Cruelty under the Hindu Marriage Act,

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THE LAW of marriage amongst the Hindus has in recent times passed through an interesting course and bears an excellent testimony to the fact that law and society are inextricably linked up with each other. It is possible to surmise that in its chequered course, perhaps law was left behind the social aspirations and social changes for a considerable time. Nevertheless, it has to be accepted that particularly after the codified Act about Hindu marriages came into operation in 1955, the law and social change are almost following a harmonic notion. It can also be stated that the wind of change was blowing more from forces other than merely the social ones, and true to its functions, the judiciary in such a change, has contributed indeed significantly.

If the movement of the marriage law was not equally dynamic with the aspirations of the higher strata of the urban society, it was so very inherent in the functionary role of the law. The most striking factor in this context is the delicate area of the individual's social life over which law has its peripheri and while evidently it deals with the lives of the two spouses, it generally engulfs the entire social fabric and thus has far reaching overall effects. Marriage according to the old conception was a sacrament, a *samskara* to the Hindus, and apart from its mundane aspects, marriage had also a spiritual mission to fulfil.

The nature of union constituted by marriage was reflected in the incidents and legal consequences of a Hindu marriage. Thus, for instance, marriage being a *samskara*, was an indissoluble union.[1] In a Bombay case question had arisen as to whether Hindu Marriage was also a contract for certain purposes and it was observed that marriage is a *samskara* as well as a civil contract.[2] Since it was basically a *samskara*, a marriage established in fact was also presumed to be according to law, unless the contrary was proved.

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1. S.V. Gupte, *Hindu Law of Marriage* 6.
2. *A.* v. *B.* (1953) I.L.R. 437.

Before the Hindu Marriage Act of 1955, the law was laid down by the *smritikars, commentators,* as well as customs and usages. The law was modified by judicial decisions. The union through marriage was indissoluable and only permissible ground for dissolution of a marriage was force or fraud. It is true that from the period 1935 to 1955, several acts affecting Hindu law were passed in the central and provincial legislatures of which the most outstanding ones are the Bombay Prevention of Hindu Bigamous Marriage Act, 1946 and the Bombay Hindu Divorce Act of 1946 with amendment in 1949. Similar acts were put on the statute book in the states of Madhya Pradesh and Saurashtra. The Madras Hindu (Bigamy Prevention and Divorce) Act of 1949, prohibited bigamous marriages and provided a right of divorce on certain grounds but obviously all these statutes had jurisdictions in their respective states only. Notwithstanding these piecemeal enactments, Hindu law of marriage as a whole still remained by and large unchanged for an influential and important section of the community, and lagged behind its social needs and requirements. Even before the new enactment by which the law relating to marriage among Hindus was codified, there was a great commotion and a part of the public opinion did not cherish the idea of amending the marriage law which was based on religious scriptures and which gave it a spiritual role. However, now the Hindus have codified laws, which is much in tune with their social needs and social moves and which with its elasticity, has a capacity to suit to the needs of the time.

II

Several new features, not accepted by the original scriptures are provided in the Hindu Marriage Act, which include judicial separation, divorce and nullity of marriage. The reasons permitted by the Act for these reliefs have stood the stress of time and when found wanting, have been suitably interpreted and augmented by the judicial authorities, with the help of the English law. Evidently in their interpretations, judicial verdicts have tried to bring in new provisions keeping in view the new social needs and social patterns, and some of the judgments, while interpreting, have rather sought to give a new meaning to them in confirmity with the new trends of social evolution and social thought.

In the Hindu Marriage Act, the aforesaid new features of judicial separation, nullity of marriage and divorce are dealt with respectively in sections 10, 11, 12 and 13. The entire scheme of new arrangement is full of checks and balances and ample safeguards are provided before the marriage is finally allowed to break up. The needs of an ancient society with deep-rooted concepts and conventions, and with a religious background were

to be remodelled and refashioned for an entirely new upsurge of thoughts and action. Verily, this upsurge was also not uniform for all the different strata of the society and all were not also in a position to face squarely the consequences of the new order. Such a situation led the framers of the Act to so devise the scheme that in the new enthusiasm for reforms, the foundation of the society was not unduly strained much less shattered. With unequal changes in the outlook, approaches, culture, civilization, education and economic conditions since the mid-century, these strata were bound to be slow to absorb the changes and it must be conceded that the scheme has witnessed a satisfactory performance. It is beyond the purview of this brief paper to discuss all these aspects and the temptation to dwell upon them has to be resisted. However, it will be sufficient to add that the new changes have been proved adequate to accelerate the motion of social change and now after 20 years of its operation, a new look to its various provisions will prove timely.

As per section 10 of the Act, judicial separation is permissible in cases of continuous desertion for a period of 2 years or more, or in cases of cruelty which would cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party, or that the other party suffers from a virulent form of leprosy for a period of one year, or venereal disease in a communicable form for a period of three years or more, or unsound mind for a period exceeding 2 years, or the other party had sexual intercourse with any other individual than his or her spouse.

As a check to the possible unrestricted or improper reliance on the above strong grounds, section 10(2) empowers the court with ample discretion to rescind the order of judicial separation when it is just and reasonable to do so.

For the foregoing requirements for the order of judicial separation, it is clear that except for those of desertion and cruelty, the rest of the requirements are more or less explicit though genuineness of grounds submitted are to be substantiated by cogent and reliable evidence. The law on desertion both express as well as implied or constructive desertion has achieved sufficient clarity through both Indian and English case law. But that also needs a careful examination in the set-up of Indian conditions. The law on cruelty and reasonable apprehension arising therefrom in the mind of the petitioner about the consequences has been also well brought out by the Indian and the English case law. However, a question may be posed that if there is desertion, whether of any particular type of desertion or set of circumstances pertaining thereto, does it warrant immediate divorce or not? Similarly, if there

are very pertinent and striking facts of cruelty, whether divorce would not be a more human remedy, instead of prolonged separation which is not likely to bring harmony between the spouses. It is true that all these are subjective questions and it is difficult to lay down a fixed pattern of law for similar cases arising out of different circumstances. Further, the subjectiveness varies from judge to judge too and what would appear to be a case of judicial separation to one judge, may appear to be a case of divorce to the other judge as well. This paper is an humble effort to explore and expose the situation *vis-a-vis*, the law of cruelty.

III

Indian law has never defined cruelty and hence the quantum of cruelty required to establish a matrimonial offence is to be derived from facts of each case. Even in English law, a clear cut definition does not seem to have been attempted. Thus, the legal concept of cruelty will vary from time to time, or from place to place or from group to group and would undergo a change along with the change in social and economic conditions of the persons concerned. This is a very vital proposition particularly in the context of Indian circumstances, inasmuch as, here even in the same place and in the same community, both in rural and urban areas different conditions prevail. Under the circumstances, it is but proper that no attempt to define cruelty has been made in any statute and the attempted definition in the famous English case of *Russel* v. *Russel*,[3] has been the main basis on which the courts have relied in India, and the same has been adopted according to the Indian cases. In the latest case of *Priti* v. *Kailash Singh*,[4] Berry, C. J.while considering a special application under section 10(1)(*b*), the Hindu Marriage Act, relied on this famous English case in defining cruelty. Thus, it can be said that law will take cognizance of cruelty when "the conduct of spouse is of such a character as to have caused a damage to life, limb, or health (bodily or mental) or to give rise to a reasonable apprehension of such a danger."[4] This is amply illustrated in *Russel* v. *Russel*[4a] and in 1895, Lord Lopes, L.J., attempting to define cruelty said: "There must be danger to life, limb, or health bodily or mental or a reasonable apprehension of it, to constitute legal cruelty." Thus the element of mental cruelty in the definition has been introduced which is very essential and vital in the life of spouses of the current century. In *Birch* v. *Birch*[5] (which is an older case), Sir James Hannan had said: "cruelty must be of such a character that it is dangerous to life, limb or

3. (1897) A.C. 395.
4. A.I.R. 1975 Raj. 7.
4a. *Supra* note 3.
5. (1873) 28 L.T.R. 540.

health." The modern view is generally to take note of the facts which are likely to cause either bodily or mental injury and the approach now is not, as before, to punish the guilty party but to protect the innocent party. Since the legal situation is almost clear, as is evident from the case-law, it will not be necessary to refer here in details to each small or big act or conduct which is considered as amounting or not amounting to cruelty, though a reference to a few cases bringing out the legal import would prove an interesting review.

Before discussing the case law it will be useful to examine in a greater detail the law on mental cruelty also. Formerly, in order to constitute cruelty, proof of actual physical harm was necessary but now this viewpoint has been rejected and since cruelty is to be judged from the entire facts of the case, circumstances which would cause constant and continuous mental tension and friction are adequate enough to constitute cruelty. Mental cruelty is to be viewed in relation to the mental attitudes of both the spouses. That is why intention is not considered an element of cruelty in many cases. Generally in case of mental cruelty, the conduct of the spouse against the other aggrieved spouse in aiming at hurting him or her and display of temperament, emotions or outbursts cause mental cruelty. Denning, L.J., in *Kaselfesky* v. *Kaselfesky*[6] observed :

> In cases of this kind, if there is no desire to injure or inflict misery on the other, the conduct only becomes cruelty when the justifiable remonstrances of the innocent party provoke resentment on the part of the other, which evinces itself in actions or words actually or physically directed at the innocent party.[7]

Even nagging, abusiveness and jealousy may amount to cruelty. As observed by Gupte:

> The General rule in all questions of cruelty is that the whole of the matrimonal relations must be considered, and that rule is of special value when cruelty consists not of violent acts but of injurious reproaches, complaints, accustions or taunts.[8]

To be brief and precise, cruelty is to be understood by its effects on the victim.

The question of intention may briefly be considered *vis-a-vis* cruelty. It hardly needs to be added that if intention to be cruel on the part of a spouse

6. (1950) 2 T.L.R. 616.
7. *Id.* at 618.
8. *Supra* note 1 at 161.

is established, there is obviously no valid reason as to why a particular matrimonial alliance should be allowed to subsist. But the law is also clear in cases when there is no intention. Looking at the English case law on the ground of cruelty, it is found that intention to injure is not an essential element though it may be considered an important element. In *Jameson* v. *Jameson*,[9] Lord Merriman said that an actual intention to injure was not essential element and unintentional acts may amount to cruelty. In *Williams* v. *Williams*,[10] it was also observed that motive, or turbulent passion, causes inconsistent affection, jealousy, *etc.*, may be the motives behind cruelty but if once cruelty is established, such motives, malignity, malevolent intentions are not be considered at all in cases of cruelty. Even insanity was not considered a pardonable factor and if because of insanity, a spouse perpetrates cruelty, it was a sufficient ground for giving the other spouse, a proper relief.

Indian case law has also fallen in line with the English decisions. In *Bhagvat* v. *Bhagvat*[11] the spouse responsible for cruelty was also insane. Yet that was not considered a sufficient ground for exonerating cruelty. In a Punjab case, the circumstances were more poignant.[12] The wife was crazy to get the love and affection of her husband and she consulted a *fakir* to get his help to change the leanings of the husband. The *fakir* gave some love-potion which created a very adverse effect on the health of the husband. The wife did repent for the consequences. The wife attended to the husband when he was ill as a dutiful wife. It was perhaps a case of over enthusiasm to secure the husband's love and that proved to be her fault. Shamsher Bahadur, J., observed that the wilful intention to injure is not an essential element of cruelty. If the husband felt apprehensive that the wife's craziness was harmful for him to stay with her, he must be given separation, and that was granted to him.

The next question that may be considered is as to whether cruelty must be aimed at the petitioner. In *Cooper* v. *Cooper*,[13] the court said that when conduct of a spouse does not consist of direct action against the other spouse, but may be only his misconduct, such as drunkenness, gambling, crime or sexual offences against other party, they do not directly aim at the petitioner but if these traits remain continuous, they are sufficient to be termed as cruel since they are bound to affect the mental health of the other spouse. In *Bhagvat* v. *Bhagvat*,[14] a similar trend was followed and it was observed

9. (1952) A.C. 525.
10. (1963) 2 All E.R. 991.
11. A.I.R. 1967 Bom. 80.
12. *Sayal* v. *Sarla Rani*, A.I.R. 1961 Punj. 125.
13. (1954) 3 All E.R. 415.
14. *Supra* note 11.

that it is not material to show that the cruelty is not aimed at the other spouse. The effects of such a behaviour on the other spouse are to be considered and if they cause reasonable apprehension, of injury to physical or mental health, they are considered under the provisions of the Act adequate to entitle the petitioner for a relief under the law.

A note must be made here about the case law and the views of the courts on the question of the necessity of ascertaining as to whether the act or conduct complained should be of the respondent alone or some of the respondent's family members. This is very pertinent in the context of a joint Hindu family and the overall social conditions prevailing in the country. There are frequent cases about the wife having been met with cruelty by relatives of the husband with or without his knowledge, connivance and/or approval. It is possible that the husband may be helpless also in some cases. In the peculiar and transitional circumstances of the Hindu society at the present juncture, such cases are bound to arise frequently and due consideration should be given to the possibilities of such cases. In *Shyam Sunder* v. *Shantadevi*,[15] the Orissa High Court held that the husband's negligence or intentional ommission to protect his wife from the ill-treatment extended by others, amounted to cruelty. This concept was further confirmed in *Mango* v. *Premchand*[16] and *Tayawwa* v. *Chinnappa*.[17] Thus, it can be stated that law is clear on the issue of cruelty and even ill-treatment by persons other than the husband will also be considered a legal cruelty.

It will be worthwhile here to consider a few other cases which further throw light on the subject. *Saptami* v. *Jagdish*,[18] was a case of physical cruelty coupled with mental cruelty while *Jyotish Chandra* v. *Meera*,[19] was a case of physical and mental cruelty coupled with desertion.

In *Sreepadachar* v. *Vasantha*,[20] wherein the aggrieved party was the husband because his wife was of an irritating temper, quarreling mentality and with foul tongue. Once, while the husband was going to his office, she caught hold of his neck and hurled insults at him. In *Siddagangiah* v. *Lakshamma*,[21] the court observed that wilful, unjustifiable interference by the spouse in the sphere of life of the other is a type of cruelty by itself. In another case,[22] it was observed that if there are wild accusations of

15. A.I.R. 1962 Ori. 50.
16. A.I.R. 1962 All. 447.
17. A.I.R. 1962 Mys. 130.
18. (1969) 73 C.W.N. 502.
19. A.I.R. 1970 Cal. 266.
20. A.I.R. 1970 Mys. 232.
21 A.I.R. 1968 Mys. 115.
22. *Soosanamma* v. *Verghese*, A.I.R. 1957 T.C. 227.

adultery along with insults, and abuses, the married life is bound to be extremely difficult and cruelty is obviously proved. In *Kandal* v. *Ranganayaki*,[23] the Madras High Court has declared that when the course of conduct is of such a nature that it would undermine the health of the wife, it constitutes legal cruelty. In India, the honour of the woman has always been considered in high esteem and hence whenever, there are accusations against her pertaining to her chastity, the courts have taken a strict view and have reckoned such accusations as cruelty.

In *Kusumlata* v. *Kamtaprasad*,[24] and in *Gurucharansingh* v. *Waryam kaur*,[25] the Madras and Punjab High Courts respectively have also taken such a view and considered the charge against the chastity of the wife as baseless and amounting to cruelty. *Dawn* v. *Henderson*,[26] was a case of complaint for forcing the wife to bear the overtures of another person. While in *Jyotish* v. *Meera*,[27] the husband refused to have marital intercourse with the wife. In another case of *Ruplal* v. *Kartaro Devi*,[28] the wife emmitted a nasty odour which made the husband extremely uncomfortable and this was considered a sufficient factor to be reckond as cruelty. In *Chander Prakash* v. *Sudesh*,[29] the wife left the husband's house on the second day after the marriage and was seen thereafter moving with various persons in public places. The court considered this behaviour on the part of the wife sufficiently grave so as to cause cruelty to the husband. In *Kashinath Sahu* v. *Devi*,[30] the well-settled principle that a wife is entitled to insist that she should not be exposed to the unpleasantness of the relatives of her husband is once again confirmed.

However, it must be conceded that in married life, there are wears and tears also. Every small conduct cannot lead to cruelty though it makes the other party unhappy and miserable. Again, the proverbial power of tolerance of a Hindu wife is still not a matter of history and small difference of opinion, or casual exchange of hot words, or some inconveniences here and there are not considered adequate as to amount to cruelty. In *Raj Kumari* v. *Ram Prakash*,[31] the husband used to send money to his father. The wife was annoyed at the husband's behaviour and at times abused him and refused to cook for him. She arranged for a *tawiz* to convert the

23. A.I.R. 1924 Mad. 49.
24. A.I.R. 1965 All. 280.
25. A.I.R. 1960 Punj. 422; see also *Iqbal Kaur Pritam Singh*, A.I.R. 1963 Punj. 242 and *Kohli* v. *Kohli*, A.I.R. 1967 Punj. 397.
26. A.I.R., 1970 Mad. 104.
27. *Supra* note 19.
28. A.I.R. 1970 J. & K. 158.
29. A.I.R. 1971 Del. 208.
30. A.I.R. 1971 Ori. 295.
31. (1968) 70 P.L.R. 879.

views of the husband. But this was not considered cruelty. *Narayan* v. *Prabha*,[32] is a typical case of quarrels and strained relations between a Hindu daughter-in-law and her mother-in-law where both were at daggers drawn and the former took pleasure in disobeying consistently the latter. But this attitude of the wife was not considered as cruelty to the husband though the husband must have passed through a discomfortable situation. In *Anna Saheb* v. *Tarabai*,[33] when the husband insisted that the wife should accompany him whenever he went out and the wife resisted, the attitude of the husband was not considered cruelty. These are the type of cases where wear and tear of married life should be carefully distinguished from mental cruelty.[34]

But it must not be forgotten that the language of the law is still wider. The law postulates that such a cruelty—physical or mental—should create a reasonable apprehension in the mind of the petitioner that it may cause injury to his or her body, limb or mind. The aforesaid review of the case-law clearly bears testimony that in these cases, there was reasonable apprehension of the injury required by law and that impelled the courts to grant the plea of cruelty.

It will be appropriate to make a mention of an unreported Delhi case, wherein the court granted judicial separation on the ground of impotancy which was continuous after the birth of a child in the wedlock. In absence of authoritative facts and details of the judgment, it is risky to make observations thereupon. But it is evident that the court in a bold judgment has taken into consideration (as reported in the press), the conditions of injury to the mind of the wife whose husband got impotent after the birth of a child and gave the wife judicial separation from the husband. This shows that the marriage no more remains only a *samskara*. The couple had already a child for *samskar* but that was not enough. If the wife had to pass her remaining life with a husband who was impotent, the life and the lot of the wife, physically, mentally and emotionally would become miserable, hence she deserved separation from the husband. The wind of a new outlook is manifested in this case.

Some of the eminent authors, while discussing the concept of cruelty, its contents and its characteristics for being considered a legal cruelty have time and again emphasized that great caution must be exercised in applying

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32. A.I.R. 1964 M.P. 28.
33. A.I.R. 1970 M.P. 36.
34. See Paras Diwan, *Modern Hindu Law* 143.

English standard to Indian conditions. It is submitted that by and large the patterns and standard of matrimonial living in both the countries are positively different. But the wind of change in Indian urban life is narrowing the difference to the extent of outlook and time is almost approaching, if it has not already approached in some quarter, when the patterns and standards, outlook and approaches of the Indian life will almost be on par with those prevailing in England or for that purpose in any other westernized country.

At the same time, it is to be remembered, that majority of Hindus live in villages. There the weaker sex is largely under a severe strain and handicap. She is generally on the suffering side and her concept of marriage is not still out of the antiquated secramental notion. Separation is too ghastly for her, almost unthinkable. If a judicial separation, is foisted upon her, it will create insurmountable difficulties in future for her. Even if there is legal cruelty and also a reasonable apprehension that this cruelty will endanger the life, limb or mind of a woman, she feels hesitant to get herself freed from the conjugal clutches, because she is generally scared and dreads the future consequences. A divorced village woman may not always find it easy to remarry though *natre* or remarriage is permissible under custom in the various castes and subcastes of the rural society. Likewise, an urban girl also will not find it easy to remarry because the urban male society has not yet reformed its mind to marry divorcees, without a pinch of salt. The problem will be still more difficult if there are children out of the first wedlock. Apart from the emotional upsurge for keeping the custody of the children by the mother, the society as yet is not sufficiently and liberally prepared to facilitate the marriage of divorced lady with the children from the former marriage.

On the other hand, it must be conceded that there are genuine cases of cruelty where notwithstanding the aforesaid consideration, judicial separation or even divorce for that purpose is the only judicial and judicious remedy. The power of tolerance, adjustment and the spirit of understanding and accommodating each other's view points is fast drying. It is found to be impossible for educated, and even slightly sophisticated couples to pull together, once a deep blow is made on their mutual understanding. Even though the links of joint family are weakening, they are not yet given up and notional and emotional ties are still sustained. It is not always easy for an educated urban youth though, self-dependent to turn his face away from his parents. He would feel obliged to reciprocate the affection of his parents by providing them some financial help. There are also a number of families where it is much more than monetary assistance is involved, hence the problem gets more complicated. Sometimes the

parents do tolerate free life of their son and his wife, but they do so only up to a degree with rumblings, displeasure and discontentment. The couple tolerate the situation as far as possible but a time comes when an educated woman, who is quite often earning, finds it difficult and intolerable to stay together with her parents-in-law. She finds enough portents of cruelty though not necessarily physical, but sufficient to cause apprehension in her mind that if she continues to live longer under such conditions, she will suffer a mental, emotional, or nervous breakdown. Thus, the situation goes beyond the ordinary wear and tear and she yearns for a separation, perhaps unavoidably, generally from the husband's parents and other relations but if that is not forthcoming, then even from her husband who can neither mend nor end her woes and miseries amidst a hopeless and helpless situation.

IV

Law and society must move together in a covincing manner and any amendment suggested here must confirm to the present day social needs. It is very obvious that if the breakdown theory is accepted in conjugal relations, the spouses should not be further allowed to suffer, in cases of desertion and cruelty as the relations between them have already reached a stage of no return. Very rarely, peace, or rapport or rapprochement would again may prevail. They are on the brink of parting and to further bind them for a period of about 4 years in conjugal clutches would be undesirable. Since after obtaining an order of judicial separation two years period of non-cohabitation is required to initiate the divorce proceedings, which would at least take again this much of period for procuring complete separation. But the conditions in small cities and villages are also be taken in consideration to safeguard the interest of the wife against the opportunist husband who would like to get himself freed within a short period, leaving his wife to her lot. Once there is enstrangement the husband's relations will never care for the daughter-in-law. There is possibility of even her own relations neglecting her because of social stigma. Thus, the law may be amended in such a manner as to give the court complete discretion to permit divorce, on terms and conditions to be prescribed in the decree, in fit and proper cases. If the court is of the opinion that circumstances in the case are not ripe for divorce, an order for judicial separation may be made.

Secondly, even when judicial separation is made, the period of separation should be restricted to only one year, instead of two, as is the law today. A year's separation between the spouses is quite sufficient for them to reconsider the problems of their married life and to find out ways and means to bridge up the gaps.

Thirdly, like the Special Marriage Act, Hindu Marriages Act should also provide for divorce by mutal agreement provided court is satisfied that divorce is the only wayout. In cases of extreme hardship there is no point in continuing the period of trials and tribulations of the parties. But lest there may be collusion or pressure or helplessness of one of the parties, an order in such cases can be absolutely discretionary, casting a duty on the court to elaborately state the reasons for the orders.

Finally, time limit should be set for completion of matrimonial proceedings. No proceedings in the original court should be allowed to continue for more than a year, while in appeals or revisional applications, whenever, permissible, this period should not exceed six months from the date of admission. For obvious reasons, promptness must be the key point in matrimonial proceedings and a statutory duty on the court to dispose of pending matters within a stipulated period it will hasten the end of proceedings, of unfortunate persons, one way or the other. Delay in such cases, would really defect justice.