Lacunae in Divorce Law under Hindu Marriage Act, 1955: Reasons and Remedies

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DIVORCE SHOULD owe its origin to the adoption of marriage as an institution by the human society for a settled marital life. It is a technique set up by society in collaboration with law whereby, the mismated may find legal release. Divorce is the mode for complete marital disruption. It serves as legal insurance for bad matrimonial risks by marriage and even by a subsequent divorce if required. It frees the spouses both from marital and material obligations to each other which arose from marriage. It is essentially a human problem founded upon physical and emotional disabilities. The framers of laws both in ancient time as well as in the present time, whether theologians or secular minded ones, were aware of the need to regulate dissolution of marriage so that divorce might not be mere desertion by one of the spouses depending upon his or her will. However, with the march of humanity and the resulting change in the outlook, the question of divorce has begun to be looked upon from the angle of the present day aspirations and expectations of a man or a woman.

To Hindus marriage was considered to be one of the most important *samskars*, stability in marriage was the desired norm.[1]

It, being a pious obligation, was treated as a holy union which was indissoluble.[2] Divorce was unknown to the *shastric* law and to the Hindu society for about two thousand years, except customary divorce which has always been approved and held valid under Hindu law.[3] The Hindu Marriage Act, 1955 has introduced divorce amongst Hindus. By virtue of clause (1) of section 13 of the Act, either spouse can obtain divorce on grounds of

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1. Kane, 2 *History of Hindu Dharma Shastras* 427 (1941)

2. *Gopal Krishna* v. *Venkatanarasa*, I.L.R. 37 Mad. 273; *Debi Lal* v. *Nand Kishore* (1922) I.L.R. 1 Pat. 266.

3. Banerjee, *Marriage and Stridhan* (5th ed. 1923); Derrett, *Divorce by Caste Custom* 65 Bom. L. R. 161 ; Raj Kumari Agarwal, *Hindu Law of Divorce—Its History*, 1959 *S.C.J.* 196 ; *Sonkeslingam* v. *Subban* (1894) I.L.R. 17 Mad. 479.

adultery; conversion to another religion, insanity; incurable leprosy ; contagious venereal diseases; renunciation of the world; disappearance for 7 years; and non-satisfaction of a decree for restitution of conjugal rights or for judicial separation. Clause (2) of section 14 allows two more grounds exclusively to the wife. These are : existence of a co-wife; or the husband being guilty of rape; sodomy or bestiality. The Special Marriage Act, 1954 allows devorce by mutual consent also; but that ground is not available under the Hindu Marriage Act, 1955.

The Indian Divorce Act, 1869 was enacted mainly to cater the needs of Europeans then residing in India and of Indian Christians. The Christian marriage still which was up to some extent like a Hindu marriage under the Hindu Marriage Act, 1955, seems to have come to nothing for no very clear reason; the project of codifying the law relating to marriage amongst Christians has not commended itself at the last stage to the legislature. The Indian Divorce Act is an antiquated law and needs to be overhauled; especially in view of the competition offered by the much more recent Special Marriage Act, with its own divorce part (which is not without an eccentric feature).

In Hindu society divorce has been only recently accepted by law, therefore, it is essential to find out the worth of the new law. After a period of twenty years the pros and cons of the law of divorce amongst Hindus ought to be minutely and objectively analysed and if the scales tilt heavier in the direction of disadvantages, the fault should be rectified by amending the law.

The greatest lacuna that virtually makes all divorce laws ineffective is the difficulty in procuring evidence sufficient for an action for divorce. It is experienced from judicial proceedings that most of the divorce suits fail due to the non-availability of evidence to prove the prescribed grounds. Except in cases where the grounds could be proved by medical evidence, say in the case of leprosy or any communicable venereal disease, it is not always possible for a party to produce reliable and convincing evidence to prove the grounds like adultery, cruelty, desertion, *etc.* The difficulty arises due to the peculiar relationship of husband and wife and specially when the action has been brought by the wife. As the social conditions are, women, as a class are still confined within the precincts of home and usually it is not possible for them to gather evidence to prove the alleged grounds. This handicap sometimes is faced by the husband too, in cases where he had occassion to live for a pretty long time at a distant place, away from his wife. The situation is aggravated by the fact that courts seldom look with favour single or stray acts of adultery, cruelty or desertion for short durations. Their insistence for fool-proof case, has always been upon continued acts. Such an approach be appreciated on the one hand as avoidance of a hasty conclusion

based upon stray facts but on the other hand it sometimes blocks the successful termination of an otherwise truthful case. It is, therefore, necessary that the standard of evidence sought by the courts to justify a decree of separation should be fixed at a point lower than the fastidiousness with which a criminal case is required to be proved. Although, an action for dissolution of marriage is a civil action but courts seek standard of evidence normally higher than any other civil action. Thus, the law should be suitably amended as to compel or enable the courts to presume those grounds as conclusively proved if certain facts are found in favour of the grounds of divorce as the very nature of action shows that assemblage of necessary evidence in such cases is not always an easy task.

The suggestion given above may invite the critics to assail it on the ground that even a case of divorce based upon frivolous grounds might run a smooth sail in the court. But it is only one side of the coin and the other side, if approached with a sense of reality, appears to be more dreadful. The other aspect of this matter is the situation and the conditions in which the parties to a divorce petition are placed after the action for divorce is dismissed for want of evidence. The framers of laws never paid an attention to the plightful and more wretched life which the spouses are ordained to lead if their bout for divorce fails. It can be seldom overemphasised that the failed action for divorce leaves behind in its trail more bitterness and uncompromising attitudes. Both the spouses obviously cannot enter into new matrimonial alliances. Therefore, it is, necessary that the law should make provisions to meet such situations, and the court, while dismissing an action for divorce, should be empowered to grant some monetary assistance to the wife for a limited period to enable her to stand on her feet. The discretion ought to be exercised by the court on being satisfied that although a decree of divorce was not legally maintainable but there appeared little prospect for the parties to live jointly.

II

Adultery has been recognised as a ground for divorce in all the divorce laws in force in the country. However, the law as contained in the Hindu Marriage Act, makes a difference between a continued living in adultery and a single act of adultery.[4] In the former case, it is a valid ground for divorce under section 13(1) (*i*) of the Act, but in the latter case it enables the injured spouse to seek a right of judicial separation.[5] Adultery is regarded universally not only as a moral degeneration of

4. *Mahalingam Pillai* v. *Amsavall*, (1956) 2 M.L.J. and *Mt. Nokhi* v. *Tehru*, A.I.R. 1957 Him. Pra. 65.

5. *Rajni Prabhakar Lokur* v. *Prabhakar Raghvendra Lokur*, 59 Bom. L.R. 1169.

the adulterous spouse, but it also causes mental agony to the other spouse finding the opposite spouse leading an unchasteful life. It is this mental condition of the injured spouse which has been given a due place in the marriage laws by giving the injured spouse a right of divorce or judicial separation. There appears to be little logic in differentiating between single act of adultery and continued adulterous life, as in either case the mental agony to the injured spouse is the same. Looking from the angle of judicial proceedings the difference seems to be only a matter of quantum of evidence. If a spouse can convince the court of a single act of adultery there is no reason why it should not confer upon him or her the right of divorce. Mere a decree of judicial separation does not help the spouse, as judicial separation itself is a stepping stone towards an ultimate divorce.

Another apparent flaw in the Hindu Marriage Act is that the cause of action for divorce arises under section 13 if the plaintiff can prove that the defendant spouse was living an adulterous life on the date of the application.[6] This requirement arises from the use of the words 'living in adultery' in section 13(1)(*i*). This in effect means virtually a state of desertion by one spouse or the other. The common cases which fall into this category are those in which one of the spouses has deserted the other and is living continuously in adultery with a third person. It is not usually common to find that the two spouses are living under the same roof and one of them is living in adultery with a third person. Equally difficult it is to prove that such a condition subsists on the date of application. It is, therefore, necessary that if it is found in the evidence that none of the spouse is living for whatever period with a third person with whom he or she does not stand in prohibited degree and in circumstances which may lead to the inference that they must be cohabiting, the insistence that such adulterous life should be proved on the date of the action should be obviated.

Under the Indian Divorce Act, 1869 and the Mohammedan law, cruelty has been recognised as a ground of divorce by women. This ground does not find a place in the Hindu Marriage Act. It is unthinkable that the framers of law felt that Hindus, as a class could claim to give better treatment to their wives than the Muslims or Christians. The social and intellectual outlook in the society comprising people of all the three religious sects should be the same, so also the treatment, whether good or bad, meted out to the women irrespective of the facts whether the husband is a Hindu, Muslim or Christian. In these circumstances there appears to be no logical reason for awarding special consideration to a Hindu husband to the detri-

6. *Magan Lal* v. *Bai Dahi*, A.I.R. 1971 Guj. 33.

ment of the Hindu wife by not providing cruelty as a ground for divorce. Likewise, desertion has not been provided as a ground for divorce for Hindus. Considering that the majority of Indian women are not only illiterate but are unable to earn livelihood for themselves and their children; desertion appears to be a more serious ground than adultery or cruelty. In case of desertion by the one spouse of the other, the wife suffers more than the husband as for her it is not only the loss of marital company but coupled with that of monetary security also. It is, therefore, necessary that the desertion for a number of years, say two years, if proved, should be a ground for divorce instead of only being a ground for judicial separation as it is now.

Under section 13(IA) two years period is allowed to parties after the procurement of a decree of judicial separation to seek a decree of divorce. The obvious objective of this provision is that the spouses are given an opportunity to compose their differences so that dissolution of marriage could be avoided. But this object is plainly defeated by section 13(1A)(*i*) which provides that in case the spouses cohabit any time in the said period of two years, the decree of judicial separation stands nullified; because after a decree for judicial separation neither of the parties are under obligation to resume cohabitation as it is a step towards dissolution of marriage.[7] Cohabitation does not necessarily mean that there is sexual intercourse between husband and wife.

As observed by Lord Goddord, C.J., in *Evans* v. *Evans*,[8] cohabitation consists in the husband acting as a husband towards the wife and the wife acting as a wife towards the husband and the husband cherishing and supporting his wife as a husband should. Sexual intercourse usually takes place between parties of moderate age if they are cohabiting; and if there is a sexual intercourse, it is very strong evidence—it may be conclusive evidence—that they are cohabiting; but it does not follow that because they do not have sexual intercourse they are not cohabiting. In the case of *Thomas* v. *Thomas*[9] the wife resumed residence in the husband's house under an arrangement with him by which she and her child occupied rooms in the house which were entirely separate from those occupied by him. It is no secret that a good many of the actions for divorce are thrown out on the plea that for a few days in the said period of two years, the spouses lived together here and there. This provision has virtually compelled the spouses after a decree of judicial separation, to play a game of hide and seek so as to avoid their

7. *B.R. Syal* v. *Smt. Ram Syal*, A.I.R. 1968 P. & H. 489.
8. *Evans* v. *Evans*, (1948) K.B. 175.
9. *Thomas* v. *Thomas*, (1948) 2 All E.R. 98.

meeting, at any point of time or place. Such a situation excludes the possibility of scoring out or composing the differences between the spouses. Consequently, the purpose for providing two years period to the spouses to iron out their differences is defeated. Therefore, mere cohabitation within the said period should not affect the decree of judicial separation or defeat an action for divorce where the petition for divorce is otherwise maintanable. If the bar of living together and cohabiting is removed, there are chances of effecting a real and lasting settlement by the spouses themselves, as they would be in a better position to settle their differences. It will reduce the number of actions for divorce which now follow after a decree of judicial separation.

So far as the other grounds of divorce, *e.g.*, insanity for three years, incurable leprosy for three years and a contagious venereal disease for three years, are concerned, it is necessary that the time limit for obtaining the decree for divorce in all these cases, should be abolished. Retention of three years period in case of above diseases is not justifiable on humanitarian basis, the existence of these diseases are to be treated as sufficient ground for seeking divorce. This gives rise to a chronic marital conflict which germinates dissatisfaction and hatred between the spouses. Their marital lives become intolerable resulting into constant tension affecting their marital relationship. Virtually, they want to break their marital ties. If in such conditions the law forces them to live in misery, till the expiry of a certain period, then such provision of law would prolong the agony of the spouses for another three years and causes frustration instead of providing any proper relief to them. Thus, the time limit to institute a suit for divorce on the basis of the said three grounds as given in section 13(1) of the Hindu Marriage Act, should be abolished.

III

Another lacuna in the Hindu Marriage Act is that the remedy of divorce can be claimed only by one of the parties to the marriage, a third party is not authorised to move for the dissolution of another person's marriage. This kind of provision has caused great difficulty in the cases of minors. If a minor has been trapped or entered into a disasterous marriage, should not the guardian of such minor be legally authorised to free the minor from the disasterous union ? By the time the minor becomes mature enough to realise the gravity of the situation and contemplates to start a divorce action, it might be too late (children might have been born) and at that time divorce may not be desirable. Hence, the guardian should not be treated as a third party and should be allowed to initiate a divorce petition on behalf of the minor. In order to escape further complications in such cases prompt action is necessary. The

three years limit[10] for filing the divorce petition should be deleted in the case of minor's marriage. Amendment of sections 13 and 14 is desired in such a way as to authorise guardians of minors to move the petition of divorce in case the minor is forced to enter an undesirable marital bond and the bar of three years for initiating matrimonial proceedings in the case of minor's marriage be removed. The other alternative can be that a minor's marriage unaccompanied with guardian's consent should be legally declared as void. This would require a change in sections 5, 11 and 12 of the Hindu Marriage Act. These changes will eliminate the danger of undesirable marital unions by immature people.[11]

It will be appropriate to conclude that in a sizeable section of community the justification of incorporating some of the legal grounds for divorce in the statute book is not acceptable. The impact of legal provisions loses its effects *(i)* due to lack of knowledge, *(ii)* due to prevailing attitude in some section of the society that the legal provisions are not justificable on grounds other than legal, and *(iii)* due to the inevitable lag between legal provisions on the one hand and actual action to take advantage of the provisions on the other. It is found that the conditions which facilitate quick, trouble free, smooth and effective application of the laws through law courts simply do not exist, nor has anything been done to improve the existing conditions. In actual practice, the impact of any law though useful is negligible. And this is practically true about divorce law which is connected with the most intimate and private affairs of the human society, and to discuss those affairs into broad day light is always a painful process, not enjoyed by any of the parties. Even in advanced countries divorce is sought to be avoided, if one can help it, for fear of scandal, stigma and unusual amount of social attention that such a suit always attracts. In the case of divorce, there is always a fear of social stigma and censure on one hand, lack af knowledge of legal provisions and the distaste for getting involved in complex, time and money consuming legal suits on the other hand. All these factors discourage the parties even in actual distress to approach the court.

By and large, there is no organised or deep-rooted opposition against 'divorce' in special circumstances at least on rational grounds. Whatever resistance is felt at the time of actual translation of the provisions of the law and here, the drastic reduction in the over all impact of the legal provisions can be accounted for not because of any inherent or abiding deep seated attitudinal opposition to the idea of divorce but because of the various forms of hurdles that the parties have to face, if they wanted to have divorce

10. S. 14 of the Hindu Marriage Act.
11. Raj Kumari Agarwal, *Matrimonial Remedies under Hindu Law* 68-69 (1974).

through the agency of law courts. If the provisions of the law were more simple, inexpensive and less time consuming and trouble free, the impact of divorce law could have been felt more freely. In fact for ordinary differences and quarrels between marital parties the first remedy advocated is to effect reconciliation so that differences could be patched up. Remedies like judicial separation and ultimate divorce be kept as last resort for which some of the conditions are also unambiguous adultery and change of religion. Even physical disabilities like diseases and insanity which are considered to be retributions by God and nature, are not considered as strong ground for judicial separation and divorce as adultery. This differential importance attributed to two classes of conditions, one in the area of morals and values, like mental infidelity and change of religious belief and the other in some form of disability where ethical and moral principles are not involved, is to be noted, which throws some light on the minds of the rural people; specially because 'divorce' by and large is a drastic eventuality in any family. It is abnormal and always attracts a lot of unpleasant attention. Since divorce has been accepted by law more than twenty years ago, it is essential to find out the worth of the divorce law under Hindu Marriage Act in the light of the above discussion. The pros and cons of the law of divorce amongst Hindus ought to be minutely and objectively analysed and if the scales tilt heavier in the direction of disadvantages, the fault should be rectified by suitably amending the law of divorce under the Hindu Marriage Act.

The author agrees with the Law Commission that every effort should be made to avoid delay in the disposal of matrimonial cases. Many a young man and woman after marriage find that they cannot adapt and adjust themselves with each other. There are quarrels and strained domestic relations. In such cases justice requires that there should be no delay in the disposal of matrimonial cases. It is distressing to find matrimonial cases take a slow, meandering, time consuming course. If a matrimonial case lingers on for about six or seven years from the date of its institution for its final disposal in appeal, one can well imagine the anguish it causes to the parties concerned. If the parties grow old by the time the matrimonial case is decided, it is as good as denying an effective relief to them. Delay in the disposal of matrimonial cases not only causes accute frustration, it also results in other evils which raise their ugly head when a young man and woman has to spend long period of youth without the company of a spouse. In no field, however, such a delay constitutes a greater stigma on the administration of justice than in that of matrimonial cases. These cases call for a broad, sympathetic and humane approach.

To avoid delay in matrimonial litigation there is an inevitable need to establish special family courts; that the matters pertaining to family should

not be litigated in ordinary courts, but in specially constituted family courts. In some countries such courts have already come into existence. In India where divorce jurisdiction is new and is exercised by district courts; delays are chronic and phenomenal. The need for setting up family courts in India for family matters has also been recognised by the Law Commission.[12] The government should not further postpone the matter.

12. The Law Commission, *Fifty-ninth Report*, 13.