

## 2. Civil Marriage Law : Nature and Scope

### *General*

The secular law of marriage contained in the Special Marriage Act, 1954 serves us in two different ways. To a person who wishes to marry within his or her own religious community it is available as an alternative to his or her personal law of marriage; and it is entirely the discretion of such a person to opt between this secular law and the personal law concerned. In case one opts for the secular law, one need not at all renounce one's religion. On the other hand, to an Indian who may wish to marry outside his or her own religious community, the Act of 1954 furnishes a law under which he or she can freely fulfil the desire irrespective of any restriction in that regard imposed by the personal laws of the parties. In such cases both the parties shall give up their respective personal laws (of course, again, without renouncing their respective religions) and subject themselves to the secular law of marriage.

The Special Marriage Act, 1954, thus, makes room for two categories of marriages—(i) intra-communal and (ii) inter-communal. We will discuss below the scope of both, in the light of the permissible extent of marital choice under the various personal laws.

### *Intra-communal marriages and succession*

In regard to the application of the various personal laws, citizens of India may be grouped into the following communities :

- (i) Parsis,
- (ii) Christians,
- (iii) Jews,
- (iv) Muslims, and
- (v) Hindus, which term now applies generally, in the domain of law, to all those who are not covered by categories (i) to (iv) above and includes Buddhists, Sikhs, Jains, Prarthnasamajis, Aryasamajis, Brahmosamajis, Vaishnavas and Lingayats.<sup>1</sup>

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1. See the Hindu Succession Act, 1956, s. 2; the Hindu Minority and Guardianship Act, 1956, s. 3; the Hindu Adoption and Maintenance Act, 1956, s. 2; the Hindu

We will compare the Special Marriage Act with the personal law of marriage otherwise applicable to each of these groups. Since the Act is not uniform in its treatment of various communities in respect of succession, the impact of the Act in this regard is to be examined separately with regard to each community.

The Parsi law of marriage and inheritance is at present found in the Parsi Marriage and Divorce Act, 1936. The special rules of succession (applicable exclusively to Parsis) are contained in chapter III, part V (sections 50-56) of the Indian Succession Act, 1925.<sup>2</sup> Under the Act of 1936 any two Parsi Zoroastrians can contract a marriage. Thus, if a Parsi wants to marry another Parsi, he or she can do so either under the Parsi Marriage and Divorce Act, 1936 or under the Special Marriage Act, 1954. In the former case succession to the couple's property will be regulated by the Parsi law of succession contained in sections 50-56 of the Indian Succession Act, 1925. In the latter case, *i.e.*, when two Parsis get married under the Special Marriage Act, succession to their property will be regulated by the general provisions of the Indian Succession Act, 1925.<sup>3</sup> This legal position remains intact even after the 1976 amendment of the Special Marriage Act.

The marriage law of Christians (except those of the territories which constituted the erstwhile Travancore and Cochin states<sup>4</sup> and the present State of Jammu and Kashmir<sup>5</sup>) is found in the Christian Marriage Act, 1872. In matters of dissolution of marriage they are governed by the Indian Divorce Act of 1869. The law of succession applicable to Christians (except those of the former States of Travancore and Cochin<sup>6</sup> and Jammu and Kashmir<sup>7</sup>) is the Indian Succession Act, 1925. Thus, a Christian can marry a Christian either under the Christian Marriage Act, 1872 (in which case the Indian Divorce Act of 1869 will also apply) or under the Special Marriage Act, 1954. In both the cases, succession to the couple's property will be governed by the Indian Succession Act, 1925. Similarly most of the Kerala Christians may exclude the application of the local Christian laws of marriage and succession by contracting a marriage under the Special Marriage Act. The 1976 amendment of the Act does not change the position of Christians in this matter.

Marriage Act, 1955, s. 2.

2. The Parsi law of inheritance was earlier found in the Parsi Intestate Succession Act, 1865. Its provisions were later incorporated into the Indian Succession Act, 1925 (sections 50-56). Those were replaced by the existing sections 50-56 by Act XVII of 1939.

3. See the Special Marriage Act, 1954, s. 21.

4. In these areas there are local laws relating to marriages of Christians.

5. The Act of 1872 does not apply in this state.

6. In these territories the Travancore Christian Succession Act, 1092 F and the Cochin Christian Succession Act, 1097 F are still applicable.

7. Here the Act of 1925 has no application.

The matrimonial law of the tiny Jewish community in India is entirely uncodified. In regard to succession they are governed by the Indian Succession Act, 1925. Thus, like Christians, two Jews can marry either according to the Jewish religious rites (in which case the Jewish personal law will apply)<sup>8</sup> or under the Special Marriage Act, 1954. The Indian Succession Act, 1925 will be applicable in either case to the succession of the couple's property. The position of the Jews, like Christians and Parsis, remains unchanged in this respect till the present day.

The Muslim personal laws of marriage, divorce and succession are uncodified, except to the extent of wives' right to seek judicial divorce which forms the subject-matter of the Dissolution of Muslim Marriages Act, 1939. Out of the various schools of Islamic law, four are prevalent in India—the *Hanafi* and the *Ithna Ashari* schools in the whole country, the *Shafei* school in the southern states (specially in Malabar) and the *Ismaili* school in western India. The followers of these various schools of Muslim law can freely intermarry. Thus, Islamic law permits the marriage of a Sunni with a Shia, of a *Hanafi* with a *Shafei* and so on. Traditionally, however, Sunni-Shia marriages are rare in spite of the absence of any legal bar whatsoever. A Muslim can, thus, marry another Muslim (whether of the same or of a different school of Muslim law) either under the Muslim personal law or under the Special Marriage Act, 1954. In the former case, succession to the couple's property will remain subject to Muslim law; in the latter case, it will be regulated by the Indian Succession Act, 1925. Like Parsis Muslims, too, continue to lose their personal law of inheritance and wills on opting for the Special Marriage Act. The recent amendment of the Act does not affect them.

As explained above, for purposes of the application of the Hindu code of 1955-56 the entire Indian community minus Muslims, Christians, Jews and Parsis, is "Hindu". So, Buddhists, Sikhs, Jains and those who are Hindus in the strict theological sense (*i.e.*, who adhere to any form of the Vedic faith), all can freely intermarry under the Hindu Marriage Act, 1955 irrespective of the old restrictions on inter-caste marriages, which it abolishes. In that case succession to the couple's property will be governed by the Hindu Succession Act, 1956. In the alternative, two persons who are legally "Hindu" can contract a marriage under the Special Marriage Act, 1954. Before the amendment of 1976 such a marriage would, like the Muslim and Parsi marriages *inter se*, attract the application of the Indian Succession Act, 1925. However, as a result of the said amendment, so long as the parties contracting a civil marriage belong to the "Hindu" religion within the broad meaning of the term accepted under the Hindu code of 1955-56 (*i.e.*, including Buddhist, Sikh, Jain and other

8. See *Benjamin v. Benjamin*, I.L.R. (1926) 50 Bom. 369; *Ezekiel v. Reuben*, I.L.R. (1931) 55 Bom. 803.

quasi-Hindu faiths), the Hindu Succession Act of 1956 will apply to their property, even if they belong to different sub-communities out of these. This is the result of a specific provision inserted in the Act in 1976 saying that section 21 of the Act will have no application where both parties to a civil marriage are Hindu, Buddhist, Jain or Sikh.<sup>9</sup>

Thus, till 1976 the secular laws of marriage and succession contained in the Special Marriage Act of 1954 and the Indian Succession Act, 1925 furnished an alternative to each of the different personal laws prevailing in the country. So, any Indian, man or woman, could have contracted a civil marriage under the Special Marriage Act, 1954 within his or her own religious community. By doing so the couple would be ousting the application of their personal law to their family affairs as well as to succession to their properties, without renouncing their religion or sub-religious faiths. However, the 1976 amendment has changed the situation in regard to the application of the Indian Succession Act to the parties contracting a civil marriage. Now the various communities may be classified as follows in this respect:

1. Christians (except those of Kerala) and Jews: they are governed by the Act of 1925 in every case, whether they contract a civil marriage or prefer a religious marriage.
2. Muslims, Parsis and Kerala Christians: they will lose their religious law of succession in case they contract a civil marriage even within their own respective community.
3. Hindus, Buddhists, Jains and Sikhs marrying within these communities: they will be governed by the Hindu Succession Act, 1956, irrespective of whether their marriage is religious or civil.

We shall comment on this new legal position, introduced in 1976, a little later in this study.

#### *Inter-communal marriages and succession*

Under the Special Marriage Act, 1954 a person professing one particular religion can freely marry another person belonging to an entirely different faith. Thus, a Hindu can marry a Muslim, a Muslim can look for a Christian life-partner, a Parsi may wish to wed a Buddhist, a Jewish bride can have a Jain husband, and so on. On the other hand, many personal laws impose restrictions on inter-communal marriages. They also make provision for the dissolution of marriage in a case where one party to the marriage converts to an alien faith afterwards. We shall examine below the relative position in this respect under the Special Marriage Act,

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9. See s. 21A of the Act added in 1976.

1954 and each of the various personal laws.

Under the Parsi personal law a Parsi Zoroastrian can marry only a Parsi and none else.<sup>10</sup> If one of the parties to a marriage renounces the Zoroastrian religion by conversion to another faith or otherwise, the other party, at his or her discretion, can seek a divorce.<sup>11</sup> If, however, the other party who remains a Parsi chooses to retain the marital bond with the convert spouse, it is permissible and in that case the Parsi Marriage and Divorce Act, 1936 will continue to apply to the couple. Thus, though a Parsi cannot marry a non-Parsi, a Parsi couple may turn their marriage into an inter-religious marriage by agreeing to the conversion of either party to a different faith.

The Christian Marriage Act, 1872 says that every marriage between persons "one or both of whom is or are a Christian or Christians" shall be solemnized under its provisions.<sup>12</sup> Evidently, thus, a Christian can marry a non-Christian under the Act, and in such a case the couple will be governed by the Christian marriage law contained in the Act of 1872.

Under the Jewish personal law a person can marry only a Jew. A marriage outside the Jewish religious community is not permissible under that law.

In Muslim personal law, a woman can under no circumstances marry a non-Muslim man. As regards men, under the various Sunni schools of law, one can lawfully marry a *kitabiyah*, i.e., a woman following any of the scriptural religions recognized by Islam. This term has, in India, been extended to Christians and Jews only, since their scriptures have been expressly mentioned in the Qur'an. Though many socially progressive Muslims believe that at least the monotheist Hindus (e.g., the Brahmosamajis) too should be regarded as "people of scripture",<sup>13</sup> judicial opinion still favours the traditional view which keeps the term *kitabiyah* confined to Christian and Jewish women. Unlike the *Hanafi* law, the *Ithna Ashari* and the *Isma'ili* Shia schools do not allow even a Muslim man to contract a marriage (in the normal *nikah* form<sup>14</sup>) outside the Muslim community. Where a Sunni male marries a Christian or Jewish woman, the marriage shall, according to Muslim law, be governed by its own provisions and not by the law of the wife.

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10. The Parsi Marriage and Divorce Act 1936, s. 2 (6) says that "marriage" under the Act means "a marriage between Parsis".

11. Parsi Marriage and Divorce Act, 1936, s. 32 (j). The suit for obtaining a decree of divorce on this ground must, however, be filed within two years after the plaintiff comes to know of the facts.

12. Christian Marriage Act, 1872, s. 4.

13. For arguments in favour of this proposition see, Tahir Mahmood, The Position of Indian Scriptures in Islam, *National Herald*, New Delhi, May 1, 1973.

14. An *Ithna Ashari* male is permitted to contract a *muta*, i.e., a temporary marriage (which is now an obsolete concept) with a Christian, Jewish or Zoroastrian woman. See Tyabji, *Muslim Law* 68 (1968).

If either of the parties to a Muslim marriage renounces Islam, difficult questions arise. Under the traditional law apostasy of a wife will automatically dissolve her marriage with her Muslim husband. But since the enactment of the Dissolution of Muslim Marriages Act, 1939, the traditional law remains abrogated.<sup>15</sup> Now, though a Muslim husband can immediately repudiate his marriage with his apostate wife, the wife's renunciation of Islam will not *ipso facto* dissolve the marriage, unless by so renouncing Islam she is returning to her original faith.<sup>16</sup> This legislative provision makes the position of Muslims in this regard analogous to that of Parsis under the Parsi Marriage and Divorce Act, 1936. The apostasy of a Muslim man, however, still renders his marriage with his Muslim wife null and void.<sup>17</sup>

Under the Hindu Marriage Act, 1955 a person—man or woman—cannot marry one who is legally not a Hindu.<sup>18</sup> In other words, though Hindus, Sikhs, Jains and Buddhists can freely intermarry, a person belonging to any of these communities cannot marry a Muslim, Christian, Parsi or Jew under the Act. Also, renunciation of Hinduism (in the wider legal sense) by either party entitles the other party to obtain a decree of divorce.<sup>19</sup>

The above brief survey of the provisions relating to inter-communal marriages under the various personal laws shows that the Christian law is most liberal in this respect, as it permits a Christian to marry under its provisions any person, to whatever religion the latter belongs. Next comes the Sunni branch of Muslim personal law which allows a man to marry a Christian or Jewish woman. Also in general, the Muslim law as laid down in the Dissolution of Muslim Marriages Act, 1939 does not impose a divorce on a Muslim whose wife changes her faith. As regards Parsi law, though an inter-communal marriage cannot originate under its provisions, it can accommodate a supervenient inter-communal marriage. The Jewish law, Hindu law (*i.e.*, the law of Hindus, Buddhists, Jains and Sikhs) and the Shia Muslim law, do not at all permit an inter-religious marriage.

The matter, however, is not so simple. The Sunni Muslim law allows a man to marry a Christian woman. But under the Christian Marriage Act 1872, such a marriage cannot be solemnized except under its own provisions. There, then, arises a conflict of laws. Complicated situations involving serious inter-personal conflicts of law arise also out of the cases of post-marriage conversion. Difficulties are also faced in the matter of succession to the properties of a bi-religious couple married under any particular personal law. Intercommunal marriages are, thus, not practicable under the

15. See the Dissolution of Muslim Marriage Act, 1939, s. 4.

16. *Ibid.*

17. See the Tyabji, *supra* note 14 at 187-88.

18. See Hindu Marriage Act, 1955, s. 5.

19. *Id.*, s. 13 (1) (ii).

personal laws, even if permissible to any extent under one or the other of such laws. And if solemnized, they give rise to insurmountable difficulties which the personal laws fail to remove.

In all the cases where the parties to a civil marriage belong to two different religions (Hindu, Buddhist, Jain and Sikh faiths are not, it is notable, regarded as different religions) succession to their property would invariably be regulated by the general provisions of the Indian Succession Act. The legal position in such cases remains unchanged till the present day.

The Special Marriage Act and the Indian Succession Act, thus, are the secular matrimonial and succession laws which have no connection with any religion whatsoever and apply alike to both the parties to an inter-religious marriage, irrespective of the difference in their faiths.

#### *Registration of religious marriages under the Act of 1954*

We have seen that a civil marriage between any two Indians, whether professing the same religion or different religions, can originate under the Special Marriage Act. Besides making room for the original solemnization of secular marriages, the Special Marriage Act also provides the facility of converting an existing religious marriage into a secular marriage. A marriage originally solemnized under any of the personal laws can, without regard to the time of its solemnization, be registered by the parties under chapter III of the Act, provided that it satisfies the conditions specified in the Act.<sup>20</sup> These conditions are, in certain respects *i.e.*, marriage-age, sanity and prohibited relationship) somewhat different from those required to be complied with by the parties originally contracting a civil marriage. These points of difference will be discussed by us in the next chapter. The effect of the registration is to turn the religious marriage into a civil marriage deemed to have been solemnized under the Special Marriage Act.<sup>21</sup> Henceforth, the personal law of the parties cease to apply in matters of marriage and divorce and marital rights and duties of the couple are regulated by the Special Marriage Act. Also, as is the case of a marriage originally solemnized under the Act, succession to the properties of the couple registering their marriage under its provisions is regulated by the Indian Succession Act, 1925 (unless, now, both the parties to the marriage are Hindu, Buddhist, Jain or Sikh, in which case they continue to be governed by the Hindu Succession Act, 1956. <sup>21a</sup>)

In some cases a religious marriage which may have been invalid under that law, it seems, can be validated by registration under the civil marri-

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20. Special Marriage Act, s. 15.

21. *Id.*, s. 18.

21a. This will be the effect of the 1976 amendment of the Special Marriage Act,

age law. For example, if X, a Muslim man, marries Y, a Muslim widow, during her *'idda*, the marriage will be invalid in Muslim law (*fasid* under *Hanafi* rules). But if soon after solemnizing their marriage according to Muslim rites the couple register it under the Special Marriage Act, it will become a perfectly lawful marriage. Similarly a marriage between two Hindus in violation of the rule of *sapinda* relationship, which will be invalid under the Hindu Marriage Act, 1955,<sup>22</sup> will become legal after registration under the Special Marriage Act, 1954. Also, if a Parsi couple get married without arranging the traditional *ashirvad* ceremony, the marriage, though invalid in the Parsi personal law,<sup>23</sup> may be registered as a valid marriage under the Act of 1954. In all these cases the marriage in issue does not violate any condition laid down under the Special Marriage Act. The Act does not specifically say that the religious marriage desired to be registered under its provisions must have been solemnized in strict compliance with all rules of the personal law concerned.

### *Dissolution of marriages*

A civil marriage, whether originally solemnized or subsequently registered under the Special Marriage Act, can be dissolved by the court in accordance with the principles laid down in the Act. The Act provides detailed rules for the nullification of void and voidable marriages,<sup>24</sup> judicial separation<sup>25</sup> and divorce.<sup>26</sup> It is important to note that the extent of the applicability of those sections in the Special Marriage Act which deal with the dissolution of marriage is much wider than that of the rest of its provisions. The preamble of the Act reads as:

An Act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorce.

The High Court of Rajasthan has found in the wording of this preamble a room for an unconditional applicability of the Act, in respect of court's power of granting divorce, not only to (i) originally civil and (ii) superveniently civil marriages, but to all marriages irrespective of their solemnization or subsequent registration under its provisions. In *C.A. Neelakantan v. Mrs. Anne Neelakantan*<sup>27</sup> a man married in England under the Christian

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22. S. 5(v), 11.

23. See the Parsi Marriage and Divorce Act, 1936, s. 3 (b).

24. S. 24.

25. S. 23.

26. Ss. 27-29.

27. A.I.R. 1959 Raj. 133.



law had applied for divorce to the district court of Jodhpur under section 27 of the Special Marriage Act. Ordinarily a Christian marriage would be governed by the Indian Divorce Act, 1869. The district court summarily dismissed the petition for divorce holding that it had no jurisdiction to decide the case. In an appeal to the High Court of Rajasthan, Justice A.N. Modi made, *inter alia*, the following observation:

It may also be pointed out in this connection that the preamble of the Act shows that so far as divorce is concerned, the Act is all embracing and would govern the dissolution of all marriages irrespective of the consideration whether the marriage is of the special form envisaged in the Act and whether it has been registered under the Act or not.<sup>28</sup>

Referring to the particular case under the consideration of the court, he added :

I can see nothing in the Act of 1954 which would exclude the application thereof to the case of petitioner, no matter that the provisions of the Act of 1869 (Indian Divorce Act) in this respect are somewhat narrower.<sup>29</sup>

These judicial observations are indeed pregnant with very serious implications. If these observations have set the law (which they have obviously done in the absence of any Supreme Court judgment or a contradictory judgment of another High Court), the following propositions follow :

- (i) A Hindu (or a Buddhist, Jain or Sikh), though married under the traditional Shastric law or (after 1955) under the Hindu Marriage Act, can seek a divorce under the Special Marriage Act, 1954.
- (ii) A Parsi, after having contracted a marriage under the Parsi Marriage and Divorce Act, 1936, can get it dissolved under the Special Marriage Act, 1954.
- (iii) A Jewish religious marriage, as also a Christian marriage, can be annulled by the court under the divorce provisions of the Special Marriage Act.
- (iv) A Muslim wife tired of her married life can get a divorce under the Special Marriage Act, no matter whether she can establish a case for judicial annulment of the marriage under the

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28. *Id.* at 135.

29. *Ibid.*

Dissolution of Muslim Marriages Act, 1939.

- (v) A Muslim husband, instead of exercising his power of unilateral repudiation of marriage, can get his marriage dissolved under the Special Marriage Act.

In all the above cases, let it be noted, it will not be necessary for the party to the marriage seeking a divorce to get, first, the marriage registered under the Special Marriage Act.

The law as settled by the Rajasthan High Court holds good in spite of the fact that there are significant differences between the divorce rules under the personal laws of Hindus, Muslims, Christians, Parsis and Jews on the one hand and those under the Special Marriage Act on the other. However, the divorce rules under any personal law are not automatically superseded by the Act in the light of the Rajasthan decision. The aggrieved party in each case will, it seems, have a discretion either to get a divorce effected under his (or her) personal law or under the Special Marriage Act.

The gloss put in the *Neelakantan* case on the preamble to the Act of 1954 is focussed on the words "and for divorce" appearing at the end thereof. The reasoning seems to be that if the legislature wanted to make room under the Act for the dissolution of only those marriages which are solemnized or registered under its provisions, the preamble would have read as "An Act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for dissolution of such marriages." We, however, fail to understand that if the intention of the legislature was to make the divorce provisions in the Act of 1954 all-embrasive, why it could not specifically state this important matter in section 27 itself.

#### *Effect of civil marriage on coparcenery status*

The Special Marriage Act, when originally enacted in 1954, provided that whenever two persons contracted or registered a marriage under its provisions, their respective personal laws (which could be either same or different) would cease to regulate succession to their properties.<sup>30</sup> For this purpose the properties of the parties must, it was thought, be well defined and, if necessary, separated from joint family properties which would otherwise remain subject to the rules of personal law. Keeping, therefore, in mind the possibility of a person having an interest in a joint family contracting a civil marriage, section 19 of the Act provided that such a marriage would effect his severance from the joint family. He would not, however, lose his interest in the coparcenery. To assure this the Act

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30. See s. 21.

extended to the couples marrying under the Act the application of the Caste Disabilities Removal Act, 1850.<sup>31</sup> The main reason why it was necessary to effect the severance of a coparcener from the joint family in the case of his contracting a civil marriage was that without that his interest in the coparcenery (which he did not lose) could not be conveniently subjected to the Indian Succession Act, 1925. Another rationale of the insertion of this rule in the former Special Marriage Act, 1872 (which gave way to the present Act of 1954) was that it was then considered to be a "deterrent" against civil marriages which the Hindu religious leadership did not favour.

The 1976 amendment of the Special Marriage Act has restricted the application of section 19; it now remains applicable only to the cases of inter-religious marriages between Hindus and non-Hindus (within the meaning of these terms as used in the Hindu code of 1955-56).<sup>32</sup> As the application of the Indian Succession Act, 1925 is no more attracted by a civil marriage between two "Hindus", such a curtailment of the scope of section 19 was unavoidable.

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31. S. 20.

32. See s. 21A inserted by the Marriage Laws (Amendment) Act, 1976.