divorce was thus an alien notion to the Hindus and was completely unknown to them.

II

For the first time the Hindus began to learn the implications of divorce when it was incepted in their personal law by the Hindu Marriage Act. They came to know of its so-called merits because of wide publicity accorded to it by the Anglicized Hindus. The Act granted a Hindu the right to divorce his or her undesirable spouse on certain grounds,² as provided in it on the plea that the indissoluble union concept of Hindu marriage in a few cases proved to be a curse than a boon to the peaceful family life. Parliament with a view to bringing Hindu marriage laws at par with the west was very much inclined to accept divorce in Hindu marriages in restricted cases;

2. See s. 13 of the Hindu Marriage Act, 1955 (hereinafter referred to in the notes as the Act).

thereby it passed the Hindu Marriage Act, and granted divorce to Hindus also as it had been already available to non-Hindus under their respective personal laws. The Hindu Marriage Act was also passed on a further alleged consideration that the newly constituted Parliament in its first five years of inception was much keen and in a mood to do something for the displeased Hindu wives and husbands, who wanted social reforms through legislation and a substantial guarantee for their peaceful conjugal lives.

Thus, Parliament introduced the rule of monogamy³ and abolished the institution of polygamy and further made bigamy⁴ a punishable offence in the Act. The Act has permitted a Hindu spouse to seek various matrimonial reliefs,⁵ on the grounds enumerated in the Act, so that the frustration and the miseries of their conjugal lives can be removed actively and positively by a judicious approach of the judiciary, but it is disconcerted to note that the judiciary by its inaction and indifferent attitude in few cases, have allegedly failed to meet the expectations of the law makers and became a source of greater misery to an already unhappy spouse. It is well known today that the spirit of section 23, clause 2, of the Hindu Marriage Act has been much respected by the courts in its violation than in its proper observance.

In a country like India the luxury of going to the court and seeking matrimonial reliefs even in just cases belong either to a very rich class of people or to the people who like litigation, no matter how much they loose in it. The socio-religious prejudices also play a vital role in debarring a Hindu to seek matrimonial reliefs in actual practice. It is, therefore, observed that the actual gain which one expects by snatching these reliefs from an acknowledged dilatory judicial process of the court is available to the estrange spouses much at the cost of his or her prestige and reputation and by involving him or her in the high cost of litigation. A divorce decree when obtained too late and at a high cost with so much of social embarrassment and stigma to a couple, gives him or her a sad feeling as well as artificial satisfaction that there will be relief from conjugal frustrations of domestic life and make him or her happy again. It is also an acknowledged view that the divorce decrees very rarely provide a real satisfaction to the divorced couples in the longer run of their lives in India, where divorce is disfavoured, depreciated, publicized, especially while contracting remarriage or marriage of the relations of divorced couples. Where illiteracy rules among masses, unemployment and unstable economic status deprives a person to earn his daily

3. S. 5(1) of the Act.

4. S. 17 of the Act read with s. 494 of the Indian Penal Code.

5. Ss. 9, 10, 11, 12 and 13 of the Act.

bread for livelihood, the luxury of having divorce decrees becomes the exclusive domain of a very restricted class of people.

Nonchalant role played by the courts in dissolving matrimonial differences among estranged couples and making symbolic efforts in bringing reconciliation between them, also discourages an unhappy couple to seek the remedy through courts. Because one may question the desirability of having this provision under the Act when parties have themselves to make efforts for reconciliation. The grant of frequent adjournments during matrimonial proceedings is no reply to that duty which Parliament imposed on the court to discharge positively.

Parliament expected a sense of involvement in the judge hearing a matrimonial petition⁶ and that is why it declared him to be one of the parties to such petition but the courts in India, it is said, have failed to meet expectations of the law givers. All these drawbacks are but natural in case of ordinary courts dealing with matrimonial petitions. Therefore, it has been suggested that special matrimonial tribunals or counselling centres be set up which should exclusively be entrusted with the job of dealing and disposing of matrimonial petitions devotedly as well as expeditiously like a cool headed guardian educated in progressive norms of the gradually changing Hindu society.⁷ The suggestion, it is observed, appears to be quite logical though inexecutable for practical reasons. Sometimes bad representation by the lawyer also frustrates the full implementation of the Hindu Marriage Act.

Section 9 of the Hindu Marriage Act provides for the relief of the restitution of conjugal rights. It is observed that section 9 of the Act has lost its vivid life and practical utility these days. The remedy as envisaged in section 9 of the Act, may prove to be quite helpful in those cases where couples are mostly illiterate and guided by socio-religious ideals of the past but where couples happen to be educated and too western minded and leave the spouse with a calculated and final determination and with a vow not to meet each other again in future, this remedy may prove to be quite useless and redundant. No court can force a couple to live together by a decree, against their wishes, it can punish them for violation of the decree only and that is all. But can the fear of punishment deter a determined couple to resume cohabitation and revive conjugal happiness where they had or have none in real conjugal life ?

6. *Chotte Lal v. Kamla*, A.I.R. 1967 Pat. 269; *Lakshmi v. Durvasulur*, A.I.R. 1966 A.P. 1973 and *Jivubai v. Ningappa*, A.I.R. 1963 Mys. 3.

7. See the views of Krishna Bahadur in 5, *Jaipur Law Journal* 111 (1965).

Owing to the weaker force and sanction attached to the said section, a view has been advanced that it should be deleted from the Act. But here it may be submitted that if such a view is accepted with a free hand, it will close the doors of resumption of cohabitation in those cases too, where it has ceased, due to sheer misunderstanding of the parties to the marriage or by sudden loss of temper and imbalance of the mind of quarreling couples, Where escape from matrimonial home is more governed by sentimental and psychological reasons the relief by way of restitution of conjugal rights helps maintaining the sanctity of marriage institution and also the healthy growth and development of a civilized society. If restitution of conjugal right can successfully be ordered in few cases, the retention of section 9 would not be wholly unjustified, because, after all, one can reasonably feel, that it may work in few other cases too, where life is not too mechanical and sensitive, the family life is not vitally affected and remedies like restitution of conjugal right possess their usefulness. But where the life is too fast and people too busy outside their homes, it may of course loose its practical utility ! And where divorce is not much appreciated, restitution of conjugal rights alone serves the purpose of the society.

Section 10 of the Hindu Marriage Act, grants a decree of judicial separation to an aggrieved spouse on grounds of desertion, cruelty, venereal disease, insanity, leprosy and sexual misconduct of a spouse. According to one point of view this decree does not guarantee couples a permanent conjugal peace, rather in the long run it encourages them to seek divorce. The judicial separation decree too, in many cases, it is said, fails to patch up the differences between the estranged couples.

Section 10 of the Hindu Marriage Act, was enacted by Parliament for avoiding easy and hasty divorces on the ground that Hindu society does not favour divorce and further, divorce creates many social problems. Section 10 thus offers the excited and estranged couples the cooling off period and an opportunity to dissolve their marital differences like a good sportsman and a good old friend. But it may be submitted that the decree of judicial separation can help those who either abhor the idea of divorce or do not appreciate it. But what about those who want divorce and are not interested in leading a cruel married life ?

Section 13 of the Hindu Marriage Act allows divorce to a Hindu spouse on certain grounds.⁸ Some of the grounds are available to both the parties to marriage, but the others to the wife only. A Hindu wife has two addi-

8. Read s. 13 of the Act.

tional grounds for claiming divorce against her guilty husband and one of these two is rape, sodomy and bestiality committed by the husband.⁹ One may question the wisdom of the law makers, that why the wife alone should enjoy this ground of divorce. Can a wife be not guilty of committing bestiality ?

The Hindu Marriage Act does not allow a Hindu to seek divorce on the following grounds *viz.*,—desertion, mutual consent, cruelty, impotency and breakdown of marriage irretrievably. Mutual consent and desertion should be made grounds of divorce in Hindu Marriage Act, as these are already grounds of divorce in the Special Marriage Act, 1954.¹⁰ Mutual consent (*mubarat*) is also a ground of divorce in Muslim law. It is a ground of divorce in customary divorces too.

The suggestion, that it should be made a ground for divorce in the Hindu Marriage Act, needs a thorough consideration and necessary caution. Hindu marriages in most of the cases are arranged marriages and ceremonial in character, and, therefore, to permit divorce by mutual consent may not be much helpful, as is the case with intercaste and inter-religion marriages conducted in a court of law. Further, among Hindus, child marriages are much in vogue upto now. It is also a fact that, in a Hindu marriage, validity of marriage does not depend on the consent of parties to the marriage and a Hindu marriage is not invalid for lack of consent. Therefore, when consent is not material for contracting a valid Hindu marriage, why it should be a ground for terminating the Hindu marriage ? In civil and Muslim marriages, consent plays a dominant role in validating a marriage. Moreover, divorce by mutual consent possesses its own merits and demerits and its utility has already been judged by scholars on Hindu Law.¹¹ Therefore, it is submitted that if it is incorporated in section 13(1) of the Hindu Marriage Act, it should have only a restricted application and the relief on this ground be so checked and controlled that it is not readily or hastily enjoyed by contesting parties in vacuum.

Cruelty has become a ground of divorce in Uttar Pradesh by a local amendment. It is reasonably expected from Parliament, that since cruelty can be practised in all states by the Hindu spouses, it should be made a ground of divorce for all Hindus residing in any part of India.

9. S. 13(2) of the Act.

10. S. 28 read with s. 34 (c) of the Special Marriage Act.

11. See Paras Diwan, *Modern Hindu Law* 71-73, (2nd ed. 1974),

Desertion is not a ground of divorce in the Hindu Marriage Act, it can be made a ground as is the case in England¹² as well as in India, in the case of the Special Marriage Act.¹³ Where polygamy is allowed or where inter-religion marriages take place, the possibility of desertion is greater than in a Hindu marriage, nevertheless, it cannot be denied that it is a serious matrimonial offence and it should get its due place in section 13(1) of the Act. Because it is honestly believed that a deserted spouse is much in need of an established home than a mere hope or assurance of an "established home", which unfortunately sometimes collapses with no hope of repairs; due to the most hostile attitude of the deserting spouse. For desertion, divorce is a better remedy than judicial separation and further it is in tune with the current norms of the society.

Impotency is a ground of divorce in Muslim law; but in the Hindu Marriage Act, a spouse can obtain only a decree of nullity on this ground. It appears to be a sound logic that where parties opt to live together, irrespective of having no sexual pleasure, their marital tie should not be disturbed by law. But where people marry at a younger age, with a view to deriving legitimate sexual pleasure, they should not be tied up with impotent partners and indirectly allowed to satisfy their physical needs outside the legal wedlock. Where impotency is incurable medically or surgically, it is too much to expect from a younger couple to continue the marital tie, on the ground that impotency did not exist at the time of marriage; but existed at the time of filing the petition only. It is true that a Hindu never marries for sex alone; but when it has great importance in married life, how can it be forgotten easily?

Non-consummation of marriage has been suggested to be a ground of divorce too; but one fails to understand, how it can work in actual practice effectively. It, instead of solving problems, may further complicate them, and moreover, to prove the fact of non-consummation of marriage, in many cases, may become not only difficult but even unthinkable. Where a wife, during subsistence of marriage, may engage herself in extra-marital activities, the court may find it difficult to ascertain the fact of non-consummation of marriage. The court at the most can look to the medical report for confirmation of non-consummation, but how far it will be reliable, one may only wonder in awe!

Some of the grounds of customary divorce¹⁴ have been found to be quite effective in granting speedier divorce to the estranged couples belonging to

12. The English Divorce Reforms Act, 1969.

13. S. 27 (b) of the Special Marriage Act.

14. S. 29 (2) of the Act gives recognition to it.

the lower class of Hindus. Therefore, a plea for their incorporation in the Act may not sound unreasonable, if some of these grounds are thoroughly studied, and if found suitable are granted to all Hindus. It may also be noted that the procedure for obtaining customary divorce is easy, simple, non-technical as well as speedier. The plea for liberalizing divorce¹⁵ is being favoured these days. Therefore, a suggestion is put forward that three years' bar for obtaining divorce should be suitably reduced to one year. It appears to be just and humane suggestion; because one cannot wait too long for terminating his or her marriage, without being cruel towards each other.

It is a just plea that where estranged couples have lost all faith and charms of married life and are fed up with the tortures of conjugal union, they should be given a fresh opportunity to re-orient their matrimonial life anew, if they so desire, instead of dragging on unsuccessful marital life unnecessarily and that too for a very long time. Where divorce is granted too late, the parties to the unsuccessful marriage not only exhaust their energy, money and reputation in terminating it, but suffer much embarrassment and disappointment also in future life. The sanctity of judicial institution is also affected, when it becomes a source of further embarrassment to the litigants, who are already frustrated with their matrimonial lives.

The procedure of first obtaining judicial separation and then divorce appears to be a dilatory process and it unnecessarily delays justice to the parties in dispute. Justice delayed is justice denied in such cases. Is it not too much to expect that estranged spouses, who are much in need of divorce, should get it only after three years or more after the total satisfaction of the court and in many cases at such a late stage of life, that all their future charm of another marriage is diminished, because they find themselves now too old for it. Where conjugal relations are damaged irreparably soon after marriage or within few years of marriage, the estranged couple expect speedier divorce. To delay the divorce in such cases will not only be inhumane but absurd too. Therefore, the Hindu Marriage Act should be so moderated that it ensures the estranged couples divorce at an earlier date, *i.e.*, when they are much in need of it. But in doing so regard must be had, that the sanctity of a Hindu marriage is not assailed beyond repairs. Because the institution of marriage is more respectable than the institution of divorce, and the later is a part of the former, and not above it.

15. Balraj, 'Divorce Law Reform', and Arun Gandhi, 'Divorce on Demand', *Times Weekly* (New Delhi) March 11, 1973.

The younger generation, it appears, does not possess that much of regard for the institution of marriage, as the people of the past had, nevertheless, if it desires easy divorce, its demand should be conceded to with utmost care and caution, and on universally accepted principles of marriage and divorce laws only.

Besides above observations, it may also be pointed out that section 5 (i)¹⁶ and (vi)¹⁷ and section 16 of the Hindu Marriage Act¹⁸ also need a better drafting, so that the law laid down in it is further clarified and made up to date.

III

It is heartening to note that the Law Commission's recommendations as contained in its fifty-ninth report have taken note of the inadequacies of matrimonial reliefs granted in the Hindu Marriage Act, 1955 (Special Marriage Act, 1954) and the commission has been right in recommending the following reforms *viz.*,

- (i) Cruelty should be made a ground of divorce.
- (ii) Adultery should be made a ground of divorce.
- (iii) Two years' desertion should, on the part of either party, be made a ground of divorce.
- (iv) There should be deletion of three years period for grounds based on diseases *viz.*, insanity, leprosy and venereal diseases.
- (v) In regard to section 13(1A), Hindu Marriage Act, 1955 the period be reduced to one year, *i.e.*, divorce should be allowed to either party one year after the non-compliance of the decrees of judicial separation or restitution of conjugal right. In other words two years period of waiting be reduced to one year in the above cases.
- (vi) Three years bar for obtaining divorce as provided in section 14 of the Act be removed, *i.e.*, section 14 should be deleted.

16. The rule of monogamy says that one cannot keep two wives or two husbands at a time, but if one keeps a wife and many girl friends... s. 5 (i) cannot effectively check it. Such a wife cannot get her immoral husband back, though she can get judicial separation or divorce on grounds of cruelty and desertion or adultery on the part of her husband.

17. Where parents withhold consent unnecessarily, the Act is helpless.

18. S. 16 of the Act should also cover the children of void marriage contracted in violation of s. 15 and s. 7.

- (vii) From section 15 of the Act, the bar of one year for remarriage be removed.
- (viii) With a view to avoiding undue delay in the disposal of matrimonial petitions, the family courts be established and "endeavour should be made" to avoid under delay.
- (ix) Every proceedings under the Act should be made in camera.

According to one view the Fifty ninth Report of the Law Commission is very disappointing ; but this view needs a thorough study in a separate paper.

IV

The Seminar under the wise guidance of Dr. S.N. Jain, the Director of the Indian Law Institute, paid special attention to the desirability of suggesting such reforms, which without offending Hindu sentiments much, not only guaranteed the Hindu couples a happy matrimonial life, but also granted them the matrimonial reliefs most expeditiously though not unwisely.

The Seminar thus purposely deliberated upon the following points, before reaching to a final conclusion, which may later on be passed on to the Ministry of Law for active consideration, viz., :

(i) Whether section 7 of the Hindu Marriage Act be deleted and be replaced with a more effective clause, making thereby registration of a Hindu marriage compulsory.

(ii) The social changes and progressive values should be taken into account before effecting any change in the state of Hindu marriage laws.

(iii) Whether India should follow the English pattern of matrimonial reliefs, while amending the Hindu Marriage Act, 1955 and would piecemeal legislation help her in bringing the desired social reforms ?

(iv) Whether the substantial reforms are more essential than the procedural reforms. Should a time limit be imposed for the early disposal of a matrimonial petition ?

(v) Should statutory conciliatory boards be established and due sanctity be attached to the report of the conciliatory board, before granting matrimonial relief to a Hindu couple? It was also desired that the necessary legal assistance be provided to the poor spouses

and special care should be taken to meet that end, while changing the state of law.

(vi) Why not sections 9 and 25 of the Hindu Marriage Act be deleted and the law should be made much in tune with the current ideals of the society ?

(vii) Should the divorce laws be made easier and couples given a free passport to separate ?

Majority of the learned participants held the view that easy divorce was neither suitable to the Hindus nor it guaranteed them a happy life in future.

(viii) Should the scope of section 13 of the Hindu Marriage Act be so enlarged as to provide divorce on grounds of (a) incompatibility of temperament, (b) cruelty, (c) imprisonment, (d) mutual consent, and (e) impotency of either party to marriage or it be replaced with only one ground of "break down" of marriage?

The following suggestions were made by the learned participants, keeping in mind the above points:

(i) Divorces should not be made that easy.

(ii) If divorce by mutual consent was allowed, the court would have little say in the matter. Therefore, the discretion of the court in deciding matrimonial petitions should not be unduly curbed.

(iii) Section 23 (1) of the Hindu Marriage Act should be so changed that it comes in full accord with section 13 (1 A) of the Act.

(iv) The provision for the settlement of the property of the separated spouses be clearly laid down in the Act.

(v) A realistic view of the situation be taken and the court should exercise active discretion in the disposal of matrimonial petitions.

(vi) The test of a "prudent man" be applied, while interpreting section 23 (1) of the Act.

The Seminar, while considering the recommendations of the Law Commission apparently concluded that the "breakdown of the marriage" should become the sole ground of divorce in the Hindu Marriage Act. A mixed feeling is but natural on such a kind of observation because it is viewed with caution that such an extreme view, if accepted, may open way for easy divorces. As has already been pointed out in the present paper, marriage comes first and divorce comes next. Therefore, an extreme view should neither be entertained nor accepted without looking into all its implications. Because, however satisfactory the "breakdown theory" may have been claimed to be, it cannot be accepted as a sole ground without reservations. But that constitutes a subject for further study in a separate paper.