IRRETRIEVABLE BREAK DOWN OF MARRIAGE : IMPLICIT IN GROUNDS OF DIVORCE UNDER HINDU LAW

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INTRODUCTION

Sometimes, parties to the marriage find their marriage turned out to be a bad bargain. This make it difficult for both of them to pull on together or to live together harmoniously. The reason may be any like fraud, force, adultery, cruelty or any other kind of guilt on the part of one party or they simply find that they are not suitable match to each other.

Now the question comes as to what is the solution of such problem? The answer can be given by a single word i.e. DIVORCE. Divorce means dissolution of marriage or putting an end to the marriage by some legal or customary mode. But this is not so simple as it seems to be.

Hindu Law has an age old history. From the Shastric times to the contemporary world, it has seen different phases. It changed in some aspects but the sacramental character of marriage remained the same.

In the Shastric period, under Shastric law marriage was treated as holy and indissoluble union. It stressed on continuing the relation, come what may. There was no room for matrimonial remedies because marriage was treated as permanent and indissoluble union.

However in some texts, we find that some sort of divorce or at least the power of abandonment of one spouse by the other was recognized. For instance, a text of Vashistha runs,

"A damsel betrothed to one devoid of character and good family or afflicted by impotency, blindness and the like or an outcasted or an epileptic or an infidel or incurably diseased …. Should be taken away from him and married to another."

But this text deals with betrothal. Regarding marriage, the often cited text of Narada provides:

"Another husband is ordained for women in five calamities namely, if the husband be unheard of, or be dead, or adopts another religious order, or be impotent, or becomes an outcast."

Similarly, some texts give permission of renunciation of wife by husband in some cases. Manu laid down:

"A husband could abandon his wife who was blemished, afflicted with disease, or previously defiled or given to him fraudulently."

But that did not mean that divorce could be granted as rule. It was permitted in very exceptional circumstances. Marriage was a rule and divorce was an exception and this was strictly adhered to.

EVOLUTION OF CONCEPT OF DIVORCE

Hindu society kept on changing with the passage of time. It observed other cultures carefully, and then tried to assimilate their best of ideas or ideals. This change from time to time reshaped it. Though its exposure to Islamic culture in India was not so useful but with the advent of Britishers in India, it got acquainted with Christian cultural pattern. With this Hindu society got an opportunity for the comparison between the two.

During British rule, there was an introduction of English language. It was not merely studied but widely used by Indians. This resulted in the opening of the wide windows for Indians upon the West, its mind and life. The doctrines of equality and liberty also being adopted widely. Educated Indians started favouring the fresh Western ideas and became impatient to introduce these in the traditional norms and attitudes. But nothing much could be done. Though in the later part of the 19th century, divorce was introduced by statute for two classes of persons:

(i) those who converted to Christianity and consequent there of their spouses refused to live with them, and
(ii) those who were Christians and performed Christian marriage.

With regard to high caste Hindus, the position remained the same. Although among them, some of those who had the impact of the western education worked for the social reforms and advocated for introduction of divorce in Hindu Law also. Their attempts did not succeed at All-India level but these

succeeded in an Indian state, Baroda and the Baroda Hindu Lagnaviccheda Nibandha (Hindu Dissolution of Marriage Act) was passed in 1931. Similarly, some other piecemeal reforms took place in the provinces of Bombay and Madras, namely the Bombay prevention of the Hindu Bigamous Marriage Act, 1946 which was followed by the Bombay Hindu Divorce Act, 1947. In the same way in 1949, the Madras Province and in 1952, the Savrashtra state passed the similar statutes.

DIVORCE UNDER DIFFERENT STATUTES

In our contemporary society, divorce is an important aspect of Indian personal laws of every community. Probably our use of divorce Jurisdiction is not as large as it is in many western countries, including the United States, yet it is an ever-increasing source of litigation and our family courts have more than usual share of matrimonial litigation.

Stability of marriage is *sine qua non* of every society, yet we should not confuse stability with indissolubility. A marriage which has broken down irretrievably is not a stable marriage, and stability of marriage requires that it should be dissolved with maximum fairness and minimum bitterness, distress and humiliation.

The Hindus and Christians always considered their marriage as a sacrament, while the Romans, before the advent of Christianity, and the Muslims considered their marriage as a contract without any semblance of sacrament. Roman marriage were dissoluble by mutual consent of the parties. In fact, in Roman Law marriage and divorce were in the realm of private law and marriages were dissoluble as easily as they could be entered into. Among the Muslims marriage requires formalities but once it is entered into, the man is given dominant role because of the Muslim belief that man is physically and intellectually superior to women. Man is given power to pronounce *talak* (divorce) unilaterally on his wife without any cause, at his whim or fancy, and even in her absence. The Muslim wife has no similar freedom In *Khula and Mubaarat* forms, she can get divorce with the consent of her husband but then she had to forgo her claim to dower or give him some money or property in consideration of his agreeing to dissolve the marriage.

For Hindus and Christians divorce was unthinkable, a sacrilege, a sin. In Hindu religion wife is not considered just *patni*, she is *dharampatni*, *Sahadhrmini*. In the idealized form she is *samarajyi, patrani, bharya, sachiva, sakhi, Grihalakshmi, Hirdeyaswamini*. In the most idealized form wife is considered to the source *dharma, artha, kama* and *moksha*.

The case with which a Muslim husband can pronounce divorce on his wife and the pad-lock on the wedlock or the sacramentality put on Hindu Marriage did not imply that marriages, were as a rule unstable among the Muslims and stable among the Hindus. The sacramentality and sacrosanctity of marriages did sanctity the marriage but, it did not necessarily lead to stability, the contractuality of Muslim Marriage did provide unilateral freedom to husband but did not lead to stability of marriage either. The fact of the matter is that in both systems wives were oppressed and bonded, and the agony, the anguish and the robs of the woman were muffled either under the sacramentality or contractuality of marriage under the sway of man's sovereignty.

However, if marriage has to be a marriage it must confirm to its minimum requirement of being an exclusive union. But this bond when proved to be noose the escape door was adultery. Both the Christianity and Hinduism, condemned adultery as a sin and crime of the highest order.

The question was : should an adulterous woman continue to be bonded in the holy bond? After all from an adulterous wife the basic objective of marriage, viz., the determination of paternity, cannot be achieved. The Hindus allowed the husband to abandon her (but an abandoned wife remained bonded) and, since the Hindus permitted polygamy, the man could take another wife. Among the Christians it became a sore point, man could take separation from bed and board but marriage bond remained, he could not take another wife as the Christianity was wedded to monogamy. The rich and wealthy found a way out by getting the marriage dissolved by an Act of Parliament. But the problem of a broken marriage was a common man's problem, too. The social need of dissolution of marriage did exist but the law stood firm. It seems that the Industrial Revolution's lofty ideals of equality and liberty did compel the western world (though the Roman Catholics stood firmly by the indissolubility of marriage) to recognize divorce. The importance of the English statutes, The Matrimonial Causes Act, 1857, lies in the fact that for the first time, the dissolubility of marriage was recognized, though the ground of dissolution was only one, namely adultery, and if wife sought divorce it has to be adultery-plus. But once dissolubility of marriage was recognized, the march was on. If marriage can be

dissolved on account of adultery, it can as well as be dissolved for other causes. Soon desertion and cruelty were recognized as grounds of divorce, since these as much undermined the stability of marriage as adultery.

DIVORCE UNDER HINDU LAW

The significance of the Hindu Code at its revolutionary character lies in the passing of four Acts pertaining to the personal laws governing the Hindus. Parliament has emphasized that personal law is a social and secular matter and not a part of religious property so called. These four Acts thus constitute the first decisive step in implementing the important principle enshrined in Article 44 of the Constitution.

This is how, the Hindu Marriage Act, 1955 came into existence, eight years after the independence of the country. Section 13 of the Hindu Marriage Act deals with the grounds on which the parties can seek a decree of divorce from a competent court having jurisdiction to entertain such petition. Sub-sections (1) and (1 A) of section 13 of the Hindu Marriage Act, 1955 prescribes the grounds on which either of the party can seek a decree of divorce from a court of Law.

Under sub-section (1A) of section 27 of the Special Marriage Act, there are ten fault grounds on which wife alone can seek divorce. Section 2 of The Dissolution of Muslim Marriages Act, 1939 contains nine fault grounds on which wife alone can seek dissolution of marriage. There are ten fault grounds under the Parsi Marriage and Divorce Act, 1936, on which the parties can seek a decree of divorce from a competent court. Under section 32 of this Act, either of the spouse can move the court for divorce under Christian Law, we will notice that it contains only one fault ground on which it is the husband alone who could seek dissolution of marriage.

Grounds for Divorce

Following are the grounds under which either of the party is entitled to seek a decree of divorce under section 13 of the Hindu Marriage Act, 1955:

(α) Adultery
(β) Cruelty
(χ) Adultery and Cruelty
(δ) Desertion
(ε) Conversion or Change of Religion
(φ) Insanity
(γ) Leprosy
(η) Venereal Disease
(ι) Renunciation of World
(φ) Presumption of Death
(κ) Non-resumption of Cohabitation after Passing a decree for Judicial Separation.
(λ) Non-resumption of Cohabitation after Passing of a decree for Restitution of Conjugal Rights.

(a) Adultery :- According to H.L. Mencheh, adultery means an application of democracy to love".

"Adultery" means the offence of incontinence by married persons (Stroud's dictionary).

What amounts to adultery :

In *Mahalingam Pillai* v. *Amsavalli*, and *Douglas* v. *Douglas*, it has been observed that one general intercourse after the solemnization of marriage is sufficient to make a case.

An attempt at general intercourse is not enough. Some penetration, however brief, must be proved. In *Rxford* v. *Rxford*, it was held that a wife allowing herself to be artificially inseminated with semen of a person other than her husband, cannot be said to have committed adultery.

In *Subbaramma Reddiar* v. *Saraswathi Ammal*, an unrelated person was found alone with the wife after midnight, in her bedroom in actual physical juxtaposition. Madras High Court held that this would lead to an irresistible conclusion that they were committing an act of adultery.

OFFENCE OR GUILT THEORY OF DIVORCE

According to this theory, a marriage can be dissolved only if one of the parties to marriage has, after the solemnization of the marriage, committed some matrimonial offence. The offence must be one that is recognized as a ground of divorce. This theory was considered to be relevant in the most of the commonwealth countries and in most states of the U.S.A. Thus offence of guilt theory implies (1) a guilty

party and (2) an innocent party. By the term guilty party means a party which has committed matrimonial offence and by innocent party; it means a party which has tolerated the matrimonial offence of the other party but has not committed any matrimonial offence.

Originally, Hindu Marriage Act, 1955 incorporated the guilt or fault theory and laid down that there must be a guilty party and an innocent party. All the three traditional faulty grounds, adultery, cruelty and desertion were made ground of judicial separation and not of divorce under Section 13, nine grounds of divorce were recognized both for husband and wife, and two additional grounds were recognized on which the wife alone could seek divorce. These grounds were: living in adultery, change of religion, insanity, leprosy, venereal diseases, presumption of death, renunciation of world, non-resumption of conjugal rights. The wife's additional two grounds, viz., rape, sodomy or bestiality of the husband and the existence of another spouse of the polygamous pre-1955 marriage of the husband, were also based on the same theory.

It is laid down that the petitioner will not be allowed to take advantages of his or her own wrong or disability. In case the ground for seeking matrimonial relief (divorce or judicial separation) is adultery or cruelty the petitioner had to show that there is no collusion between him and the respondent. The petitioner is also required to show that he or she did not condone the offence. The petitioner is every matrimonial cause is required to prove that there is no improper delay in the presentation of the petition. Even after the amendments of 1964 and of 1976 faults grounds of divorce are still part of Hindu Law of divorce. The amending Act of 1976 has made adultery, cruelty, and desertion as fault grounds of divorce, and has added two more fault grounds of divorce for wife.

IRRETRIEVABLE BREAKDOWN OF MARRIAGE: A GROUND OF DIVORCE

The guilt theory of divorce has been found deficient as it recognizes divorce only on certain specified grounds. The consent theory has been found wanting as it either makes divorce too easy or too difficult. The problem that the modern law faces is that if a marriage has in fact broken down irretrievably, may be on account of fault of either party or both parties, or on account of fault of neither, then, is there any sense in continuing such a union? Would it not be in the interest of both the individual and the society that the marriage is dissolved? From such a marriage, substance stood disappeared and, only form has remained. There is no use in retaining the empty shell. In other words, the law recognizes a situation and in effect says to the unhappy couple; "if you can satisfy the court that your marriage has broken down, and that you desire to terminate a situation that has become intolerable then your marriage shall be dissolved, whatever, may be the cause." The breakdown theory of divorce represents the modern view of divorce. Recently, the Law Commission on Reform of the Grounds of Divorce said in its Report that objectives of any good divorce law are two: "One, to buttress, rather than undermine, the stability of marriage, and two when regrettably, a marriage has irretrievably broken down, to enable the empty shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation." If a marriage has broken down beyond all possibilities of repair, then it should be brought to an end, without looking into the cause of breakdown and without fixing any responsibility on either party.

In our contemporary society the irretrievable breakdown of marriage theory is recognized by the laws of many countries. In or about nineteen fifties, a trend towards this theory became discernible in those countries also which were deeply entrenched in the fault theory. Two methods were used. First, by enlarging the number of grounds. Such grounds as incompatibility of temperament were added. The Swedish Marriage Law of 1920 provides a very good illustration of this trend. It was laid down that both the spouses could present a joining petition for separation decree on the ground of "profound and lasting disruption." Such an application could be presented by one of the spouses to the marriage also. In the case of joint application, the divorce be granted if the court, after an enquiry, comes to the finding of profound and lasting disruption of marriage. The second method that was used was to give widest possible interpretation to the traditional fault grounds. Cruelty proved to be the most fertile ground. In *Gollins* v. *Gollins*, the husband's failure to take up a job, his inability to maintain his wife and his wife to pay off his pressing debts was held to be a conduct amounting to cruelty. In *Williams* v. *Williams*, husband's persistent accusations of adultery against the wife were considered to amount to cruelty, despite the fact that husband was found to be insane. In *Masarti* v. *Masarati*, the Court of Appeal said : "Today we are perhaps faced with a new situation as regards the weight to be attached to one particular factor that is the breakdown of marriage."

Thus, the way for the reception of the irretrievable breakdown theory of divorce was opened up. In the Mortimer Committee's report, the breakdown of marriage is defined as "such failure in the matrimonial relationship or such circumstances adverse to that relation that no reasonable probability remains for the spouses for living together as husband and wife." In the opinion of the Committee if it is shown that a marriage has broken down completely, the marriage should be dissolved even if one of the parties to marriage does not desire it.

In the modern law, the irretrievable breakdown theory of marriage has found its way in two modes:

(i) The law lays down that if a marriage has broken beyond any possibly of repair then it should be dissolved. The determination of the question whether in fact a marriage has broken down or not is left to the courts. In other words, the legislature does not lay down any criterion on which a marriage may be deemed to have broken down. It leaves to the court to find out whether a marriage had in fact broken down or not in each individual case. The Soviet Union in its family law since 1944 has adopted this mode. So did West Germany in its family law of 1946. Most of the East European States also adopted this for breakdown theory. The law of these countries imposes an obligation on the court to try to effect a reconciliation between parties before proceeding to dissolve a marriage.

(ii) In its second mode, the legislature lays down the criterion for breakdown of a marriage and if that is established, the courts have no option but to dissolve the marriage. For instance, the petitioner must show that before the presentation of the petition he has been living separate from the respondent for a specified period. This goes to establish that marriage has broken down beyond all possibilities of repair. In this form, the breakdown theory received early recognition in some countries. The Swedish law lays down that divorce could be obtained if one year has elapsed after the passing of a decree for judicial separation provided the parties have in fact lived separate from each other during the period. The law of New Zealand and about eighteen States of the U.S.A. also contains a similar ground. The two States of the commonwealth of Australia also recognized such grounds. The law of South Wales laid down that if a decree for restitution of conjugal rights was not complied with, then divorce could be obtained forthwith. No period of waiting was provided. On the other hand, the law of South Australia provided that divorce could be obtained if a decree for restitution of conjugal rights was not complied with for a period of three years or more. A similar grounds has been provided by the Commonwealth of Australia Matrimonial Causes Act, 1959 where under the minimum waiting period is one year.

Another version of this form of breakdown theory is the one which requires that before a petition is presented the parties must have lived apart from each other for some specified period. The Royal Commission on Marriage and Divorce recommended that either spouse may be able to obtain divorce on the ground that they had lived separately from each other for a period of seven years, but if one of the parties objected to divorce, divorce could not be granted. In its yet another version, two periods of separation have been suggested, one longer and the other party consents to it. In the former divorce can be obtained even if the other party withholds its consent. Following the recommendations of the Law Commission of England, the Divorce Reform Act, 1969 (which has been replaced by the Matrimonial Causes Act, 1973) laid down that if parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition, and the respondent consented to the decree being granted, decree dissolving the marriage could be passed. It also recognized separation for a period of 5 years or more as a ground for divorce, irrespective of the fact whether the other party consented or did not consent to divorce. In this manner the modern English law recognizes consent theory as well as the breakdown theory. In the former case the criticism of consent theory that it leads to hasty divorces has been met by laying down that before the presentation of the petition parties must have lived separate from each other for a period of two years. Under the second ground the English law incorporates the irretrievable breakdown of marriage theory by laying down that five years' separation is a sufficient evidence of the breakdown of marriage. This is also the form in which the breakdown theory is recognized at Australia and Canada under the law of the latter the period of separation is three years. In that event, the consent or dissent of the other party is immaterial. These ground have been hedged with sufficient safeguards for the parties to the marriage and for the children of the parties.

In Hindu Law, the breakdown theory, has its own version. Under the Hindu Marriage Act, 1955-76 divorce can be obtained by either party (a) if it is shown that a decree for restitution of conjugal rights has not been complied with for a period of one year or more, or (b) if it is shown that cohabitation has not been resumed for a period of one year of more after passing of the decree for judicial separation. In this very form the breakdown grounds are recognized under the Special Marriage Act, 1954 76. Thus the breakdown theory was introduced into the Indian law by allowing divorce both to the so-called innocent and the guilty party. But the provision of the matrimonial bars under both statutes was over-looked. In the framework of guilty theory the breakdown theory was buttressed. The letter of law still requires that the petitioner must prove that he is not taking advantage of his or her own wrong or disability, though the breakdown theory does not admit of any such provision. And it may be interesting to note that most of our High Courts have strucked to the letter of law and have held, despite the amendment, the party who is not innocent cannot get a decree of divorce under section 13(IA).

The Law Commission in its 71st report has recommended that irretrievable breakdown of marriage should be a ground of divorce for Hindus. It suggests the period of three years' separation as a criterion of breakdown. On the basis of the Report, the Marriage Law (Amendment) Bill 1981 (Bill No.2 3 of 1981) was introduced in Parliament but was allowed to lapse.

CONCLUSION

No doubt that bill No. 23 of 1981 was not passed by parliament but the judiciary considered the irretrievable breakdown of marriage part and parcel of the grounds of divorce mentioned under Hindu Marriage Act, 1955. But the big question is whether this ground is lies in the spirit of the Act or it is the discretion of the Court to accept it or not for the purpose of granting the decree of divorce. The question did not find its answer in the absence of clear provision under the Hindu Marriage Act, 1955. But it is true that when the marriage has broken-down beyond repair, it can be considered as a ground of divorce having its implicit in the various other grounds provided under Section 13 of Hindu Marriage Act, 1955.

REFERENCES

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2. Manu, IX; 27.
3. Native converts Marriage Dissolution Act, 1866.
4. The Indian Divorce Act, 1869. It was also made applicable to those persons who married under the Special Marriage Act, 1872.
5. It was later on replaced by the Baroda Hindu Nibandha of 1937.
6. Paras Diwan, The law of Marriage and Divorce, Ed. p. 11.
7. 1956(2) MLT 289, 1956 Mad. LI 259.
8. (1950)2 All ER 748 (753).
9. (1921)58 CLR 259.
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11. Report, para 15.
12. (1963) All E.R. 966.
13. (1963)2 All E.R. 994.
14. (1969)1 W.L.R. 393.
15. Section 2(1) (d).
16. Section 2(1) (b).
17. See Section 2(2) (3); Section4 and 6 of the Act.
18. Matrimonial Causes Act, 1956 (Australia), S. 28(m).
19. Divorce Act, 1968(Canada) S. 4. (1) (e).
20. Section 13(IA).
21. Section 27(2), special Marriage Act, 1954.