BIGAMY AND HINDU MARRIAGE: A SOCIO-LEGAL STUDY

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Abstract

In contemporary society, marriage is no doubt an individual relationship, a private affair of the parties, but more than that it is a social institution having complex social dimensions. Among Hindus, marriage institution since its inception, has been given prime importance due to certain religious, spiritual and social reasons. However, indiscreet importance of the law of divorce is an attempt to destroy all that is good in Hindu culture. If we consider marriage a mere contract, even then it cannot be said that it is the parties to the marriage whose interests have to be regarded in divorce proceedings. It is larger social interest which should be put above the individual interests of the parties. Steep increase in divorce cases even in the most materially advanced countries causes alarm and is considered as a menace to the social system. Trust among married couples is not only the social fabric which bounds them together, not only for this life but lives to come, but also a key factor for any legal remedy. Once this fabric torn off by either of the parties to marriage, solemnised or not, a pool of litigation flows from the relationship which leads to disturbance in the family and society. In this paper, attempts are made to analyse the relationship in marriage and in the nature of marriage and find out the status and rights of the parties involved in such relationships. Further, an attempts are also made to suggest corrective measures against the offender in such relationships.

Key Words: Marriage, Relationship, Solemnisation, Customs, Rites, Ceremonies, Bigamy, Legitimacy, Status, Matrimonial and Property Rights.

Introduction

Hindu marriage is considered to be a sacrament than a social contract. There have been numerous opinions on the nature of Hindu marriage. One juristic opinion is to consider it as a sacrosanct, permanent union, indissoluble union, and sacramental union but the others say that in contemporary Hindu society option of divorce is made available under Section 13 of the Hindu Marriage Act 1955, hence, it is a dissoluble union that leads it to a contractual in its nature but due to absence of consideration, not opposed to law or public policy, makes it a social contract where emphasis is given on performance and obligations-social, pious, and legal. The remedy of divorce among Hindus was unheard of until Hindu Marriage Act 1955 came in to force. Further, considering Hindu marriage as sacrament finds its recognition in Section 7 of the Hindu Marriage Act wherein emphasis is laid on solemnization of marriage by observing certain customary rites and ceremonies of either party to the marriage. Invoking the sacred fire and performing *Saptapadi* around the sacred fire have been considered by the Supreme Court to be the two basic requirements for a traditional Hindu marriage.

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There can be a marriage acceptable in law according to customs which do not insist on performance of such rites as referred above and marriages of this type give rise to legal relationships which law accepts.[1] In this paper attempts are made to trace nuances of bigamy in Hindu marriages and to propose attempt to bigamy as a criminal offence. Further, attempts are made to suggest corrective measures, while keeping in view, the sufferings of women in such relationship which are getting within the purview of legal framework of marriage and socio-legal conditions of children born out of such relationships.

Essentials of a Valid Hindu Marriage

In 1955, law of marriage among Hindus was amended and codified in the form of the Hindu Marriage Act and was made available in written form wherein the essential requirements of a valid Hindu marriage are provided in Section 5 of the Act. For the first time among Hindus, the Act of 1955 introduced monogamous marriage and provides requirements of marriage in Section 5 of the Act whereas Section 5(i) provides monogamous marriage which reads as "*neither party has a spouse living at the time of the marriage*". However, no marriage can be solemnized without fulfilling requirements of Section 5 of the Act but legal provision of solemnization of a Hindu marriage is given in Section 7 of the Act which states that "*a Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto*"[2]. Therefore, no Hindu marriage can be considered as solemnized validly until essential requirements of marriage as laid down in Section 5 of the Act are fulfilled and the marriage is solemnized as per customary rites and ceremonies of the parties as required by Section 7 of the Act. However, before this Act came into force there were two essential elements necessary to constitute a valid marriage under Hindu law according to *Shastras*; one a secular element, *viz.*, gift of the bride or *Kanyadana* in the four approved forms, the transference of dominion for consideration in the '*Asura'* form and mutual consent or agreement between the maiden and the bridegroom in the '*Gandharva'* form. These must be supplemented by the actual performance of the marriage by going through the form prescribed by the *Grihyasutras* of which the essential elements are '*Panigrahana'* and '*Saptapadi'*. In the case of '*Rakshasa'* and '*Paisacha'* forms also, there should be a marriage rite in the form prescribed by the *Shastras*. This is the religious element. Both the secular and the religious elements are essential for the validity of a marriage.[3] Therefore, once the essential requirements of a valid marriage provided in Section 5 of the Act

1. *Sumitra Devi* v. *Bhikan Choudhary* AIR 1985 SC 765.
2. Hindu Marriage Act 1955, Sec. 7.
3. *Deivanai Achi* v. *Chidambaram Chettiar* AIR 1954 Mad 657, 665.

are fulfil, the intended marriage must be solemnised with proper ceremonies and in due form. Solemnisation of a valid Hindu marriage is analysed in the following lines.

Solemnisation of Marriage and Bigamy

The Hindu Marriage Act 1955 provides that a Hindu marriage must be solemnised in accordance with the customary rites and rituals as laid down in Section 7 of the Act. The word 'solemnise' means, 'to celebrate the marriage with proper customary rites and ceremonies and in due form', unless this is done the marriage cannot be called as 'solemnised'. The Act does not prescribe any ceremonies necessary for the solemnisation of a marriage; rather it leaves it to the parties to choose their ceremonies according to their customs and usage. Customary and religious elements in solemnisation of Hindu marriage is seen in Section 7(1) of the Hindu Marriage Act wherein it has been mandated that "*a Hindu marriage may be solemnised in accordance with the customary rites and ceremonies of either party thereto*". Further, Section 7(2) of the Act further states that "*where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken*". Therefore, solemnisation of a Hindu marriage with proper customary rites and ceremonies and in due form are the two key concerns in case of determining whether there is a case of bigamy committed by either of the parties to the marriage. It is therefore, essential, for the purpose of Section 17 of the Act, that the marriage to which Section 494[4] of Indian Penal Code 1860 applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make the ceremonies prescribed by law or approved by any established custom.[5] As custom is 'transcendent law' according to the sages, it is open to establish a custom modifying the ordinary Hindu law, i.e., a custom having the force of law. The essentials of a valid custom, whether it is a caste or a sub-caste custom or

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4. Section 494 of the Indian Penal Code 1860 states that "*whoever is having a husband or wife living, marries and such a marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine".* Exception under the Section:- "*This Section does not extend to any person whose marriage with such husband or wife has been declare void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge".*

5. *Subbarayudu* v. *Venkatiah* AIR 1968 AP 107.

custom of a particular locality or of a family, are that it must be ancient, certain and reasonable and it cannot be enlarged beyond the usage by parity of reason since it is the usage that makes the law and not the reason of the thing.[6] Clause (a) of Section 3 of the Hindu Marriage Act provides that the expression of 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family.[7]

With regard to the solemnisation of Hindu marriage, the parties involved hardly understand the rituals such as chanting of mantras, pronouncing of owes/oaths, call upon the ancestors during invoking sacred fire, performing *Yajna* for purification of atmosphere at the wedding place, or taking seven steps together by the bride and the bridegroom or taking seven or less rounds around the sacred fire-whether first led by the bride or later led by the bridegroom, or giving the hand of the bride (*Kanyadana*) to the bridegroom by the parents/guardian(s) of the bride or putting *Kumkum* (*Sindoor*) in the forehead of the bride that are followed by chanting of sacred texts (mantras) in most of the cases in Sanskrit or unpolished vernacular language by the priest. Therefore, it is difficult to prove whether the parties to even validly solemnised marriage have understood the chanting of sacred text (*Mantras*) in a language which both of them do not know or could not have understood but performed them and presumed to have solemnised their marriage in due form as supervised by the priest. Further, it is also difficult to prove with reliable evidence towards intention of either of the parties to the marriage who has cheated the other party but mere observance of sacred text or ceremonies and mere following the direction of the priest indicates that the parties were having an intention to marry. If anything found to be defective or incomplete on the part of either of the parties to the marriage who hardly understands the whole celebration and the party who honestly consented to the solemnisation of marriage must be respected and must be provided with the status and matrimonial rights including property rights.

Where there was no evidence with regard to solemnisation of marriage between the parties who were Christians as they had simply entered into a wedlock agreement to live and cohabit as man and wife and the children born to them will be their legal heirs, the wedlock agreement is only an evidence of cohabitation and not evidence of

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6. *Deivanai Achi* v. *Chidambaram Chettiar* AIR 1954 Mad 657, 667.
7. *Bhaurao Shanker Lokande* v. *State of Maharashtra* AIR 1965 SC 1564, 1567. See also Section 3(a) of the Hindu Marriage Act 1955.

solemnisation of marriage. 'To marry' is to go through a form of marriage known to law and not merely to make an averment in a document. The document is at once an admission of cohabitation and a negation of a marriage having taken place between the parties.[8] Mere going through certain customary rite and ceremonies like tying of *thali* will not be enough to establish solemnization of the marriage where invocation before sacred fire and *Saptapadi* are essential for solemnization of marriage.[9]

What ceremonies are necessary for a valid marriage would depend upon the custom of the community to which the parties belong. The performance of the *Homam*, the *Panigrahana* or taking hold of the bride's hand going round the fire with *Vedic* mantras, the treading on the stone, and the seven steps or *Saptapadi*, the marriage becomes complete and irrevocable on the completion of the *Saptapadi*.[10] Hence, *Homa* and *Saptapadi* are essential.[11] There is no marriage in law where one of the parties was induced to enter into a matrimonial alliance under coercion, duress, fraud, evidencing want of free consent and hence, liable to be annulled by a decree of court.[12] *In Re Raghavareddy*[13] case it was held that in Lingayat Reddy community of Telangana state *Homa* and *Saptapadi* are not necessary and tying of *Thali* and *Kankan Bandhan* are essential. Where there are evidences of performance of *Dola*, *Saptapadi* and *Kanyadana* officiated by a Pandit, it was held that it was sufficient to say that the marriage was solemnized.[14] '*Saklong*' form between Ahmos in Assam state is necessary for a valid marriage. When it is not proved to have been gone through, mere admission by the accused would not make him liable for the offence provided under Section 494 of the Indian Penal Code 1860.[15] Mere admission of marriage by the accused is not evidence of marriage for the purpose of Section 17 of the Hindu Marriage Act.[16] But if that admission is

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8. *Asirvadam Samuel Nadar* v. *Raja Jothi* 1998 (2) HLR 216 (Mad). See also *Kali* v. *Kamalakshi Amma* 1967 KLT 1063.
9. *Subbarayudu* v. *Venkatiah* AIR 1968 AP 107: relying on *Kanwal Ram* v. *H.P. Administration* AIR 1966 SC 614. See also *Balakrishana Ramaraju* v. *Tirupalamma* (1973) 2 An WR 367; *Venkatalakshmi* v. *Parvatanarayana* 1969 Crl LJ 836 (AP); *Phankari* v. *State* AIR 1965 J&K 105.
10. Vijender Kumar (rev.) John D. Mayne, HINDU LAW & USAGE, 17th ed. 2014, p. 148.
11. *Priya Bala Ghosh* v. *Suresh Chandra Ghosh* AIR 1971 SC 1153.
12. *Kunat Devi* v. *Siri Ram Kalu Ram* AIR 1963 Punj 235, 238.
13. AIR 1968 AP 117.
14. *Mallikarjunappa* v. *Virramma* ILR 1971 MP 163.
15. *Bolaram* v. *Surya* AIR 1969 Ass 90.
16. *Kanwal Ram* v. *H P Administration* AIR 1966 SC 614. See also *Muthyala* v. *Subbalakshmi* AIR 1962 AP 311; *Purnachandrarao* v. *Sitadevi* (1979) 2 AnWR 359; *Sarupchand* v. *State* ILR (1974) 1 Del 215; *Rabindranath* v. *State* AIR 1969 Cal 55.

corroborated by other oral or documentary evidence it can be held that a second marriage was solemnized.[17]

Where a Hindu husband not belonging to Sikh faith married a Hindu woman according to Hindu customary rites and ceremonies and subsequently married another Hindu woman according to Sikh form of marriage before *Gurugranth Sahib* following *Anand Karaj* ceremony, it was held by the court that the second marriage was not validly solemnized and the husband could not be convicted under Section 494 of the Indian Penal Code.[18] Second marriage of the husband during the subsistence of his first marriage even after conversion to another religion does not automatically dissolve the first marriage. Despite conversion the husband would be liable to be prosecuted for the offence of bigamy under Section 494 of the Indian Penal Code 1860.[19]

In *Bhaurao Shanker Lokande v. State of Maharashtra*[20] case it was held that *prima facie* the expression 'marries' in Section 494 of the Indian Penal Code must mean 'marries validly'. If the marriage is not a valid one according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or the wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law. These observations are made while dealing with a case where the marriage was performed not in accordance with customary rites and ceremonies prescribed by law or custom applicable to the parties. It is submitted that these observations should be confined to such cases where there has been no marriage in the eye of law at all. It should not be extended to a case where marriage was duly solemnized but was void for some other reason. Opinion of Archibald cemented the argument further that "*even if the subsequent marriage would have been void as for consanguinity or the like the prisoner is guilty of bigamy*" [21]. Further, it is stated that "*... Invalid second marriage-person already married who having the intention of appearing to contract a second marriage goes through a form known to and recognised by the law as capable of producing a valid marriage is guilty of bigamy although the second marriage even if it were not bigamous would be otherwise invalid*" [22].

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17. *Bolaram* v. *Surya* AIR 1969 Ass 90. See also *Trilokya Mohan* v. *State* AIR 1968 Ass 22; *Nasib Chand* v. *Surinder Kaur* 1980 HLR 157.
18. *Mohanlal* v. *Balbir Kaur* 1979 HLR 376. See also *Ravindra Kumar* v. *Kamal Kanta* 1976 Cur LJ (Crl) 327.
19. *Lily Thomas* v. *Union of India* AIR 2000 SC 1650.
20. AIR 1965 SC 1564.
21. Archibald, *Criminal Pleading, Evidence and Practice*, 34th ed., p. 420.
22. Halsbury's, *Laws of England,* 3rd ed. Vol. 10, p. 664, para 1267.

In *Gopal v. State of Rajasthan*[23] it was sought to be contended relying upon *Bhaurao Shanker Lokande's* case that as the second marriage is void under Section 11 of the Hindu Marriage Act; Section 494 of the Indian Penal Code is not attracted. This contention was rightly repelled by the Supreme Court in view of the clear language of Section 17 which states that "… *the second marriage is void and the provisions of Sections 494 and 495 of the Indian Penal Code shall apply accordingly*". It is to be noted that if the argument advanced before the Supreme Court is accepted it will lead to an absurd result that no person can be convicted for the offence of bigamy as the second marriage would always be void.

An interesting but difficult question arose in *Rangabhashyam v. Ranjani Murugan*[24] case that the complainant was validly married to the first accused. The second accused was married to the third accused. The question arose whether a subsequent marriage between first and second accused would constitute an offence under Section 494 of the Indian Penal Code. The Madras High Court held that the second marriage was void as the second accused was already married to the third accused, and therefore, there was no question of bigamous marriage. It is submitted that the decision is not correct because the second marriage was solemnized according to customary rites and ceremonies prescribed by law. The mere fact that it was void on the ground that there was a prior valid marriage would not make it less offence under Section 494 of the Indian Penal Code.

In *Padullapathi Mutyala Paradeshi v. Padullapathi Subbalakshmi*[25] it was held that when there is solemnization of a marriage which was intended by the parties to be binding on each other, the presumption that the customary rites and ceremonies were completed and the marriage was legal. There is nothing to indicate in the language of the sections of the Hindu Marriage Act to treat a solemnized marriage though defective or irregular but intended to be in force and operative, as of no legal effect by pointing out that proof of particular ceremony is not made out by credible evidence. Such a marriage no doubt when successfully impugned would be a nullity but the marriage tie between the parties to such a marriage is otherwise non-existent till the ceremonies are established to have been performed. The court further held relying on English authorities that even if the subsequent marriage would have been void the prisoner would be guilty of bigamy.[26]

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23. *Gopal* v. *State of Rajasthan* AIR 1979 SC 713.
24. 1980 HLR 632.
25. AIR 1962 AP 311.
26. *Id.* at 321.

After passing of the Hindu Marriage Act, any custom allowing plurality of marriages for an individual, as in the State of Manipur, is no defence or excuse for the offence under Section 494 of the Indian Penal Code.[27] However, as customary divorce is saved under Section 29(2) of the Act, one can obtain customary divorce and then enter into a second marriage, in such case there can be no offence under Section 494 of the Indian Penal Code, for after the dissolution of the first marriage, the status of wife or husband no longer exists.[28]

Further, if the marriage is not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and woman living as husband and wife does not give them the status of the husband and wife, even though they may hold themselves out before the society as the husband and wife and the society treats them as husband and wife.[29] Where the accused was living with the second wife and begot a child it was held that second marriage was established on evidence.[30] Further, where a husband married again during the lifetime of his wife, the second marriage is void, and therefore, the second wife, if she marries again to another man, cannot be held guilty of the offence under Section 494 of the Indian Penal Code as her prior marriage was void in law.[31] In order that the second marriage is valid, the spouse of the first marriage should not be living at that time. Under Section 108[32] of the Indian Evidence Act 1872 a person is presumed to be dead after the lapse of seven years, if he or she is not heard of. But this presumption does not hold well with regard to the date of death which has to be proved as a fact by a person who seeks to rely on it.[33]

There is nothing in the Hindu Marriage Act forbidding a prosecution for the offence punishable under Section 494 of the Indian Penal Code if it is not preceded by a declaration obtained under the provisions of the Act that the second marriage is void. A complaint by the first wife against the husband for the offence of bigamy

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27. *Thok Shom* v. *Barunitan* (1961) 2 Crl LJ 258.
28. *Ibid.*
29. *Bhaurao Shanker Lokande* v. *State of Maharashtra* AIR 1965 SC 1564 followed in *Surjit Kaur* v. *Garja Singh* AIR 1994 SC 135. See also *Nirmala* v. *Rukmani* AIR 1994 Kant 47; *Santi Deb Berma* v. *Kanchan Prava Devi* AIR 1991 SC 816.
30. *Anand Rao* v. *State* (1972) 1 SCC 800.
31. *Padi* v. *Union of India* AIR 1963 HP 16.
32. Indian Evidence Act 1872 Sec. 108 reads as "*Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it*".
33. *Veena Rani* v. *Jagdish Mitter* (1990) 1 HLR 113 (P&H).

punishable under Section 494 of the Indian Penal Code is maintainable as the effect of Section 17 of the Act is to make Section 494 of the Indian Penal Code applicable to Hindus.[34] Such complaint is to be filed before the First Class Magistrate who can take cognizance of the offence under Section 494 of the Indian Penal Code and not under Section 19 of the Hindu Marriage Act (*i.e.*, before District Court) which contemplates only a petition for matrimonial relief such as restitution of conjugal rights, judicial separation or divorce.[35] However, the first wife cannot present a petition under Section 19 of the Hindu Marriage Act 1955 of annulment of the husband's second marriage.[36] The criminal court having jurisdiction over the place of the second marriage would have the jurisdiction to try the offence under Section 494 of the Indian Penal Code 1860.[37] In *Kanwal Ram v. Himachal Pradesh Administration*[38] the Supreme Court held that in a bigamy case, the second marriage as a fact, that is to say, the essential ceremonies constituting it, must be proved. Admission of marriage by the accused is not evidence of it for the purpose of proving marriage.

Keeping in view the literacy status among women in general and Hindu women in particular with the patriarchal setup of Hindu families, it is difficult for a common woman to find out correct details about a man who attracted her mind, heart and attention. Further, common Hindu women have still not achieved independence from the patriarchal setup. However, few of them have started working in different strata of employment which has provided them economic/financial freedom/independence but only economic independence is not sufficient for her overall growth where she can take her independent decisions and can lead her life as she wants. It has compelled the present central government to start a movement on '*Beti Bachao Beti Padhao'* which means 'let us protect our daughters, let us provide education to our daughters'. Consequently, better child sex ratio has been in some of the states. Hence, this kind of social awareness and initiative on the part of the central and the state governments are welcome steps.

Once solemnisation of a Hindu marriage is over irrespective of whether it was a perfect solemnisation in its due form or was an incomplete or defective which was not known to the woman involved in such solemnisation, the woman is bound to suffer

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34. *Chunamma* v. *Dhalappa* AIR 1958 Mys 117. See also *Padi* v. *Union of India* AIR 1963 HP 16; *Thimmareddi* v. *State* AIR 1958 AP 318; *Trilokmohan* v. *State* AIR 1968 Ass 22.
35. *Thimmareddy* v. *State* AIR 1958 AP 318.
36. *Kedarnath Gupta* v. *Suprava* AIR 1963 Pat 311.
37. *Vasanta* v. *Krishnaswami* AIR 1967 Mad 241. See also *Thimmareddy* v. *State of AP* AIR 1958 AP 318; *Ramakrishna* v. *Bhaskaran* AIR 1960 Ker 234.
38. AIR 1966 SC 614.

the most as she happily submits herself for consummation of her marriage with the man with whom she has solemnised her marriage. In a marriage relationship which is not solemnised validly, the woman feels that she has been cheated by the man under the pretext of marriage. Here, another point in law, we need to understand that 'marital rape' is not recognised in India. At this point of time among these two heterosexuals the sexual relationship has been established which legally cannot be considered as 'rape' because there has been free consent on the part of both of them though the purpose of free consent for sexual intercourse was different. Further, if we consider this act of the man towards civil wrong in the form of 'injury against body' of the woman in relationship, it is difficult to bring it within the ambit of legal framework of torts because we are very well aware of the fact that in India, law of torts is yet to develop either by legislations or by judicial pronouncements. Hence, it is difficult for her to claim legal protection against 'injury against body' under the current legal regime.

A ray of hope in the life of a woman could be seen where women have been provided some legal protection from domestic violence under the aegis of the Protection of Women from Domestic Violence Act 2005. However, to get protection under the Act, the woman must be living in marriage or in relationship in the nature of marriage that indicates that there has been an intention to marry among the two heterosexuals whether it has been solemnised validly or not. The law provided under the Act is a public law and the remedies provided therein are civil and criminal in their nature but do not confer on the parties any matrimonial remedy as provided under the Hindu personal law. Hence, the Protection of Women from Domestic Violence Act 2005 does not fulfil the desired objectives. Further, marriage solemnised validly, has its incidents of bringing a new human being in existence, the child. If the relationship of these two heterosexuals is neither recognised by society nor protected by law, the children born out of the validly solemnised marriage will have no problem but the child born out of such relationships would have problem, socially and legally. The children when grow elder with no social recognition or legal protection would pollute society and may damage the moral fabric of society. Hence, any developed state cannot afford to encourage this kind of birth in its jurisdiction.

Intention to Marry

The *Dharmasastras* prescribe marriage for the attainment of three objectives in life, i.e., *Dharmasampatti*, *Prajya* and *Rati*, and according to Manu, the main aim of marriage was not the satisfaction of vernal desires but it was considered that a man is complete as an individual only after he got married and the wife was described to be the other-half of man. Apart from the attainment of the three objectives mentioned earlier, the *Mahabharata* speaks of a fourth objective that is the *Samajaruna* that is the discharge of one's duty towards the wife which requires the presence of a wife. Even

in the *Vedic* period, the sacredness of the marriage was repeatedly declared and the woman on her marriage was at once given an honoured position in the family.[39] Therefore, a Hindu male and female think of marrying during their lifetime.

In case of a validly solemnised marriage, there is no scope or requirement to discuss or deliberate on the validity of the marriage, status of the parties and legitimacy of children born out of the wedlock but in case of void and voidable marriages, it is always a serious question of law to analyse the validity of such marriage, status of parties, and legitimacy of children born out of such marriage. After reading Section 5 of the Hindu Marriage Act and also after understanding of the consequences of violation of conditions for a valid Hindu marriage laid in sub-section (i), (iv) and (v) of Section 5 of the Act whenever the status of marriage is likely to be challenged through a petition presented by either of the parties to the marriage against the other party by a decree of nullity under Section 11 of the Act; on close scrutiny of the intention of either both the parties or one of the parties, it is safely said that the parties or party were of the intention to marry. However, due to certain defects in solemnisation of customary rites and ceremonies, or performance of *saptapadi* or any other rituals, a legal protection to such act of the parties may not be accorded with due recognition but the parties, specially the one of two parties who were genuinely married the other party. But due to non-performance of certain ceremonies or rituals, the woman involved in the whole process of marriage becomes venerable when such marriage is being consummated, where she loses her maidenhood, as a matter of fact, i.e., *factum valet quod fieri non debuit* [40], and subsequently found that the status of 'legally wedded wife' cannot be confirmed on her as the man to whom she married was already a married man and his first marriage was found valid in law.

Further, consent in a valid marriage plays a vital role. Keeping in view the marriageable age of would be bride and bridegroom, an amendment was made in 1978 which was omitted sub-section (vi) of Section 5 of the Act, believing that prospective parties to marriage would consent their marriage. But in case of second marriage, the party which is already married one, lands his mala fide intention to marry rather free consent to marry whereas the other party lends her free consent to marry and wishes to live with the man forever and submits herself to him for consortium.

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39. Vijender Kumar, Concept of Marriage under the Hindu Marriage Act, 1955: *A Critique,* K. Padmaja (ed.), *The Law of Marriages*, 1st ed. 2007, p. 1.

40. The meaning of the doctrine is that where a fact is accomplished, in other words, where an act is done and finally completed, though it may be in contravention of a hundred dictionary texts, the fact will stand and the act will be deemed to be legal and binding. Vide Satyajeet A. Desai (rev.), D.F. Mulla, *Hindu Law*, 22nd ed. 2016, p. 638.

Thus, it is the starting point of exploiting woman through misrepresentation of material facts or mala fide intention to marry by the man. Therefore, law must come forward to help the woman, and child from such relationship, and must provide her certain legal rights against the person who has cheated her a2nd such perpetrator must be punished for his illegal act under the law.

In case of live-in relationship of two heterosexuals which is 'by chance'[41] and not 'by choice',[42] there has been honest intention of the woman who was/is leaving with the man for quite a long time and gets no legal recognition under the Hindu Marriage Act. further, Section 11 of the Hindu Marriage Act does not confer any status on such parties to live-in relationship. Consequently, Sections 9 (restitution of conjugal rights), 10 (judicial separation), and 13 (divorce) of the Hindu Marriage Act do not offer any matrimonial remedies to them. Furthermore, children born out of such relationships do not get any property right under Section 16 of the Act. After amendment into Section 16 of the Act in 1976, children born to void or voidable marriages have been provided with the legitimate status under Section 16(1) and (2) respectively and provided with certain property rights under Section 16(3) of the Act but children born out of live-in relationships have not been provided any status and without any legal status, they do not get any property right from the putative father under Section 16 of the Act. Hence, remain dependant on the mother for all practical purposes.

Registration of Marriage-Conclusive Evidence

Section 8 of the Hindu Marriage Act 1955 provides provisions for registration of marriages.[43] Though it is left to the discretion of the contracting parties to either solemnize the marriage before the sub-registrar or register it after performing the marriage ceremony in conformity with the customary beliefs. However, the Act makes it clear that the validity of the marriage in no way will be affected by omission to make the entry in the register. Further, the Hindu Marriage Act enables the state government

41. Relationships 'by choice' are those where the partners live together. It may exist even where one or both of the partners are already legally married to another person and yet engage in such a relationship as a matter of preference. Relationship in this category is wholly voluntary. Vide Vijender Kumar, *Live-in Relationship: Impact on Marriage and Family Institutions*, (2012) 4 SCC (J), pp. 19-34.

42. There are live-in partners whose concerned are consciously choosing to live as 'live-in'. They do not want a status of formal marriage; they are happy to continue to live as line-in partners only. Vide Vijender Kumar, *Live-in Relationship: Impact on Marriage and Family Institutions*, (2012) 4 SCC (J), pp. 19-34.

43. For details see of the Hindu Marriage Act 1955, Sec. 8.

to make rules with regard to the registration of marriages. Sub-section (2) of Section 8 of the Act provides that if the state government is of the opinion that such registration should be compulsory it can so provide. In that event, the person contravening any rule made in this regard shall be punishable with fine. Following the footsteps of the central legislation, the erstwhile state of Andhra Pradesh enacted law for compulsory registration of marriages in the State and for matters connected therewith and incidental thereto, *viz.*, the A.P. Compulsory Registration of Marriage Act 2002 Act No. 15 of 2002. The same was followed by the Bombay Registration of Marriages Act 1953; the Karnataka Marriages (Registration and Miscellaneous Provisions) Act 1976; the Himachal Pradesh Registration of Marriages Act 1996; and the Andhra Pradesh Compulsory Registration of Marriages Act 2002. Further, in Uttar Pradesh also it appears that the state government has announced a policy providing for compulsory registration of marriages by the Panchayats and maintenance of its records relating to births and deaths. Furthermore, the Special Marriage Act 1954 which applies to Indian citizens irrespective of religion each marriage is registered by the Marriage Officer specially appointed for the purpose. The registration of marriage is compulsory under the Indian Christian Marriage Act 1872. Under this Act, entries are made in the marriage register of the concerned Church soon after the marriage ceremony alon with the signatures of bride and bridegroom, the officiating priest and the witnesses. The Parsi Marriage and Divorce Act 1936 makes registration of marriages compulsory. In Goa, the Law of Marriages which is in force within the territories of Goa, Daman and Diu since November 26, 1911 continues to be in force. Under Articles 45 to 47 of the Law of Marriages, registration of marriage is compulsory and the proof of marriage is ordinarily by production of certificate of marriage procured from the Register maintained by the Civil Registrar and issued by the concerned Civil Registrar appointed for the purpose by the government. The procedural aspects about registration of marriages are contained in Articles 1075 to 1081 of the Portuguese (Civil) Code which is the common Civil Code in force in the state. In state of Goa that the Hindu Act is not in force since it has not been extended to the state either by the Goa, Daman and Diu Laws Regulations 1962 or by the Goa, Daman and Diu Laws No. 2 Regulations 1963 by which Central Acts have been extended to the state after the liberation of the state. Procedure for marriages is also provided in Code of Civil Registration (Portuguese) which is in force in the State. However, in Jammu and Kashmir, Jammu and Kashmir Hindu Marriage Act 1980 empowers the government to make rules to provide that the parties (Hindus) shall have their particulars relating to marriages entered in such a manner as may be prescribed for facilitating proof of such marriages. As regards Muslims, Section 3 of the Jammu and Kashmir Muslim Marriages Registration Act 1981 provides that marriage contracted between Muslims after the commencement of the Act shall be registered in the manner provided therein within 30 days from the date of conclusion of *Nikah* ceremony. So far as Christians are concerned, the Jammu

and Kashmir Christian Marriage and Divorce Act 1957 provides for registration of marriages in terms of Sections 26 and 37 for registration of marriages solemnized by minister of religion and marriages solemnized by, or in the presence of a Marriage Registrar respectively. Further, in Pondicherry, the Pondicherry Hindu Marriage (Registration) Rules 1969 have come into force. All sub-registrars of Pondicherry have been appointed under Section 6 of the Indian Registration Act 1908 as Marriage Registrars for the purposes of registering marriages. In the state of Haryana, the Haryana Hindu Marriage Registration Rules 2001 have been notified. In the state of West Bengal, Hindu Marriage Registration Rules 1958 have been notified. In the state of Tripura, it appears that the said state has introduced rules called Tripura Hindu Marriage Registration Rules 1957. It has also introduced Tripura Special Marriage Rules 1989. In the state of Karnataka, it appears that registration of Hindu Marriages (Karnataka) Rules 1966 have been framed. It further appears that Karnataka Marriages (Registration and Miscellaneous Provisions) Act 1976 has been introduced. Section 3 of the Act requires compulsory registration of all marriages contracted in the state. In the Union Territory of Chandigarh, the Hindu Marriage Registration Rules 1966 have been framed.

Taking cognizance of non-registration of marriages, the National Commission for Women opined that non-registration of marriages affects the most, and hence, has since its inception supported the proposal for legislation on compulsory registration of marriages. Such a law would be of critical importance to various women related issues such as (a) prevention of child marriages and to ensure minimum age of marriage; (b) prevention of marriages without the consent of the parties; (c) check illegal, bigamy, or polygamy; (d) enabling married women to claim their right to live in the matrimonial house, maintenance, etc.; (e) enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband; (f) deterring men from deserting women after marriage; and (g) deterring parents/guardians from selling daughters/young girls to any person including a foreigner, under the garb of marriage.

Registration of marriage for the purpose of facilitating proof of a valid marriage is a viable option provided to the parties under Section 8 of the Hindu Marriage Act but sixty-two years have passed after the commencement of the Hindu Marriage Act, the registration of marriage has not yet become compulsory. The Supreme Court in *Seema v. Ashwani Kumar*[44] case had made registration compulsory as it would serve as an evidence of marriage and would help the women in seeking matrimonial remedy. Except

44. AIR 2006 SC 1158: (2006) 2 SCC 578.

some states that have made laws in this regard, the requirement of registration of marriage which has not been fulfilled yet, the alternative would be prenuptial agreement of marriage…As society is changing day by day and spouses are worried about their career and individuality after marriage, prenuptial agreement is best option available because, first, it is most economical solution, considering the divorce cost or any sort of suit relating to maintenance or adoption etc. through court; secondly, parties are free to include conditions which are suitable to them with mutual consent; thirdly, it is a more relaxed procedure than going through the court; and lastly, it keeps a check on misrepresentation made by either spouse and reduces possibilities of fraud, and hence, parties can be protected from such bitter experience.[45]

Therefore, though the registration itself cannot be a proof of valid marriage *per se,* and would not be the determinative factor regarding validity of a marriage, yet it has a great evidentiary value in the matters of conforming status on the parties, providing matrimonial remedies, deciding matters on custody of children, right of children born from the wedlock of the two persons whose marriage is registered and also determining the age of parties to the marriage.

Live-in Relationship-Presumption of Marriage

A live-in relationship is an arrangement where a heterosexual couple lives together, without entering into a formal relationship called marriage. It need not necessarily involve sexual relations. It is an informal arrangement between intended parties, although some countries allow registration of such arrangements between the couples. People generally choose to enter into such consensual arrangements either to test compatibility before marriage, or if they are unable to legally marry or simply because it does not involve the hassles of formal marriage. It may also be that couples in live-in relationship see no benefit or value offered by the institution of marriage or that their financial situation prevents them being married-on account of marriage expenses. Whatever be the reason, it is quite clear that even in a traditional society, where the institution of marriage is considered to be '*sacred*', an increasing number of couples choose a live-in relationship, sometimes even as a permanent arrangement over marriage. In such situations, various social, economic and legal issues have arisen and continue to do so.[46]

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45. Vijender Kumar, "*Matrimonial Property Law in India: Need of the Hour*", JILI, vol. 57, 2015, pp. 521-522.

46. Vijender Kumar, *Live-in Relationship: Impact on Marriage and Family Institutions*, (2012) 4 SCC (J), p. 19.

In *Indra Sarma v. V.K.V. Sarma,*[47] the Supreme Court while considering live-in relationship as 'relationship in the nature of marriage' held that marriage is often described as one of the basic civil rights of man/woman, which is voluntarily undertaken by the parties in public in a formal way, and once concluded, recognizes the parties as husband and wife. Three elements of common law marriage are (1) agreement to be married; (2) living together as husband and wife; and (3) holding out to the public that they are married. Sharing a common household and duty to live together form part of the 'Consortium Omnis Vitae' which obliges spouses to live together, afford each other reasonable marital privileges and rights and be honest and faithful to each other. One of the most important invariable consequences of marriage is the reciprocal support and the responsibility of maintenance of the common household, jointly and severally. Marriage as an institution has great legal significance and various obligations and duties flow out of marital relationship, as per law, in the matter of inheritance of property, successionship, etc. Marriage, therefore, involves legal requirements of formality, publicity, exclusivity and all the legal consequences flow out of that relationship. Marriages in India take place either following the personal law of the religion to which a party is belonged or following the provisions of the Special Marriage Act. Marriage, as per the Common Law, constitutes a contract between a man and a woman, in which the parties undertake to live together and support each other. Marriage, as a concept, is also nationally and internationally recognized.[48] Though in this case the status being 'legally wedded wife' was not conformed but the woman was provided with legal rights.

Status of Parties in Marriage

A validly solemnised marriage confirms a particular status on its parties, *viz.*, either a 'legally wedded wife' or 'legally wedded husband' and this status once conformed brings certain matrimonial rights to them. Thereafter, a bachelor is known as the husband and a spinster is known as the wife after duly solemnisation of their marriage. Section 11 of the Hindu Marriage Act determines the status of marriage in which claim is made by one of the parties before a court of competent jurisdiction.[49] If the marriage was not solemnised as per customary rites and ceremonies though it was

47. AIR 2014 SC 309.

48. AIR 2014 SC 309, para 23-24.

49. Hindu Marriage Act 1955, Sec. 11 reads as "*any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contrivances any one of the conditions specified in clauses (i), (iv) and (v) of Section 5*".

solemnised after the Hindu Marriage Act came into force, the status shall be conformed on its parties accordingly. Hence, proper solemnisation of marriage with due customary rites and ceremonies is a pre requisite to conform status in law on the parties.

In *Megh Prasad v. Bhagwantin Bai*,[50] the respondent-husband married appellant-wife with the consent of his first wife; at the time of the alleged marriage of the respondent with the appellant; both parties were having spouses living and their marriage was not dissolved by a decree of divorce or by any recognised custom but during subsistence of their first marriage they had married with each other. The court held that the marriage was in clear violation of Section 5(1) of the Hindu Marriage Act and hence, was declared as void marriage between the parties under Section 11 of the Hindu Marriage Act 1955. Therefore, no status in law was conferred on the parties. Further, where at the time of second marriage, an application for restitution of conjugal rights was pending against first husband, who shows that previous marriage was still subsisting. Hence, a presumption of lawful was that existence of the first marriage can be drawn in absence of pleading or proof of divorce. Therefore, the second marriage during subsistence of first marriage was void.[51] Where the husband contracted second marriage during subsistence of his first marriage without obtaining divorce is a void marriage and second wife is not entitled to claim succession certificate, whereas, first wife, who was a legally wedded wife, is entitled to grant of succession certificate.[52]

Where a suit was filed for declaration as legally wedded wife by the second wife as the first wife was unheard for seven years was not proved and custom in community for second marriage after obtaining customary divorce was also not proved. However, resolution passed by Gram Panchayat dissolving first marriage was not valid because first wife was not party to resolution. The second marriage, if any, during subsistence of first, is null and void. Hence, relief of declaration was not granted.[53] Where the husband failed to discharge his burden that his first marriage was dissolved as per custom of his community and second marriage was performed on assurance given by the husband that his earlier marriage was dissolved as per customary mode. In such circumstances, second marriage was found to be null and void and no status was conferred on the parties.[54]

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50. AIR 2010 Chh 25.
51. *Sushma Choure* v. *Hetendra Kumar Borkar* AIR 2010 Chh 30.
52. *Sarita Bai* v. *Chandra Bai* AIR 2011 MP 222.
53. *Pilla Appala Narsamma* v. *Record Officer, Madras Regiment, Willington* AIR 2011 AP 183.
54. *Sona Rakeshel* v. *Vinod Kumar Nayak* AIR 2012 Chh 100.

In *A. Jayachandra v. Aneel Kaur*,[55] it was held that marriage brings about the union of two souls. It creates a new relationship of love, affection, care and concern between the husband and the wife and also it is a *Samskara,* which is one of the sixteen important sacraments to be taken during one's lifetime. There may be physical union as a result of marriage for procreation to perpetuate the lineal progeny for ensuring spiritual salvation and performance of religious rites, but what is essentially contemplated is the union of two souls. Marriage is considered to be the junction of three important duties, i.e., social, religious and spiritual. The same view was also held in *Reema Aggarwal v. Anupam*.[56]

The Supreme Court in *Ramesh Chandra R. Dagga v. Rameshwari R. C Dagga*[57] tried to distinguish between 'legality' and 'morality' of relationships. Where the Supreme Court observed that keeping into consideration the present state of statutory law, a bigamous marriage may be declared illegal being in contravention of the provisions of the Hindu Marriage Act 1955 but it cannot be said to be immoral so as to deny even the right of alimony or maintenance to spouse. Further, the Supreme Court in *Vidyadhari v. Sukharana Bai*[58] has given partial relief to the second wife without deciding her status and leaving her status in ambiguity, who was duped in a bigamous relationship. The second wife was granted the succession certificate and was order to protect the share of the first wife, who was recognized as the 'legally wedded wife'.

Status and Rights of Children

Having a child to continue one's lineage is one of the prime objectives of marriage among Hindus. Though a child can be brought into existence among two heterosexuals without the marriage but where conception and birth of a child takes place in the wedlock it is considered *Aurasa* (legitimate) in law. A child born out of the legal wedlock of the parents is considered as legitimate in fact and also in law, however, a child born out of the void or voidable marriages is considered as legitimate in law, who in fact is not legitimate, after the commencement of the Hindu Marriage (Amendment) Act 1976 came into force. However, before this amendment in to Section 16 of the Act children born out of void or voidable marriages were not considered as legitimate either in fact or in law. Therefore, in case of void marriage, status of children is considered under Section 16(1) of the Hindu Marrsiage Act which reads as "*(1) Notwithstanding that marriage is null and void under Section 11, any child of such marriage who*

55. AIR 2005 SC 534.
56. AIR 2004 SC 1418.
57. AIR 2005 SC 422.
58. AIR 2008 SC 1420.

would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act". But in case of voidable marriage, status of children is considered under Section 16(2) of the Hindu Marriage Act which reads as "*(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity"*. Therefore, to determine status of children from void or voidable marriage is one such argument and the children from a relationship wherein a question of void or voidable does not arise, i.e., live-in relationship is another. However, children born from a valid marriage are not in question for any purpose.

Where second marriage contracted during subsistence of first marriage and the status of marriage was found to be null and void under Section 11 of the Act but any child born out of such marriage would be legitimate and is entitled to obtain succession certificate.[59] However contrary to this case, where a marriage was not solemnised validly between the parties and no legal status was conferred on the parties; where marriage was found to be either void or voidable and a child was born out of it. The child born is not legitimate as there was no marriage between the mother of the child and the man against whom the child claimed to be the biological father. Thus, Section 16 of the Act does not apply to the child born out this relationship and also the child is not entitled to share in property of the putative father.[60]

In *Madan Mohan Singh v. Rajni Kant* [61] the court held that live-in-relationship is permissible only among unmarried major persons of heterogeneous sex and reiterated that if a man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under Section 114 of the Indian Evidence Act 1872 that they live as husband and wife and the children born to them will not be illegitimate. The court further held that law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a number of years, however, such presumption can be rebutted by leading unimpeachable evidence.

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59. *Sarita Bai* v. *Chandra Bai* AIR 2011 MP 222. See also *Chandramathi K.* v. *B.N. Usha Devi* AIR 2013 Kant 1.

60. *Chodon Puthiyoth Shyamalavalli Amma* v. *Kavalam Jisha* AIR 2007 Ker 246. See also *Premi* v. *Ram Lok* AIR 2008 (NOC) 1861 (HP).

61. AIR 2010 SC 2933.

Where two wives claiming to be married to deceased and children were born to both women from the deceased, though wife claiming to be first wife could not produce documentary evidence from public record to prove her marriage, yet second wife produced marriage certificate issued by the Marriage Registrar. Therefore, second wife being legally wedded wife of the deceased would be entitled to succeed to his estate along with her children, though first wife would not be entitled to succeed to estate of the deceased as her marriage was not proved, however, her children would be entitled to succeed to estate of the deceased upon presumption of legitimacy and second wife would also be entitled to pension of the deceased as per the Maharashtra Civil Service Pension Rules 1982.[62]

In normal course of things, a validly solemnised marriage of the parents fetches status on the child born out of their wedlock and once this status is recognised and conferred in law, due to valid marriage among the parents, a child so born and conferred with status gets certain rights from the parents including property rights. Correspondently, the parents are duty bound of parental responsibility for bringing up the child in normal sphere of life. But, if the status of legitimacy is not conformed by law on such child; the child remains illegitimate and this non-conformance of status puts him at the lower strata of life with no rights at par with legitimate child in law.

In 1976, an amendment was made into Section 16 of the Hindu Marriage Act and a child born out of either void or voidable marriage was conformed with legitimate status in law.[63] However, the child so conformed with legitimate status, is provided limited property rights, i.e., from the parents only and not from any other relatives of the parents.[64] Therefore, it can safely be said that the amendment of 1976 has conformed limited status on the child born out of void or voidable marriage of the parents but this amendment could not get full property rights to the child, whose social stigma was removed, but legal sanction remained in existence as legal impediment in exercising full property rights not only from the immediate parents but also from the grandparents as well.

With the amendment to Section 16(3) of the Hindu Marriage Act 1955, the common law view that the offspring(s) of marriage which is void or voidable are illegitimate '*ipso-juri*' has to change completely. The status of such children and simultaneously law recognises the rights of such children in the property of their

62. *Nanda Santosh Shirke* v. *Jayashree Santosh Shirke* AIR 2011 (NOC) 286 (Bom).
63. Hindu Marriage Act 1955, Sec. 16(1) & (2).
64. Hindu Marriage Act 1955, Sec. 16(3).

parents. This is a law to advance socially beneficial purpose of removing the stigma of illegitimacy on such children who are as innocent as any other children. In case of joint family property such children will be entitled only to a share in their parents' property but they cannot claim it on their own right. Logically, on the partition of an ancestral property, the property falling in the share of the parents of such children is regarded as their self-acquired and absolute property. In view of the amendment, there is no reason why such children will have no share in such property since such children are equated under the amended law with legitimate offspring of valid marriage. The only limitation even after the amendment seems to be that during the lifetime of their parents such children cannot ask for partition but they can exercise this right only after the death of their parents. Relationship between the parents may not be sanctioned by law but the birth of a child in such relationship has to be viewed independently of the relationship of the parents. A child born in such relationship is innocent and is entitled to all the rights which are given to other children born in valid marriage. This is the crux of the amendment to Section 16(3) of the Hindu Marriage Act. However, some limitation on the property rights of such children is still there in the sense their right is confined to the property of their parents. Such rights cannot be further restricted in view of the pre-existing common law. Thus, Section 16(3) of the Hindu Marriage Act as amended does not impose any restriction on the property right to such children except limiting it to the property of their parents. Therefore, such children will have a right to whatever becomes the property of their parents whether self-acquired or ancestral.[65] Further, the Supreme Court in *Neelamma v. Sarojamma*[66] held that under Section 16(3) of the Hindu Marriage Act an illegitimate child cannot claim as of right, any share in joint family property; however, such a child would be entitled to a share in the self-acquired property of parents. In *Bhogadi Kannababu v. Vuggina Pydamma*[67] the court held that wherein a man contacted second marriage during the subsistence of his first marriage and two daughters born out of the second marriage, these daughters are entitled to inherit property from their father.

A suit for partition and separate possession of Hindu joint family property, during lifetime of the father, by children born out of void marriage is not maintainable, as such right can be availed only be the coparceners.[68] Where the respondents had not pleaded at any stage that the suit property was a self-acquired property of their father, it was evident from the record that their father did not partition from his joint family

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65. *Revanasiddappa* v. *Mallikarjun* AIR 2011 SC (Supp) 155, 161-162.
66. 2006 (9) SCC 612.
67. AIR 2006 SC 2403: 2006 (5) SCC 532.
68. *N. Sadasiva* v. *Purushothama* AIR 2011 (NOC) 40 (Kant).

properties and died issueless and intestate in 1974. Therefore, the question of inheritance of coparcenary property by the illegitimate children, who were born out of live-in relationship, could not arise. The fiction of legitimacy created by Section 16 of the Act is limited to the extent of right in the property of the parents.[69] Further, where coparcenary property devolved upon the father as sole surviving coparcener and he had no legitimate son in such a case property inherited by him is considered to be his self-acquired property. An illegitimate son would be entitled for share in property of his father even though he had no right in coparcenary property.[70]

Neither Section 16(1) nor Section 16(2) of the Hindu Marriage Act does consider children born out of live-in relationship within the purview though does consider children born out of void or voidable marriages and conform legitimacy in law accordingly on such children but children born out of live-in relationship, either 'by chance' or 'by choice' are not considered legitimate. Consequently, children born out of live-in relationships do not get property rights under sub-section (3) of Section 16 of the Act. However, in recent past some judicial pronouncements have considered them symphonically and provided them with certain property rights including right to maintenance.[71]

Bigamy and Penal Provisions

Bigamy means marrying second person while having spouse living at the time of a marriage. After the commencement of the Hindu Marriage Act 1955, a monogamous marriage was introduced among Hindus which permits a Hindu of having only one spouse at a time. During the life of existing spouse, if a Hindu marries again and commits bigamy, a penal act, attracts punishment under the law. Though, bigamy begins with matrimonial fault under Hindu personal law but ends with penal consequences under the Indian Penal Code. Section 17 of the Hindu Marriage Act provides legal provisions on bigamy but it does not provide any amount or nature of punishment or fine or both, but connects to Indian Penal Code 1860.[72]

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69. *Bharatha Matha* v. *R. Vijaya Renganathan* AIR 2010 SC 2685. See also *Trinath Naik* v. *Hema Bewa* AIR 2012 Ori 15.

70. *Vempati Anasuyamma* v. *Gouru Venkateswarloo* AIR 2008 AP 207. See also *Kenchegowda* v. *K.B. Krishnappa* AIR 2009 (NOC) 277 (Kant).

71. *Revanasiddappa* v. *Mallikarjun* AIR 2011 SC (Supp) 155. *See also* *Rameshwari Devi* v. *State of Bihar* AIR 2000 SC 735; *Savitaben Somabhai Bhatiya* v. *The State of Gujarat* AIR 2005 SC 1809: (2005) 3 SCC 636; *Vidyadhari* v. *Sukharana Bai* AIR 2008 SC 1420; *Badshah* v. *Urmila Badshah Godse* AIR 2014 SC 869.

72. Hindu Marriage Act 1955, Sec. 17 reads as "*Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of Sections 494 and 495 of the Indian Penal Code 1860, shall apply accordingly*".

In a prosecution for bigamy the second marriage has to be proved as a matter of fact and it has also been proved that the necessary customary rites and ceremonies had been performed in their due form by the parties to the marriage. Further, the said marriage must be a valid in law applicable to the parties. Therefore, certain essentials to prosecute someone in marriage for bigamy are to be qualified, i.e., first, the marriage should be a valid marriage fulfilling the conditions specified in Section 5 of the Hindu Marriage Act 1955; secondly, it should be solemnized in accordance with the customary rites and ceremonies of either party thereto as required under Section 7 of the Hindu Marriage Act; thirdly, the marriage must be between two Hindus (both the parties to the marriage must be Hindus); and fourthly, on the date of the marriage at least one of the parties to the marriage should have validly married wife or husband, as the case may be, living. If all the four conditions are satisfied, then such marriage falls within the ambit of Section 17 of the Hindu Marriage Act and the party or parties thereto would be liable for punishment under Section 494 of the Indian Penal Code. If any one of the four conditions is not proved, then the prosecution fails. In *Bhaurao Shanker Lokhande v. State of Maharashtra*,[73] it was observed that Section 17 of the Hindu Marriage Act makes the marriage between two Hindus void, if two conditions are satisfied, i.e., (i) the marriage is solemnized after the commencement of the Act, and (*ii*) at the date of such marriage, either party had a spouse living; the word 'solemnize' means, in connection with a marriage, 'to celebrate the marriage with proper customary rites and ceremonies and in due form'; it follows therefore that unless the marriage is celebrated or performed with proper ceremonies and in due form it cannot be said to be 'solemnized'. It is therefore essential for the purpose of Section 17 of the Act, that the marriage to which Section 494 of the Indian Penal Code applies on account of the provisions of the Act, should have been solemnized with proper ceremonies and in due form. Mere going through certain ceremonies with the intention that the parties be taken to be married, will not make the ceremonies prescribed by law or approved by any established custom.[74]

Under Section 13(2)(i) a right is conferred on a wife for presenting a petition for the dissolution of her marriage by a decree of divorce on the ground "(1) *in the case of any marriage solemnized before the commencement of the Act, that the husband had married again before such commencement or that the other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner"*. In both the cases the then wife should be alive at the time of the presentation of the petition. In these

73. AIR 1965 SC 1564.

74. *Ibid*, 1567.

provisions the principle of monogamy is reiterated and given statutory recognition. Therefore, no Hindu can marry under the Act if he or she is already married and the spouse is living at the time of the marriage. This section is intended to impose penal consequences for violation of the principle of monogamy by attracting Sections 494 and 495 of the Indian Penal Code. In order to attract the provisions of this sub-section, it is necessary to show that the second marriage was solemnized after the commencement of this Act, i.e., after 18th May, 1955.[75]

Where the husband contracted second marriage during life of the first wife, non-filing of complaint under Section 494 of the Indian Penal Code 1860 by the first wife, does not mean that offence is wiped out and monogamy sought to be achieved by means of Section 494 of the Indian Penal Code. However, declaration of nullity of marriage must be made by a court of competent jurisdiction as contemplated under Section 11 of the Hindu Marriage Act; until such a declaration is made second wife continues to be wife within the meaning of Section 494 of the Indian Penal Code and is entitled to maintain complaint against her husband.[76] Marriage solemnised in accordance with customary rites and ceremonies prescribed under Hindu law governing the parties as recognised by custom prevailing in the community to which they belong, is not opposed to this Act, and therefore, the presumption is that such customary marriage was legal and the parties to the second marriage are liable for the offence under Section 494 of the Indian Penal Code.[77]

Right to Claim Bigamy

Next issue for discussion comes, who can file a legal suit for bigamy and which court is competent of having jurisdiction over such matter. Section 17 of the Hindu Marriage Act provides that "*Any marriage between two Hindus solemnised after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living*…".[78] Therefore, either of the parties to the marriage can file a legal suit for bigamy. Further, Section 19 of the Hindu Marriage Act provides the court of competent jurisdiction to which a petition for matrimonial remedies shall be presented.[79] Section 17 of the Hindu Marriage Act does not authorise filing a suit for a perpetual injunction restraining a husband from taking a second wife as the section only contemplates initiation of

75. *Parameshwari Bai* v. *Muthoji Rao* AIR 1981 Kant 40.

76. *A. Subhash Babu* v. *State of AP* AIR 2011 SC 3031.

77. 1962 Ker LT 487. See also *Purnachandrarao* v. *Sitadevi* (1979) 1 APLJ 339.

78. Hindu Marriage Act 1955, Sec. 17.

79. For more details, Hindu Marriage Act 1955, Sec. 19.

criminal proceedings under Sections 494 and 495 of the Indian Penal Code.[80] However, a contrary view was expressed in *Shankarappa v. Easamma.*[81] This view appears to be sound; first, the section does not prevent either expressly or impliedly a spouse from filing a suit under Section 9 of the Code of Civil Procedure 1908 read with Section 34 of the Specific Relief Act 1963 which is the remedy available under the general law and such a suit, if filed prior to the second marriage, prevents all further complications; and secondly, the spouse living at the time of second marriage cannot take proceedings under Section 19 of the Hindu Marriage Act for annulment of the second marriage.

The language used in Section 11 of the Hindu Marriage Act is that "*on a petition presented by either party thereto against the other party*". The language used is unambiguous and clear and it straight away gives a right to file a petition by one party to marriage against the other and not to any third party who may be claiming that she is the first wife. It does not mean that such wife, who claims to be the first 'legally wedded wife', has no remedy. She certainly can bring a civil suit for declaring the marriage void between her husband and that second wife under Section 9 of Civil Procedure Code read with Section 34 of the Specific Relief Act 1963 but she has no right to bring a petition under Section 11 of the Hindu Marriage Act.[82]

Further, in *Sambireddy v. Jayamma*,[83] it was held that Section 17 of the Hindu Marriage Act does not offend the fundamental rights of equality before the law or prohibition of discrimination on grounds of religion, race, caste, sex or place of birth guaranteed by Articles 14 and 15 of the Constitution, nor does it offend Article 25(1) as it is saved by Article 25(2).

Conclusion

After analysing legislative provisions, judicial pronouncements, academic resources and having understood the social consequences from the women and children's perspectives, the author reached to the conclusion that an attempt to bigamy, wherever an attempt to marry occurs, and consummation of such marriage takes place that should be made penal act and an appropriate punishment or fine or both may be introduced through statutory enactment or amendment into the existing laws. A logical argument may be drawn from other statutes where an attempt to certain act or abetment

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80. *Uma Shanker* v. *Radha Devi* AIR 1967 Pat 220. See also *Trilokchand* v. *Jaiswal* AIR 1974 Pat 335; *Abboobuker* v. *Kunihamoo* AIR 1958 Mad 287.

81. AIR 1964 Mys 247. See also *Sitabai* v. *Ram Chandu* AIR 1958 Bom 116; *Dutta* (*R N*) v. *State* AIR 1969 Cal 55, 57; *Suresh* v. *Union of India* 1999 (1) HLR 632 (All).

82. *Sona Ralsel* v. *Kiran Mayee Nayak* AIR 2009 Chh 55.

83. AIR 1972 AP 156.

of it, such as an attempt to commit suicide is considered to be a crime under Section 309[84] of the Indian Penal Code, and attempt to murder is also considered to be a crime under Section 307[85] of the Indian Penal Code but an attempt to marry where a spinster converts into a womanhood while losing her maidenhood forever and becomes a second wife who does not hold status of being legally wedded wife of the man with whom she has had physical relations, in some cases she has given birth to a child; how can this act less serious than an attempt to suicide or murder? And not being made penal even after seventy years of independence have passed where country has travelled a lot with social welfare legislations and legislations protecting women and children making them empowered in all possible provinces of their life. An element of intention and execution of such hidden intention while marrying a woman either with defective ceremony or incomplete ceremony or mere ignorance of such customary rites and ceremonies or its form or consummating a marriage under undue influence, coercion or force or in pretext of marrying subsequently indicate that whoever commits such an act or does something in furtherance of such act deems to have been committed an offence of 'attempt to marry'. Contrary analogy may be drawn from the exceptions provided in Section 494 of the Indian Penal Code wherein this Section does not extend to (i) any person whose marriage with such husband or wife has been declare void by a court of competent jurisdiction; (ii) any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage; and (iii) any person who shall have been continually absent from such person for the space of seven years and shall have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage, shall before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge. Eventually, when intention to marry leads to observe certain customary rites and ceremonies in due form by the parties to the marriage; parties leads their married life living as husband and wife in the society; and children born out of the relationship. The law presumes that there is 'either a marriage among the parties' or 'they were living in the nature of marriage'; in both the cases common thread is towards marriage *per se* may not be *per*

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84. Indian Penal Code 1860, Sec. 309 reads as "*Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both*".

85. Indian Penal Code 1860, Sec. 307 reads as "*Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned*".

jury. Hence, such an act must be considered symphonically and legally with due consideration.

In most of the cases it has been observed that the woman submitted herself to the man for physical relations believed that the man is only the man, to whom she had submitted, in her life and he is the husband of her but reality is different than her belief. If enough and timely attention is not paid by the law makers, it may lead to encourage live-in relationship more than the present situation where the young people avoid getting into marriage and also avoid bearing and rearing child through marriage. To save marriage institution among Hindus, we need to regulate individual sexual behaviour of people by statutory provisions. At the same time, the marriage institution needs to be guarded with suitable social mores and laws where parties of validly solemnised marriages are not scared of any unwarranted eventualities rather respect the institution and children born out of marriages are also provided with desired status and rights. Therefore, an attempt to marry, with or without intention to marry, where party or parties to marriage who do not get status and rights from such marriage, must be made criminal offence and suitable penal provision must be made under Indian Penal Code in this regard. Accordingly, the following text in the form of sub-section (2) of Section 17 of the Hindu Marriage Act 1955 may be inserted through due amendment:

Section 17(2): Whoever having a husband or wife living and with such intention or knowingly marries another person shall be liable of committing offence of attempt to marry which deems to be considered to have been committed bigamy and shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Hence, the proposed amendment into Section 17 of the Hindu Marriage Act 1955 would definitely provide quality life to Hindu women and also would make them confident about their social life with due status and rights. Further, children born from such marriages would also get due recognition in the eye of law with legal rights.