

Irretrievable Breakdown of Marriage - Applicability and Current Status in India

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ABSTRACT

In India, with regards to the Hindu Marriage Act and Special Marriage Act, the Government of India has attempted to include 'Irretrievable Breakdown of Marriage' as a ground of divorce as per the recommendations of the 71st report of the Law Commission of India. Legally speaking, Irretrievable Breakdown of Marriage is defined as: "The situation that exists when either or both spouses are no longer able or willing to live with each other, thereby destroying their husband and wife relationship with no hope of resumption of spousal duties." In other words, Irretrievable breakdown of marriage can be defined as such failure in the matrimonial relationship or such circumstances adverse to that relationship that no reasonable probability remains of the spouses remaining together as husband and wife for mutual comfort and support.

Keywords : Irretrievable breakdown, marriage, applicability and current status, Hindu Marriage, India

I. INTRODUCTION

Marriages as is often said are made in heaven and solemnized on Earth. Marriage is the very basis of a social organization. It is the foundation of a family and in turn society without which no civilization can exist. Marriage is regarded as a sacrament under Hindu Law which is eternal and indissoluble. The law with regard to marriages has been codified by the Parliament as the Hindu Marriage Act 1955. Hindu Law strictly insists on Monogamy. Prior to the enactment of the Hindu Marriage Act, divorce was not a recognized means to put an end to a marriage, the only exception being where it was recognized by custom, which meant that the rules of dissolution of marriage and monogamy were subject to a valid custom to the contrary.

Under the Sharia law, marriage is a sanctified contract which is solemnized on the payment of Mehr from the husband to the wife. In the Muslim law, polygamy is not unconditionally conferred and is based on the

precedent condition about the capacity of the husband to do justice between his co-wives.

Modern society has become quite complex coupled with changes in socio-economic conditions seconded by the disintegration of the joint family structure as well as rapid industrialization and urbanisation, education and employment. Moreover, the laws have given equal status and rights to women have had a tremendous impact on the institution of marriage which is no longer treated as an indissoluble union. There has been a considerable legislative and judicial interference in the gamut of matrimonial laws all over the world. Divorce, which was earlier regarded as an evil, has codified laws which are being substantially modified and liberalized.

II. HISTORY OF IRRETRIEVABLE BREAKDOWN OF MARRIAGE

The 71st report submitted by the Law Commission of India submitted in 1978 deals with the concept of Irretrievable Breakdown of Marriage. The Report is

based on the prima facie question as to the extent and conditions on which Irretrievable Breakdown of Marriage can be included as a ground for divorce under the Hindu Marriage Act.

As per the Report in 1920, New Zealand was the first of the Commonwealth countries to introduce that a separation agreement of three or more years could become a ground to file divorce before the courts. In 1921, the first divorce on the ground of Irretrievable Breakdown of Marriage was granted by the Court in New Zealand. The Court held that “when matrimonial relations have ceased to exist, it is not in the interests of the parties nor in the interest of the public to keep the man and woman bound as husband and wife in law”. The Court also added that “in the event of such separation, the essential purpose of marriage is frustrated and its further continuance is not merely useless but mischievous”. This led to the formulation of the breakdown theory in Matrimonial law.

In England, the commencement of this theory was opened up in the case of Masarati v. Masarati, where both the parties to the marriage had committed adultery. The court of appeal, on wife’s petition for divorce, observed breakdown of marriage. The law commission of England in its report said, ‘the objectives of good divorce law are two: one to buttress rather than to undermine the stability of marriage and two, when regrettably a marriage has broken down, to enable the empty shell to be destroyed with maximum fairness, and minimum bitterness, humiliation and distress’. On the recommendation of the Law commission, Irretrievable Breakdown of Marriage was made the sole ground for divorce under section 1 of the Divorce Law reforms Act, 1973.

The Matrimonial Causes Act, 1959 of the Commonwealth of Australia provided for divorce on the grounds of breakdown of marriage.

In its report, the Law Commission observed that the provision of restricting divorce to matrimonial disability results in injustice in cases whether neither

party is at fault or the fault is of such a nature that neither party wishes to divulge it and yet the marriage has ceased to exist. In other words, Irretrievable Breakdown of Marriage refers to a situation whether emotional bonds, respect, etc, which is the very foundation of a marriage have disappeared and only a façade in the name of marriage remains.

In conclusion, the Law Commission mentions the where a marriage has ceased to exist both in substance and in reality, divorce has to be taken as a solution to escape from a difficult solution. The provisions of such a divorce should be primarily concerned with bringing the parties and the children to accept the new situation and to work out a satisfactory basis for regulating relationships in the wake of the changed circumstances, rather than finding faults during the divorce proceedings.

III. THEORIES OF DIVORCE

1. **Fault Theory** – Under the Fault theory or the offences theory or the guilt theory, marriage can be dissolved only when either party to the marriage has committed a matrimonial offence. It is necessary to have a guilty and an innocent party, and only innocent party can seek the remedy of divorce. However the most striking feature and drawback is that if both parties have been at fault, there is no remedy available.

2. **Consent Theory** – The consent theory accepts that parties to a marriage could together decide to end the relationship. This is the concept of “divorce by mutual consent.” The procedure for divorce under this theory is that the parties live apart for a specified period of time, and also require that such application be made in two stages, before the divorce is confirmed. Importantly, related but critical issues such as maintenance, distribution of common properties and custody of children are expected to be decided by the parties.

3. **No Fault Theory** – The Institution of marriage being distinct as regards its socio-economic and legal footings, it will be unjust if the law ignores the importance attached to it.

However, one must also take consideration of the fact that it is the choice of the parties to a valid marriage to understand the importance of the institution and to preserve its sanctity. With the changing requirements, attitude and aptitude, the society has drastically changed and it is very difficult for the married couples to cope with change. While adjusting in a new atmosphere in the matrimonial home, spouses may commit, knowingly or unknowingly, with or without intention, whether economical dependent or independent, some kind of mistakes which may lead to a communication gap between them and create havoc in the matrimonial home. Where both the parties of a valid marriage are at fault of any kind of matrimonial offence, it is difficult to prove which one is an aggrieved party.

According to the Doctrine of Recrimination, no remedy can be granted to the party who is at fault. It is imperative in law to have one party as innocent and another at fault to provide a matrimonial relief. In case of no fault theory of divorce, it is not necessary to prove which party is at fault. There may be many reasons based on which sweetness of matrimonial relationship is at risk. If the parties prove with reliable evidence on record that their marriage is beyond all possible repairs then law should understand the reality of the facts and should help the parties to the marriage which has broken down irretrievably.

The breakdown theory of divorce which is inherently attached with no fault theory of divorce represents the modern view of divorce. Under this theory, the law realises a situation and 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 marriage can be said to be broken when the objects of the marriage cannot be fulfilled. When there is not an iota of hope that parties can be reconciled, it can be considered as irretrievable breakdown of marriage.

IV. SUPREME COURT'S INHERENT JURISDICTION UNDER ARTICLE 142 OF CONSTITUTION OF INDIA

Our constitution confers wide power on the Supreme Court such as power to grant Special Leave against the orders or decrees from any court, or Tribunal in the country or to have exclusive jurisdiction to decide the disputes of the President or Vice President.

The law laid down by the Hon'ble Supreme Court is no doubt the laws of the land binding on all the courts in the country. The Constitution of India confers powers upon the Supreme Court to ensure that courts do not suffer from any jurisdictional difficulties to do justice between the parties before it.

Article 142 of the Constitution of India is one such provisions which empowers the Supreme Court to pass such "Decree or Order" as may be necessary for doing complete justice between the parties.

In other words Article 142 supplement the powers already conferred upon the Supreme Court under the constitution to ensure that justice is done and in doing so, the court is not prohibited by lack of jurisdiction or authority of law.

The Supreme Court has exercised its power under Article 142 of the Constitution even in the case of matrimonial matters that has been pending for long time in the Tribunal/High Court. The reason is that the matter is adjourned from time to time on account of reconciliation between the parties, but ultimately that has not happened. Hence it is indeed an

observation of the court that marriage status should, as far as possible, as long as possible and whenever possible, be maintained.

Relying on the judgement of the Hon'ble Apex Court in Sangamitra Ghose Vs. Kajal Kumar Ghosh, reported in 2007 2 SCC page 200, wherein it has been held as follows.

We are fully convinced that the marriage between the parties has irretrievably broken down because of incompatibility of temperament. In fact there has been total disappearance of emotional substratum in the marriage. The matrimonial bond between the parties beyond repair and that the marriage has been wrecked beyond the hope of salvage and therefore public interest and interest of all concerned lies in the of the recognition of the fact and to declare defunct de jure what is already defunct de facto.

In the case of Navin Kohli vs Neelu Kohli, the Supreme Court made a strong plea to the Union of India for incorporating irretrievable breakdown of the marriage as a separate ground for divorce under Section 13 of the Hindu Marriage Act 1955 and amending the Hindu Marriage Act.

It should be noted that no court in the country except the Supreme Court can grant divorce on the ground of irretrievable breakdown of matrimonial relationship.

V. MERITS, DEMERITS AND CRITICISMS OF THE IRRETRIEVABLE BREAKDOWN OF MARRIAGE

A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the faulty theory, guilt has to be proved; divorce courts are presented concrete instances of human behaviour as bring the institution of marriage into disrepute. Because of the divorce of matrimonial offence, judges, and lawyers are sometimes reduced to the role of

scavengers. The lawyers have to look for and expose and the judges are confronted with, the worst obscenities within a married life. It is therefore, not surprising that with the present adversary system all types of allegations are freely hurled across the courtroom. We need not stand on an old divorce law which demands that men and women must be found innocent or guilty.

One cannot say that it is an enhancement of the respondent for marriage if there are tens of thousands of men and women desperately anxious to regularize their position in the community and they are unable to do so. People should be able to marry again where they can obtain a death certificate in respect of a marriage already long since dead. The objection that irretrievable breakdown as a ground of divorce is vague has been already dealt with.

Irretrievable breakdown allows the spouses, or even one spouse, to terminate the marriage at will, thus transforming marriage from a union for life into one which can be ended at pleasure,

It is necessary to the basic principle that no man should be allowed to take advantage of his own wrong; a spouse who was responsible for the breakdown of marriage should not be able to rely on such breakdown in order to obtain a divorce against his or her partner's will. By authorizing one spouse to divorce the other against the latter's will after separation for a specific period, the law will have given statutory recognition for the first time to the principle that a person may take advantage of his or her own wrong.

The theory that one cannot take advantage of one's own wrong has not been adhered to in the Hindu Marriage Act in the past. According to clause (ii) of sub section (1A) of section 13 of the Act, either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition for

the dissolution of the marriage by a decree of divorce on the ground that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or afterwards after the passing of a decree for the restitution of conjugal rights in proceedings to which they were parties. This provision clearly contemplates that even the party which has been in the wrong in so far as it has failed to comply with a decree for restitution of conjugal rights can also apply for a decree of divorce on the ground that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of the decree for restitution of conjugal rights in a proceeding to which they were parties. Such a party, though at fault, would thus be taken advantage of its own fault. It cannot therefore be said that under the provision of the Hindu Marriage Act, as they stand at present, no person can be allowed to take advantage of his own wrong.

Thus, once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties if the legal bond is sought to be maintained notwithstanding the disappearance of the emotional substratum. Such a course would encourage continuous bickering perpetual bitterness, and may often lead to immorality. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist.

Marriage is lifelong cohabitation in the home. When the prospect of continuing cohabitation has ceased, the legal tie should be dissolved.

VI. CRITICISMS OF THE CONCEPT OF IRRETRIEVABLE BREAKDOWN OF MARRIAGE

The concept of irretrievable breakdown of marriage to be made a ground for divorce under the Hindu Marriage Act, 1955 has been although a lot more debated but it has equally been criticised at various points by the state High courts and The Government of India.

6.1 Criticism by the High Court:

High Court has in many cases, expressed disagreement with the suggestion that the Hindu Marriage Act, 1955 should be amended with a view to making irretrievable breakdown of marriage as a good ground for grant of a decree of divorce. The judges of the High Courts have expressed themselves against the introduction of irretrievable breakdown as a ground of divorce. One of the points made in the reply of the High Court is that it is extremely difficult to say that the husband and wife would never live together merely because there has been a rift between them and for the time being it appears that there may not be any prospect of their living together.

The mere fact that there has been a rift between the parties or that they are for the time living apart does not mean that the marriage has come to an end. It is possible that what may appear to one person to be irretrievable may appear to another as not yet beyond repair. But such a state of things cannot be allowed to continue indefinitely, and there must arrive a point of time when one of the parties should be permitted to seek the judgment of the court as to whether there is or there is not a possibility of the marriage being retrieved.

6.2 Criticism by the Govt.:

The Government of India, Ministry of Education, Department of Social Welfare, has expressed the view that making irretrievable breakdown of marriage a ground for grant of a decree of divorce is redundant in the light of the fact that sufficient grounds covering 'irretrievable breakdown of marriage' exist in the Hindu Marriage Act and the Marriage Laws Amendment Act, 1976, for the purpose of seeking divorced.

VII. CURRENT POLITICAL STATUS OF AMENDING THE HINDU MARRIAGE ACT TO INCLUDE IRRETRIEVABLE BREAKDOWN OF MARRIAGE

As per the news report dated February 19, 2015 and July 12, 2015, the present NDA government might reverse the Marriage Law Amendment Bill 2013 which was introduced by the former UPA Government. Irretrievable Breakdown of Marriage had been incorporated as Section 13C in the Bill. The bill was passed by the Rajya Sabha on 26th August 2013, however could not be taken up for discussion in the Lok Sabha due to the change in the Government at the Centre.

Though the present Government had contemplated tabling the bill again, however the then Law Minister Mr Sadanand Gowda admitted that the Government was still considering the implications of the Bill as more than 70 representations had been received against the Bill.

Even though the Bill was drafted to remove the lacuna as far as Divorce law is concerned, groups opposing the Marriage Laws Amendment Bill contend that the Bill if passed will cause an increase in illegitimate and live-in relationships thereby destroying the institution of marriage and family values. Another fear, the groups have is an increase in the crime rate and undue litigation.

Given the present scenario, it appears that the Marriage Laws Amendment Bill will not see light of the day atleast in the near future, in spite of the Hon'ble Supreme Court time and again pressing for its inclusion.

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