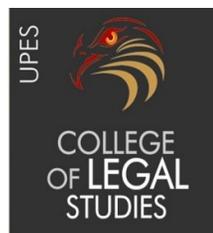


**“DIVORCE BY MUTUAL CONSENT: TREND IN  
INDIA”**

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**Submitted under the guidance of: Dr. MAMTA RANA**

*This dissertation is submitted in partial fulfillment of the degree of  
B.B.A., LL.B. (Hons)*



**College of Legal Studies  
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Dehradun  
2015**

## **CERTIFICATE**

This is to certify that the research work entitled “**DIVORCE BY MUTUAL CONSENT: TREND IN INDIA**” is the work done by GAZAL TALWAR under my guidance and supervision for the partial fulfillment of the requirement of B.B.A., LL.B. (Hons) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

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## **DECLARATION**

I declare that the dissertation entitled **“DIVORCE BY MUTUAL CONSENT:TREND IN INDIA:”** is the outcome of my own work conducted under the supervision of Dr. MAMTA RANA at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

GAZAL TALWAR

Date: 07.04.2015

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## LIST OF ABBREVIATIONS

1. AIR	All India Reporter
2. AIHC	All India High Court Cases
3. ALL	Allahabad High Court
4. ADR	Alternative Dispute Redressal
5. Anr.	Another
6. AP	Andhra Pradesh High Court
7. Bom	Bombay
8. Cal	Calcutta
9. Chap.	Chapter
10. CPC	Civil Procedure code
11. DMC	Divorce and Matrimonial Cases
12. DLT	Delhi Law Times
13. Edn.	Edition
14. E.g.	Example
15. Guj.	Gujarat High Court
16. HLR	Human Rights Law Journal
17. HMA	HINDU MARRIAGE ACT
18. ILR	Indian Law Reports
19. Ins.	Inserted
20. Karn	Karnataka High Court
21. Ker	Kerala High Court
22. Mad.	Madras High Court
23. MLJ	Madras Law Journal
24. MhLJ	Maharashtra Law Journal
25. MP	Madhya Pradesh High Court
26. Or.	Order
27. Ori	Orissa High Court
28. P.	page
29. P&H	Punjab & Haryana High Court
30. R	Rule

31. RLR

Rajasthan Law Reporter

32. S.

Section

33. SC

Supreme Court

34. SCC

Supreme Court Cases

35. SMA

Special Marriage Act

36. u/s

under section

37. V.

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All my research work was carried out in the library and with the help of internet, where I found out valuable material on this dissertation.

At last I would like to thank my parents who are the guiding star throughout my lives.

Thanking you,

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## PREFACE

1. **Introduction on marriages under Hindu Law-** The chapter throws light upon the concept of marriage discussing how marriage works in Hindu Law. It also talks about the law that guarded the Hindu marriage prior to the legislation of HINDU MARRIAGE ACT, 1955. After the enactment of the legislation, what was the position and status of the marriage under Hindu Law has been discussed. The fundamental changes brought about the Act in the institution of marriage under ancient and modern law have been stated.
  
2. **Introduction on divorce under Hindu Law-** The chapter discusses the meaning and concept of divorce under ancient India. It also states the theories of divorce, how it come into existence and how they have been accepted or rather found a place in the legislation of HINDU MARRIAGE ACT, 1955. Afterwards the focus is on the status and position of divorce in Modern India.
  
3. **Evolution of divorce in India-** The chapter states how the modern matrimonial law in India evolved. It states how the divorce was made recognizable by the customary law before the enactment of HINDU MARRIAGE ACT, 1955. It talks about the enactment of Indian Divorce act, 1869 followed on by the enactment of Special Marriage Act, 1954. Lastly the provision of divorce under HINDU MARRIAGE ACT, 1955 has been mentioned and the amendments made in the act of 1955 by the Marriage (Amendment) Act, 1976.

4. **Divorce by mutual consent:** The chapter has discussed how the idea of mutual consent as a ground of divorce has evolved. Then shifting the focus on the status and legal position of divorce by mutual consent under SPECIAL MARRIAGE ACT, 1954 and HINDU MARRIAGE ACT of 1955. It mentions about the essential requirements for divorce by mutual consent and the relevant case laws.
  
5. **Pertinent case laws of divorce by mutual consent-** In this chapter important and relevant case law has been discussed. Like in Ashok Hurra v. Rupa Bipin Zaverri it has been discussed about withdrawing of consent after the decree of divorce by mutual consent has been passed and special jurisdiction under Article 142 of the Constitution has been discussed. Then in case of Pooja Deswal v. Sagar Deswal the question revolved around whether statutory waiting period of six months referred to in Section 13-B(2) of the HMA can be waived/ condoned by the Court. Another case Neeti Malviya vs Rakesh Malviya has been stated where the question that whether a decree of divorce by mutual consent can be granted without waiting for the statutory period of six months as contemplated under Section 13-B (2) of the HINDU MARRIAGE ACT has been discussed.
  
6. **Legal position of divorce by mutual consent under Parsi, Christian and Muslim Laws-** In this chapter, the legal position of divorce under Parsi Law; Christian Law and Muslim Law has been discussed with provisions and the relevant case laws.

7. **Critical analysis of Divorce**- The chapter mentions the critique of divorce along with the critical analysis of divorce by mutual consent mentioned under Section 13B of HINDU MARRIAGE ACT, 1955.
  
8. **Conclusion**- In the end chapter conclusion have been given of all the above chapters along with required suggestions and recommendations.

## **1. INTRODUCTION ON MARRIAGES UNDER HINDU LAW.**

### **1.1 NATURE OF HINDU MARRIAGE**

Marriage is one of the oldest institutions of Hindus which occupies a very important place in the social life. It is regarded as one of most important ten Sanskaras (sacraments) for them. In marriage the father entrusts his daughter into the hands of a noble and physically sound groom who thereby becomes her husband. This mode of marriage is well-settled since Vedic period and has assumed religious importance and significance. Marriage is essential also because all the religious ceremonies and rites are to be performed by a Hindu in the companionship of his wife otherwise they will not bear any fruits. It is noteworthy that marriage under Hindu Law is not regarded primarily as means of satisfying the corporal lust nor does it have the connotation of contractual obligations.<sup>1</sup>

According to Bombay and Madras High Court the importance of the institution of marriage becomes distinct by the fact that religion regards it as one of the ten sacraments essential for purifying the body from its hereditary taints.<sup>2</sup> Marriage is a religious institution intended to fulfill religious duties and to achieve the higher ends of life namely, Dharma, Artha, Karma and Moksha. It is binding upon every Hindu to marry unless he has taken the vow to lead the life of a perpetual celibacy and abstinence.<sup>3</sup>

A Hindu marriage has been said to be a sacrament also because the marital relations between the spouses are created not on account of any contract between the two but by virtue of a gift of the girl by her father to the bridegroom. The gift is holy and accompanied with the religious ceremony of Saptapadi or any other customary religious rites. In absence of such religious ceremonies and rites marriages is said to

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<sup>1</sup> U. P.D., Modern Kesari Hindu Law, 8<sup>th</sup> Edn. 2011.

<sup>2</sup> A v. B., AIR 1953 Bom 486; Gopal Krishan v. Varkat, (1914) 37 Mad. 273.

<sup>3</sup> U. P.D., Modern Kesari Hindu Law, 8<sup>th</sup> Edn. 2011.

have not taken place at all in the eyes of the law. It is considered to be a sacramental union between the husband and the wife to last long till their life.

Hindu marriages are thus rightly acclaimed as sacrament rather than the contract as it lacks essentials of a valid contract, e.g. proposal, acceptance and consideration. In the marriage the parents give their girl by way of a gift to a noble man after accomplishing the religious rites and ceremonies. Thereafter the bridegroom accepts her as his wife and vows to keep her with utmost love and respect till the last breath of her life. Under these conditions there is hardly any place for a contract between bride and bridegroom at the time of the marriage.

### **1.2 LAW ANTECEDENT TO THE HINDU MARRIAGE ACT, 1955.**

According to ancient Hindu law marriage is the last of the ten sacraments<sup>4</sup> and is a tie, a tie which can never be broken. It is a relation established by birth to birth. According to Smritikars even death cannot break this relation of husband and wife which is not only sacred and religious but is a holy union. One created this sacred tie cannot be untied.<sup>5</sup> The institution of marriage is a sacrament and not a mere socio-legal contract. Marriage, according to the Shastras, is a holy sacrament and the gift of the girl to a suitable person is a sacred duty put on the father and after the performance of which the father gets great spiritual benefit. The object of marriage according to Hindus is the procreation and the proper performance of the religious ceremonies. Hindus have always considered their marriage as a sacrament (Sanskaras), which has the implication that it is permanent, indissoluble (i.e. valid not merely in this life but in lives to come) and holy (i.e. performance of religious ceremonies is essential). Wife is also *ardhangani* (half of man).<sup>6</sup>

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<sup>4</sup> Sundaribai v Shivanarayan, LIR (1908) 32 Bom 81.

<sup>5</sup> Shivanandy v Bhagawanthymma, AIR 1962 Mad 400

<sup>6</sup> B.M. Gandhi, Hindu Law, 2<sup>nd</sup> Edn. 2003.

According to **Satpatha Brahmana**,<sup>7</sup>

*“The wife is verily the half of the husband. Man is only half, not complete until he marries.”*

In **Manu Smriti** (Manu Smriti, VIII, 227)

*“I hold your hand for Saubhagya (good luck) that you may grow old with your husband, you are given to me by the just, the creator, the wise and by the learned people.”*

Manu enjoins on the wife that she should become a patarnuvrate, i.e. she should follow the same principles as her husband as analyzed in Manu Smriti, VIII, 228.

According to **Rig Veda**:<sup>8</sup>

*“Be thou the mother of heroic children, devoted to the Gods, be thou Queen in the father-in-law’s household. May all gods unite the hearts of us two into one.”* as analyzed in Rig Veda, IX, 85

According to **Satpatha Brahmana**:<sup>9</sup>

*“The wife is verily the half of the husband. Man is only half, not complete until he marries.”* as inferred from Satapatha Brahmana V. 16, 10.

From this notion of unity of personality of husband and wife, mutual fidelity between husband and wife is the highest *dharma*. Manu further said that once a man and a woman are united in marriage, they must see that there are no differences between them, and that they remain faithful to each other seen in Manu, IX, 101-102.

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<sup>7</sup> B.M. Gandhi, Hindu Law, 2<sup>nd</sup> Edn., 2003

<sup>8</sup> Paras Diwan & Peeyushi Diwan, Modern Hindu Law, 21<sup>st</sup> Edn. 2012, p. 62-63

<sup>9</sup> U. P.D., Modern Kesari Hindu Law, 8<sup>th</sup> Edn., 2011, p. 63

According to **Raghunandan, a well known Bhasyakar:**<sup>10</sup>

*“The acceptance of bride as his wife by the bridegroom in a gift by her parents is defined as marriage.”*

In the process of gift the father of the bride chooses the bridegroom as a suitable person to whom the girl is given. The pious duty of giving away the girl in marriage by way of gift has been thrust upon the father, as according to Rig Veda, the girl is the property of the god of fire who has entrusted the father with the responsibility of bringing her up and to give her in gift to a virtuous person by invoking the fire god to witness the act of giving.

In **Gopal Krishna v. Mithilesh Kumari,**<sup>11</sup> the Allahabad High Court observed about the nature of the institution of Hindu Marriage in the following terms-

*“The institution of matrimony under the Hindu Law is a sacrament and not a mere socio-legal contract. It is not performed for mere emotional gratification and is not a mere betrothal. Its context is religious. It is regarded as a part of the life of the soul. It is a holy spiritual union corresponding to consortium omnium vitocoi Rome, a process by which the husband and the wife becomes one. The bride on the seventh step of saptapadi loses her original gotra and acquires the gotra of the bridegroom and a kinship is created what is not a mere friendship for pleasure. A Hindu marriage thus performed is regarded as indissoluble.”*

The objective of marriage was to enable a man and woman perform religious duties and to beget progeny. Moreover the writers also said that a man was incomplete without a woman; thus marriage fortifies the concept of oneness which is expressed by an adage, that “A woman is half of her husband and completes him.” The institution of Hindu marriage is one of the noteworthy contributions of ancient Hindu sociologists in the realm of Hindu Social Organisation. Hindu marriage literally

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<sup>10</sup> U. P.D., Modern Kesari Hindu Law, 8<sup>th</sup> Edn., 2011, p. 38

<sup>11</sup> AIR 1979 All 316

means the ceremony of ‘carrying away’ the bride to the house of the groom. Hindu Marriage is different from the institution of marriage in other societies. According to Prabhu, Hindu Vivaha (marriage) is, in essence, a ritual and a formality; of course, very important through which an individual has to go, to be able to start his other life in Grihasthasrama. The meaning of vivaha refers mainly to the ceremony of ‘carrying away’ the bride to the house of the bridegroom. <sup>12</sup>

Marriage among the Hindus is obligatory because the Vedas ordain that a Hindu should perform his Dharma along with his wife. The Vedas consider vivaha or marriage as one of the important ‘Sarira Samskaras’ or sacraments sanctifying the body hence, there was the Vedic injunction that every Hindu should pass through the sacrament of marriage at the proper age. A man is not considered perfect unless he is married a wife is the very source of the Purusharthas, not only of Dharma, Artha and Kama but even of Moksha. Those that have wives can fulfill their due obligations in this world (Kriyavantah), those that have wives, truly lead a family life, and those that have wives can lead a full life. Equally, emphasis is also given on the marriage of women. For example, Narada said that if a woman remains unmarried, she cannot attain salvation. Hence, marriage is an important institution for the Hindus.

Under the Hindu law there were two types of marriages: Customary (Shastric) and statutory. The ancient Hindu law recognized eight forms of Shastric marriages:

- Brahma;
- Daiva;
- Arsha;
- Prajapatya;
- Asura;
- Gandharva;
- Rakshasa and
- Paishacha. <sup>13</sup>

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<sup>12</sup> B. M. Gandhi, Hindu Law 2<sup>nd</sup> Edn., p. 207

<sup>13</sup> B. M. Gandhi, Hindu Law 2<sup>nd</sup> Edn., p. 207

The first four forms of marriage which essentially consisted of the gift of the girl by the father to the groom were called “regular” or dharmya forms of marriage. The remaining four forms of marriages were considered as “irregular” or adharmya forms of marriages.

Under the old Hindu law only three essential conditions were required-

- Identity of caste between the parties;
- Parties to marriage must be beyond the prohibited degrees of relationship i.e., they should not be of the same gotra or pravara or sapinda of each other;
- There must be proper performance of marital ceremonies.

One could marry within one’s religion (dharma) and caste (jati) but here also marriage was not possible within one’s gotra and pravara (i.e. descendants of three paternal ancestors of one’s gotra). No lowest age for marriage was considered. Polygamy was permitted but polyandry was illegal. <sup>14</sup>

As for the effect of marriages under old Hindu law, after marriage the husband acquires guardianship over his wife. They both develop a right over each other and are supposed to live together and lead a harmonious life extending every kind of co-operation and assistance to each other as inferred from Manu 9-101-102. Any agreement contrary to the above between them was considered to be void.<sup>15</sup> If the wife lives separately from her husband, he could institute a suit in the court for the restitution of conjugal rights.<sup>16</sup> Wife was entitled to claim maintenance from her husband so long as she discharges her marital obligations. After the marriage the groom was the swami and protector of the wife. After the death of the husband her sons protect her. Besides this, custom was mainly responsible for relaxation of marriage rites, marriage conditions and divorce.<sup>17</sup>

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<sup>14</sup> B. M. Gandhi, Hindu Law 2<sup>nd</sup> Edn. 2003, p. 208

<sup>15</sup> In Re Dharnidhar, 17 Cal 298.

<sup>16</sup> Suryamani v. Kali Kant, ILR 28 Cal 37

<sup>17</sup> U. P.D., Modern Kesari Hindu Law, 8<sup>th</sup> Edn., 2011 , p. 43

The Hindu law of marriage, as the British rulers of India found, interpreted and applied, is in a nutshell, as follows:

- Hindu marriage was a holy sanskar, it could be solemnized in one of the eight forms recognized by law.
- The solemnization would be according to the Shastric or customary rites.
- One could marry at any age, there being no lowest age of marriage and a man could marry any number of women.
- Inter-religious and inter-caste marriages were prohibited, but the latter could be sanctioned by custom.
- Marrying within one's own gotra was not allowed, except among the Shudras.
- Husband and wife would live together, the latter would submit to the wishes of the former, and the former would maintain the latter.
- Marriage was indissoluble; divorce was not permitted unless recognized by custom.
- Death did not dissolve a marriage and therefore a widow could not re-marry unless permitted by custom to do so. The court in India recognized, interpreted, and applied all these principles in their minutest details.<sup>18</sup>

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<sup>18</sup> Hari Singh Gaur, Hindu Code (1973 Edn.) Vol. 1 Chap. III

### **1.3 LEGISLATION PRIOR TO 1955**

During the Mughal period religious laws and rites of Hindus were not interfered with except discouraging the practice of Sati and widow's remarriage. The Britishers in India in the beginning did not interfere with the personal laws of Hindus but from the beginning of the nineteenth century they encouraged social reforms which fructified into legislative reforms. From the period of 1830-1947 (pre-independence period) and 1947-1955 (post- independence period) - periods of about a century and a quarter, the following are some of the areas wherein matrimonial reforms were affected:<sup>19</sup>

- Effect of death on marriage;
- Status of widows and their right to remarry;
- Age of consent;
- Civil marriage and its dissolution;
- Guardianship;
- Age of marriage;
- Inter-religious and inter caste marriages;
- Marriages rites;
- Customary marriage and divorce;
- Bigamy;
- Dissolution of marriage; and
- Maintenance without cohabitation.

During the period of 1813-1900 nine legislations were passed like practice of sati was abolished by law in 1829 and was declared to be an offence; SPECIAL MARRIAGE ACT, 1872; the Majority Act, 1875; The Indian Divorce Act, 1869 and so on and so forth. During the period of 1900-1947 various major and minor legislations in British India by the government and the vassal States were enacted like The Anand Marriage

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<sup>19</sup> B. M. Gandhi, Hindu Law 2<sup>nd</sup> Edn. 2003, p. 210

Act, 1909 and so on and so forth. During 1947- 1955 as many as five legislations were passed like Hindu divorce Act, 1947; Hindu Marriage Validity act, 1949; The Hindu (Bigamy Prevention and Divorce) Act. 1949 & so on.<sup>20</sup>

#### **1.4 MARRIAGE UNDER THE HINDU MARRIAGE ACT, 1955**

Marriage between two Hindus is a subject of personal law but at present it is being governed by the codified law enacted by the Indian Parliament i.e. HINDU MARRIAGE ACT 1955. The concept of Hindu marriage, like any other social institution did not remain unaffected in modern times owing to social changes which were the by-products of early 20<sup>th</sup> century industrial revolution. Hindu marriage which was considered to be a religious duty and a sacrament has undergone a change and it has lost its religious sanctity under the HINDU MARRIAGE ACT, 1955 which came into force on 18<sup>th</sup> May, 1955. The enactment is exhaustive and is considered in the history of social legislation as a landmark.<sup>21</sup>

According to **K.M. Kapadia**,

*“Hindu marriage is a socially approved union of man and a woman aiming at dharma, procreation, sexual pleasure and observance of certain social obligations”.*

It is through marriage that relation between man and woman is socially recognized.<sup>22</sup>

**R N Sharma** defines Hindu marriage as,

*“A religious sacrament in which a man and a woman are bound in permanent relationship for spiritual, social and physical purposes of dharma, procreation and sexual pleasure.”*<sup>23</sup>

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<sup>20</sup> B. M. Gandhi, Hindu Law 2<sup>nd</sup> Edn. 2003, p. 210- 211

<sup>21</sup> U. P. D. Kesari, Modern Hindu Law 8<sup>th</sup> Edn. 2011, p. 45

<sup>22</sup> Ibid, 21

The present Act has effected certain changes in the law of marriage, which have a long bearing upon its nature. It no longer remains a pure sacrament and a binding religious duty. In the sacred texts, marriage created an inseparable tie between husband and the wife, which could not be broken in any circumstances. The HINDU MARRIAGE ACT of 1955 provides several matrimonial remedies including mainly of divorce and nullity of marriage that has seriously eroded its sacramental character.<sup>24</sup>

It is true that a marriage has to be solemnized as per religious injunctions, but mere solemnization of marriage with the help of ceremonies does not make it sacramental. The main theme behind its sacramental character was indissolubility and a sense of binding religious duty, both of which have now been done away under the Act. Moreover, the act also contained certain provisions like judicial separation and divorce and nullity of marriage which have a telling effect upon the sacramental character of marriage and in fact rendered it contractual in nature.

The new act had made radical and substantial changes in the institution of marriage under the ancient Hindu law. These salient features may be illustrated as under:

- The Act has an overriding effect i.e. Section 4(a) and (b)<sup>25</sup> provides that any texts rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in the Act. Matters expressly saved from the application of the Act continues to be governed by the previous law, statutory or otherwise.

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<sup>23</sup> Ibid, 21

<sup>24</sup> B. M. Gandhi, Hindu Law, 2<sup>nd</sup> Edn. p. 211

<sup>25</sup> Section 4 of HINDU MARRIAGE ACT, 1955: Overriding effect of Act.—Save as otherwise expressly provided in this Act,

(a) Any text rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) Any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

- A Hindu marriage is now not so much concerned with religion. It is more as a result of mutual consent than sacramental. [Sections 5 (ii)<sup>26</sup>, (iii), 13<sup>27</sup> and 7<sup>28</sup>]
- The Act is applicable to Hindus of every sect irrespective of howsoever progressive and unorthodox view they propound.
- From Section 2<sup>29</sup> it follows that marriages amongst Hindus, Jains, Sikhs and Buddhists are now valid Hindu Marriages in the eyes of the law.

<sup>26</sup> Section 5: Conditions for a Hindu marriage.

(ii) at the time of the marriage, neither party

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity

<sup>27</sup> Section 13 of HINDU MARRIAGE ACT, 1955- 13. Divorce- (1) Any marriage solemnized, whether before or after the commencement of the Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-(i) has, after the solemnization of the marriage had voluntary sexual intercourse with any person other than his or her spouse; or (ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or (ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or (ii) has ceased to be a Hindu by conversion to another religion ; or (iii) has been incurably of unsound mind, or has suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation- In this clause-

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and include schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party and whether or not it requires or is susceptible to medical treatment; or

(iv) has been suffering from a virulent and incurable form of leprosy; or

(v) has been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

<sup>28</sup> Section 7 of HINDU MARRIAGE ACT, 1955- Ceremonies for a Hindu marriage.- (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) 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.

<sup>29</sup> Section 2 of HINDU MARRIAGE ACT, 1955- Application of the Act.- (1) This Act applies,-

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been

- Monogamy amongst the Hindus is introduced for the first time by the act. Bigamy is not only been prohibited but has now been made punishable under the Indian Penal Code. The conditions and requirements of a valid marriage are now very much simplifies. [Section 5 and 17<sup>30</sup>]. It has been stated that a marriage becomes a null and void, if at the time of marriage; either party to marriage has a living spouse.
- Caste considerations for inter-caste and inter-communal marriages have now been made irrelevant, eliminating all restrictions thereupon. Under Section 29<sup>31</sup> of the Act, the marriages between persons of two different castes, which were effected before the commencement of the present Act, have also been declared as valid. In *Lata Singh v. State of U.P.*<sup>32</sup> the Supreme Court held that inter-caste marriages not barred under the Act or any other law.
- The act now makes no distinction between the marriage of a maiden and the marriage of a widow.
- The ancient Hindu law did not prescribe any age for marriage but it now a condition of marriage that the bridegroom must have completed 21 years of age and the bride must have completed 18 years of age. [section 5]<sup>33</sup>

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governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.- The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be,-

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist Jaina or Sikh by religion and who is brought up as a member of tribe, community, group or family to which such parents belongs or belonged; and

(c) any person who is a convert or re-convert to the Hindus, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindus" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion is, nevertheless, a person whom this Act applies by virtue of the provisions contained in this section.

<sup>30</sup> Section 17 of HINDU MARRIAGE ACT, 1955- Punishment for Bigamy- 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 (45 of 1860) shall apply accordingly.

<sup>31</sup> Section 29 of HINDU MARRIAGE ACT, 1955- Savings

<sup>32</sup> AIR 2006 SC 2522

<sup>33</sup> Ibid at 26

- The act now lays down the conditions of a valid marriage and does not recognize any particular form of a Hindu marriage. [Section 5]<sup>34</sup>
- For a valid Hindu marriage no particular ceremony is prescribed by the act. Sections 5 and 7 lay down that such a marriage can be solemnized in accordance with the customary rights and ceremonies of any one of the parties to the marriage.
- Provision for registration of Hindu marriages has been provided for the first time.
- Eliminating restrictions based on gotra, pravara, and Sapinda relationship the Act makes provisions for judicial separation, for divorce and for annulment of marriages. [Section 10, 13, 14 and 11, 12].<sup>35</sup>
- Provisions for restitution of conjugal rights of the parties are contained in Section 9<sup>36</sup>.

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<sup>34</sup> Ibid at 26

<sup>35</sup> Section 10 of HINDU MARRIAGE ACT, 1955- Judicial Separation.- (1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13, and in the case of a wife also on any of the grounds which might have been presented.

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statement made in such petition, rescind the decree if it considers it just and reasonable to do so.

Section 11- Void marriages- 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 contravenes any one of the conditions specified in clauses (i), (iv) and (v), Section 5.

Section 12- Voidable Marriages.

Section 14 – No petition for divorce to be presented within one year of marriage- (1) Notwithstanding anything contained in this Act, it shall not be competent for any Court to entertain any petition for dissolution of marriage by a decree of divorce, unless at the date of the presentation of the petition one year has elapsed since the date of the marriage:

Provided that the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the court at the hearing of the petition that petitioner obtained leave to present the petition by any mis-representation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of one year from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the expiration of one year from the date of the marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said one year.

- After a valid divorce either party may remarry as provided in Section 15<sup>37</sup>.
- Provisions for legitimacy of children born out of alliances which may be subsequently declared annulled or void or voidable have been made by Section 16.<sup>38</sup>
- Section 24 of the Act<sup>39</sup> makes provisions for maintenance *pendent lite* and for expenses of legal proceedings.
- Section 25<sup>40</sup> of the Act provides for permanent alimony and maintenance.

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<sup>36</sup> Section 9 of HINDU MARRIAGE ACT, 1955- Restitution of conjugal rights- When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation- Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

<sup>37</sup> Section 15 of HINDU MARRIAGE ACT, 1955- Divorced persons when may marry again- When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

<sup>38</sup> Section 16 of HINDU MARRIAGE ACT, 1955- Legitimacy of children of void and voidable marriages- (1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such a 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 the marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(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.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case, where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

<sup>39</sup> Section 24 of HINDU MARRIAGE ACT, 1955- Maintenance *pendent lite* and expenses of proceedings- Where in any proceeding under this Act it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay the petitioner the expenses of the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable.

<sup>40</sup> Section 25 of HINDU MARRIAGE ACT, 1955- Permanent alimony and maintenance - 1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purposes by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross

- Section 26 <sup>41</sup>of the Act provides for the custody, maintenance and education of minor children during the pendency of legal proceedings as also after passing of decree.
- The Act has made provision for the registration of Hindu marriage. It does not provide for any particular form of marriage, but if the rites and ceremonies include saptapadi then the marriage is complete and binding when the seventh step is taken jointly by the parties before the sacred fire.
- The right for disposal of property presented at or about the time of marriage, which may belong jointly to husband and the wife, has also been conferred upon the parties by this Act.

Therefore it has been seen that the sacramental marriage among Hindus has three characteristics:

- It is a permanent and indissoluble union;
- It is an eternal union;
- It is a holy union.

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sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immoveable property of the respondent.

(2) If the Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the Court is satisfied that the party in whose favor an order has been made under this Section has re-married or, if such party is the wife, that she has not remained chaste or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just.

<sup>41</sup> Section 26 of HINDU MARRIAGE ACT, 1955- Custody of children- In any proceeding under this Act, the Court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceedings for obtaining such decree were still pending, and the Court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

It is evident that the first element has been destroyed by the Act when divorce was recognized. The second element was destroyed in 1856 when the widow re-marriage was given a statutory recognition. Probably, to some extent, the third element is still retained. In most of the Hindu marriages, a sacred or religious ceremony is still necessary.

Thus, Hindu marriage has not remained a sacramental marriage and has also not become a contract, though it has semblance to both. It has a semblance of a contract as consent is of some importance; it has a semblance of a sacrament as in most marriages a sacramental ceremony is still necessary.

## **2. INTRODUCTION ON DIVORCE UNDER HINDU LAW**

The Hindus consider marriage to be a sacred bond. Prior to the HINDU MARRIAGE ACT of 1955, there was no provision for divorce. The concept of getting divorced was too radical for the Indian society then. The wives were the silent victims of such a rigid system. Now the law provides for a way to get out of an unpleasant marriage by seeking divorce in a court of law. The actual benefactors of such a provision are women who no longer have to silently endure the harassment or injustice caused to them by their husbands.

### **2.1 DIVORCE UNDER ANCIENT INDIA**

Divorce was unknown to the laws of the Dharmashastra as marriage was regarded as an indissoluble union of husband and wife. Manu declared a wife cannot be separated from her husband either by sale or by abandonment, because marital tie could not be severed under any circumstances whatsoever. It therefore follows that the Hindu Law does not recognize a divorce. Although the law did not contemplate divorce yet it has been held that it was recognized in some communities of Hindus as an established custom.<sup>42</sup> In some parts of the country it was permitted by legislation. For example, in Bombay, Madras and Saurashtra, it was specifically contained in the Bombay Hindu Divorce Act, 1947; Madras Hindu Bigamy Prevention and Divorce Act, 1949 and the Saurashtra Hindu Divorce Act, 1952 (all these Acts now stand repealed by the HINDU MARRIAGE ACT, 1955). In other parts of the country in absence of custom divorce had no recognition under any circumstances.<sup>43</sup>

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<sup>42</sup> Custom existed among the lower castes such as Shudras.

<sup>43</sup> U. P. D. Kesari, Modern Hindu Law 8<sup>th</sup> Edn. 2011, p. 121

In the absence of a custom to the contrary, there can be no divorce between a Hindu husband and his wife, who by their marriage, had entered into a sacred and indissoluble union and neither conversion nor degradation nor loss of caste nor the violation of an agreement against polygamy dissolves the marriage tie.<sup>44</sup> The Bombay High Court condemned a custom allowing divorce as a matter of course on payment of a fine fixed by the caste.<sup>45</sup> But the Madras High Court holds a custom valid which enables either spouse to divorce the other with the latter's consent.<sup>46</sup>

Manu does not approve of dissolution of marriage in any condition. He declared,

*“Let mutual fidelity continue till death, this in brief may be understood to be the highest dharma of husband and wife. The duty of a wife continues even after her death.”* as observed in Manu/5/162.

In Arthashastra, Kautilya declared that marriage might be dissolved by mutual consent in the case of unapproved forms of marriages. According to him, a wife could repudiate her marriage under the following conditions:

- Husband's misconduct with wife;
- Husband's prolonged diseases;
- Husband's banishment;
- Husband becoming dangerous to the wife's life;
- Husband ex-communicated;
- Husband having become impotent.<sup>47</sup>

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<sup>44</sup> R.K. Agarwala- Hindu Law, 21<sup>st</sup> Edn. 2003, p.73.

<sup>45</sup> Keshav v. Gandhi 39 Bom 588; cf: R.K. Agarwala- Hindu Law, 21<sup>st</sup> Edn. 2003, p.73.

<sup>46</sup> Thangamma v. Gangayammal (1945)1 MLJ 229; cf: R.K. Agarwala- Hindu Law, 21<sup>st</sup> Edn. 2003, p.73.

<sup>47</sup> U. P. D. Kesari- Modern Hindu Law, 8<sup>th</sup> Edn. 2011, p. 121-122.

Divorce in the ancient India can be understood by ancient Indian Sanskrit texts known as the Smriti, the texts that were traditionally handed down from generation to generation. These are as:<sup>48</sup>

**1. BRIHADA YAMA SMIRITI :**

In this Smriti, an extremely charitable think of the characteristic and congenital frailty of women has been provided. It provides that divorce can be obtained merely below the pursuing exceptional situation: "Garbhe-jate-paritya-go-nanyatha-yamabhashitam." In the opinion of Yama, a wife ought to be divorced if, as the consequence of her amour alongside one more, she conceives. Not below each supplementary condition should he counsel divorce. This is comparable to the guilt of adultery in present era. So this Smriti permits divorce below the guilt theory. It does not permit for divorce below each supplementary situation.

**2. BRIHADDHARITA SMIRITI:**

According to Brihaddharita, divorce is permitted below the pursuing circumstances. He writes: "Agnidam-Garadam-chandeem-Bhartrighneem-Lokaghatineem Himsaviharam-vanitam-tyaktva-papam-na-vindati." Sin will not be his, if an individual divorces a wife who is culpable of incendiarism, of attempted poisoning of children or husband, who is an awful termagant, who makes an endeavor on her husband's existence whichever single-handed or helped and abetted by a paramour, and a wife who is a horror to the finished globe, or who is so vicious as to ruin the chances of a husband for otherworldly welfare on report of her association alongside him. This will additionally come below the guilt theory whereas the wife is hazardous to the existence of the husband.

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<sup>48</sup> "Changes In The Ground Of Divorce In India" by Avinash Kumar Sharma

### **3. GAUTAMA SMIRITI :**

In the eighteenth chapter of the Dharma-Sutras, Gautama mentions to a woman lacking husband, and it should materialize by extremely forceful and unmistakable implication that Gautama allows a wife right to divorce her husband on the fields indicated in the acquainted stanza of Brihaspati-"Naste-Mrite-Pravrajite-klibe-chapatitepunah-Panchasvapatsu-Naree-nam-Patiranyo vidhiyate." If a husband unexpectedly disappears and all traces concerning his whereabouts are capitulated, if a husband ought to perish main and prematurely, if he runs away from residence to come to be an ascetic, if he ought to clarify to be impotent, and if he ought to plummet in communal and area estimation on report of vicious conduct like drinking, robbing, consorting alongside prostitutes, etc., the wife has a right to divorce him. Guilt theory is additionally present here.

### **4. VASHISTHA SMRITI:**

In the eighteenth chapter, Vashishta articulates of a form of divorce (stanzas 18-21): "Bharya-putrascha-sishyascha-sams-rishta-papakarmabhih-Paribhashya-parityajyah." Wife, son, and acolyte ought to be deserted after they are discovered to be culpable of sinful, vicious, and immoral conduct. Vashishta is affirmative and categorical concerning the fields of divorce whereas the erring party is the woman. He writes: "Treeni-striyah-patakani-loke- dharmavido-viduh- Bharturvadho- Bhrunahatya-Svasya-garbhasya-patanam." Endeavor to seize away her husband's existence, infanticide, and wrongly instigating abortions are the three sins that make a woman plummet, and the fallen woman ought to be abandoned. Infanticide implies adultery. Endeavor to seize away the husband's existence implies adultery. This can be seized as another example of guilt theory.

### **5. BODHYANA SMRITI:**

Bodhayana writes: "Aprajam-dasame-varshe-striprajam-dvadase - tyajet - Mritaprajam-panchadase-sadyastvapriyava-dineem." A wife who has no subject ought to be divorced in the tenth year afterward matrimony. A wife who gets merely female

children ought to be divorced in the twelfth year afterward marriage. One, who is unfortunate plenty to lose her children quickly afterward origin, ought to be deserted in the fifteenth year afterward marriage. This Smriti permits divorce below the obligation theory.<sup>49</sup>

Narada and Parashar codes of law provide that divorce can be permitted to wife in certain conditions of life. According to Narada, there are five conditions as under in which a woman could renounce her husband and choose another:

- Husband lost and unheard of for a period of 7 years;
- Husband be dead;
- Husband has renounced the world;
- Husband became impotent;
- Husband is ex-communicated.<sup>50</sup>

Under Shastric Hindu law, wedlock was unbreakable and the marital bond existed even after the death of a party to marriage. Divorce was known only as a matter of exception in certain tribes and communities which were regarded uncivilized by the Hindu elite. The courts recognized it in these communities due to the binding force of custom. But the general Hindu law did not recognize it.<sup>51</sup>

## **2.2 THEORIES OF DIVROCE**

### **1. OFFENCE OR GUILT THEORY OF DIVORCE-**

The offence theory was considered to be the most appropriate basis of divorce in the early law of England, commonwealth countries and in most states of the U.S.A. according to this theory, a marriage can only be dissolved only if one of the parties to

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<sup>49</sup> Changes in the ground of divorce in India by Avinash Kumar Sharma

<sup>50</sup> U. P. D. Kesari, Modern Hindu Law, 8<sup>th</sup> Edn. 2011, p. 121-122.

<sup>51</sup> Swarajya Lakshmi v. Padma Rao AIR 1974 SC 165.

marriage, has after solemnization of the marriage, committed some matrimonial offences. The offence must be one that is recognized as a ground of divorce. This implies that the parties, though free to enter into wedlock, are not equally free to get out of it. The marriage could be dissolved only on certain grounds that are prescribed by the law. The guilt theory, on one hand, implies, a guilty party, i.e., commission of matrimonial offence on the part of one of the parties to the marriage, and, on the other hand, it implies that the other party is innocent, i.e., in no way a party to, or responsible for, the offence of the guilty party.

Originally, the HINDU MARRIAGE ACT incorporated the guilt or fault theory, and lay down that there must be a guilty party and an innocent party. The Act had a conservative stance. The entire three traditional faults grounds i.e. adultery, cruelty and desertation, were made the grounds of judicial separation and not of divorce. Under Section 13, nine grounds of divorce were recognized both for husband and the wife. The amending Act of 1976 has made cruelty, adultery and desertation as fault grounds of divorce.<sup>52</sup>

## **2. CONSENT THEORY OF DIVORCE-**

As against the guilt theory, there has been advocated the theory of free divorce or the consent theory of divorce. The characters of this theory are of the view that parties to marriage are as free to dissolve a marriage as they are to enter it. If marriages is a contract based on the free volition of parties, the parties should have equal freedom to dissolve it. In this the argument is that it may happen that two parties who have entered into a marriage with free consent, may, later on, realize that they made a mistake, and, for one reason or another, are finding it difficult to pull on together smoothly and to live together harmoniously. Thus, it is argued, that freedom of marriage implies freedom of divorce. Protagonists of the consent theory maintained that the freedom of divorce will neither lead to chaos nor to immorality.

In the words of Tillet:

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<sup>52</sup>Paras Diwan & Peeyushi Diwan, Modern Hindu Law, 21<sup>st</sup> Edn. 2012, p. 68-70.

*“No deductions about the standard of morality in any country can be drawn from the fact that they recognize divorce by mutual consent, except, perhaps, to refute the charge that divorce by mutual agreement necessarily means widespread license or immorality.”*<sup>53</sup>

The advocate of the theory holds that the freedom of divorce will bring about more happy marriages. It will help both the husband and the wife to live in harmony and consolidate the unity of the family, so that they may fully engage in their career. Soon after the revolution, the Soviet Union introduced this theory in the family law. In the People’s Republic of China, Belgium, Norway, Sweden, Japan, Portugal and in some Latin American States divorce by mutual consent was recognized in one form or the other. In India, the SPECIAL MARRIAGE ACT, 1954, and the HINDU MARRIAGE ACT, 1955(after the amendment of 1976) recognize divorce by mutual consent.<sup>54</sup>

### **3. IRRETRIEVABLE BREAKDOWN OF MARRIAGE THEORY OF DIVORCE:**

In such theory of divorce, the law recognizes the situation wherein the marriage has broken down irretrievably and in effect asks the parties to satisfy the court that marriage has been broken and the parties desire to terminate such a situation that has become intolerable then the marriage shall be dissolved, whatever may be the cause. In the contemporary society, the irretrievable breakdown of marriage theory is recognized by the laws of many countries.

In the Mortimer Committee’s report, the breakdown of marriage has been defined as:

*“Such failure in the matrimonial relationship or such circumstances adverse to that relation that no reasonable probability remain for the spouses again living together as husband and the wife.”*

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<sup>53</sup> Law and the People, 157

<sup>54</sup>Paras Diwan & Peeyushi Diwan, Modern Hindu Law, 21<sup>st</sup> Edn. 2012, p. 70-71.

In the opinion of the Committee if it is shown that the marriage has broken down completely, the marriage should be dissolved even if one of the parties to the marriage does not desire it.

In Hindu law, the breakdown theory has its own version. Under the HINDU MARRIAGE ACT, 1955 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 or more after passing of the decree for judicial separation.<sup>55</sup>

In this very form the breakdown grounds are recognized under the SPECIAL MARRIAGE ACT, 1954-76.<sup>56</sup> Thus, the breakdown theory was introduced into the Indian law by allowing both to so-called innocent and the guilt party.<sup>57</sup>

### **2.3 DIVORCE IN MODERN INDIA**

Under the general uncodified Hindu law divorce was not recognized; it was rather unknown to the old textual Hindu law of marriage. The reason is very simple that a marriage was an indissoluble tie between the husband and the wife. Divorce was thus not recognized unless it was allowed by the custom. Under Shastric Hindu law, wedlock was unbreakable and the marital bond existed even after the death of a party to marriage.<sup>58</sup>

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<sup>55</sup> Section 13(1A).

<sup>56</sup> Section 27(2), Special Marriage Act, 1954. *Nilesh Narin Rajesh Lal v. Kashmira*, AIR 2010 Guj. 3

<sup>57</sup> Paras Diwan & Peeyushi Diwan, *Modern Hindu Law*, 21<sup>st</sup> Edn. 2012, p. 70-74.

<sup>58</sup> B.M. Gandhi, *Hindu Law*, 2<sup>nd</sup> Edn. 2003, p. 246.

Divorce was known only as a matter of exception in certain tribes and communities which were regarded uncivilized by the Hindu elite. The courts recognized it in these communities due to the binding force of custom. But the general Hindu law did not recognize it.<sup>59</sup>

Divorce is the golden key to the legal cage of marriage. The term 'divorce' comes from the Latin word 'divortium' this means 'to turn aside', 'to separate'. Divorce is the legal cessation of a matrimonial bond<sup>60</sup> and thus refers to a situation where a man and wife no longer remain so due to a number of possible reasons, acceptable in law as grounds for divorce.

According to Derret:<sup>61</sup>

*“Generally regarded themselves as hamstrung in matters of marriage and divorce....Times have changed....and we find the judges protesting that these are not the days of Manu and other Rishis and that what the latter had to say does not obtain as law to-day”*

Derret also remarks:<sup>62</sup>

*“Divorce was introduced into Hindu Law for the protection of helpless women when they were ill-treated. It was never Parliament’s intention to give husbands matrimonial variety at their option so long as they could retain a pleader.”*

Divorce is the legal cessation of a matrimonial bond. Divorce puts the marriage to an end, and the parties revert back to their unmarried status and are once again free to marry.<sup>63</sup> All rights and mutual obligations of husband and wife ceases. In other words, after a decree of dissolution of marriage, the marriage comes to an end and the parties cease to be husband and wife, and are free to go their own ways. There remain no

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<sup>59</sup> Swarajya Lakshmi v. Padma Rao AIR 1974 SC 165

<sup>60</sup> Kusum, Family Law Lectures, Family Law 1 (2003).

<sup>61</sup> J. Duncan M. Derrett, “ The Death of a Marriage Law: Epitaph for the Rishis” (1978) at 89-91

<sup>62</sup> J. Duncan M. Derrett, A Critique of Modern Hindu Law, (1970) at 329 referring to importance of reconciliation proceedings in matrimonial cases.

<sup>63</sup> Paras Diwan- Modern Hindu Law, 18<sup>th</sup> Edn. 2007.

bonds between them except in relation to Section 25<sup>64</sup> and Section 26<sup>65</sup> of HINDU MARRIAGE ACT, 1955.

In modern India the divorce starts with the Indian divorce Act, 1869. It governed only the Christians by the limit that was given to the act by section 2 of the act.<sup>66</sup> Dissolution of marriage under this act is covered in the section 10.<sup>67</sup> Under this act a male can file a divorce petition only on the ground that the wife has been guilty of adultery. A female could file a divorce petition if the husband had changed his religion or he was guilty of adultery, bigamy, sodomy or rape. The HINDU MARRIAGE ACT, 1955 permitted divorce to all the Hindus on certain reasonable grounds. Perhaps this permission was given for the first time in the history of Hindu law. The Act of 1955 also saved the customs and special legislation granting the dissolution of marriage before its time.

Section 13 of the HINDU MARRIAGE ACT, 1955<sup>68</sup>, recognizes all the three theories of divorce, and divorce can be obtained on the basis of any one of them. **Section 13(1)** contains nine fault grounds on which either the husband or the wife, in respect of a marriage solemnized before or after the commencement of this Act, could seek divorce. **Section 13(2)** provides four additional fault grounds to the wife. **Section 13(1A)** recognizes two grounds of breakdown of marriage which was inserted by the 1964 Amendment Act. **Section 13 B** which recognizes divorce by mutual consent was introduced by the 1976 Amendment Act.

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<sup>64</sup> Ibid, 40

<sup>65</sup> Ibid, 41

<sup>66</sup> Extent of power to grant relief generally,-[Nothing hereinafter contained shall authorize any Court to grant any relief under this Act except where the petitioner [or respondent] professes the Christian religion,

<sup>67</sup> When husband may petition for dissolution:

-Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution:

-Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman; or has been guilty of incestuous adultery, or of bigamy with adultery

<sup>68</sup> Divorce.

Section 13 of HINDU MARRIAGE ACT, 1955 therefore introduces a vital and dynamic change in the marriage law of Hindus. Section 13 of the HINDU MARRIAGE ACT, 1955 has introduced a revolutionary amendment to the Shastric Hindu law. Under the Hindu law, divorce does not take place unless it has been granted by a court. The HINDU MARRIAGE ACT, 1955 permitted divorce to all the Hindus on certain reasonable grounds. Perhaps this permission was given for the first time in the history of Hindu law. The Act of 1955 also saved the customs and special legislation granting the dissolution of marriage before its time.

### 3. EVOLUTION OF DIVORCE LAWS IN INDIA

The modern matrimonial law in India has been greatly influenced by and based upon English matrimonial law. In England, the MATRIMONIAL CAUSES ACT, 1857 for the first time permitted divorce by judicial process. Before 1857, divorce could be obtained only by a private Act of parliament and only very rich could afford this luxury. Under the Act, the husband could file a petition for divorce on the ground of wife's adultery (single act was enough), but a wife had to prove adultery coupled with either incest, bigamy, cruelty or two years desertion or alternatively, rape or any other unnatural offence. This was the typical mid-Victorian attitude to sexual morality.<sup>69</sup>

The MATRIMONIAL CAUSES ACT, 1923 put both spouses at par and wife could also sue for divorce on the ground of adultery simpliciter. The MATRIMONIAL CAUSES ACT, 1937 added three more grounds; cruelty, three years desertion and supervening incurable insanity. After the Second World War, a movement developed for the reform of divorce law which accepts the breakdown of marriage as the basic principle of divorce. Later, the MATRIMONIAL CAUSES ACT, 1973 was passed which is a consolidating statute and retains the breakdown of marriage as the basic ground of divorce.

The Indian matrimonial law has closely followed the development in English law. The Converts Marriage Dissolution Act, 1866 was passed to provide facility of divorce to those native converts to Christianity whose spouses refused to cohabit with them on account of their conversion. Divorce was not unknown to Hindus before the HINDU MARRIAGE ACT. Customary law had recognized divorce.

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<sup>69</sup> Paras Diwan- Family Law, 6th Edn. 2001, p.124.

There were also provisional enactments enforced in some provinces which permitted divorce in specific purposes.

Even in our ancient texts there is often cited revolutionary verse in parasara which reads as:

“Another husband is ordained for the women in five calamities, namely when the husband is dead, is lost has become a sanyasi, is impotent or has fallen.”

This verse did not find any acceptance in the literal sense, the judicial decision in Anglo Hindu law, Courts refused to recognize divorce except on the basis of custom or specific legislation<sup>70</sup> and Marriage was regarded as indissoluble.

The concept of divorce was introduced in India in the latter part of the 19<sup>th</sup> century with the INDIAN DIVORCE ACT of 1869 being the first legislation to recognize divorce. The Indian Divorce Act, 1869 is based on the MATRIMONIAL CAUSES ACT, 1857 and lays down the same grounds of divorce. At the time when the statute was passed, it applied only to Christian marriages. The INDIAN DIVORCE ACT was extended to marriages performed under the SPECIAL MARRIAGE ACT 1872. This Act was repealed by the SPECIAL MARRIAGE ACT, 1954. The SPECIAL MARRIAGE ACT was passed in 1954 and the HINDU MARRIAGE ACT, 1955.<sup>71</sup> Baroda was the first Indian state to introduce divorce for all Hindus by legislation in 1931.<sup>72</sup> Some States introduced divorce by legislation.<sup>73</sup> These acts (acts enacted by the States) were repealed by Section 30 of the HINDU MARRIAGE ACT of 1955.

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<sup>70</sup> Kudomeo v. Joteeram (1877) I.L.R. 3. Cal. 305

<sup>71</sup> Paras Diwan- Family Law, 6th Edn. 2001, p.124.

<sup>72</sup> Baroda Hindu Divorce Act, 1931, referred to in Report of Hindu Law Committee (1947), page 27, para 109, 110.

<sup>73</sup> Bombay Hindu Divorce Act, 1947; Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 Saurashtra Hindu Divorce Act, 1952

The HINDU MARRIAGE ACT, 1955 introduced divorce for all Hindus throughout the territories to which the act extended and on specifically enumerated grounds. Section 13 of the HINDU MARRIAGE ACT, 1955 has introduced a revolutionary amendment to the Shastric Hindu law. It provides for the dissolution of marriage. Under the Hindu law, divorce does not take place unless it has been granted by a court. Before passing of the Marriage Laws (Amendment) Act, 1976, the grounds for judicial separation and divorce were different. The Marriage Laws (Amendment) Act, 1976 makes the grounds of divorce and judicial separation common. An aggrieved party may sue for divorce or judicial separation.

In 1964, Section 13 (1-A) has been inserted containing 2 clauses under which, non-resumption of cohabitation for 2 years or upwards after the decree of judicial separation or restitution of conjugal rights was made a ground of divorce. This is a modification of clauses (viii) and (ix) of Section 13 of the HINDU MARRIAGE ACT, 1955. After the amendment, either party to the marriage can prefer such petitions. However, this facility is not available to the cases where the decrees of judicial separation and restitution of conjugal rights were obtained prior to the passing of the Amendment of 1964. The Marriage Laws (Amendment) Act, 1976 reduced the time limits from two years to one year. Section 13 (1-A) introduced Break-down theory in the HINDU MARRIAGE ACT, 1955.

The HINDU MARRIAGE ACT, 1955 permitted divorce to all the Hindus on certain reasonable grounds. Perhaps this permission was given for the first time in the history of Hindu law. The Act of 1955 also saved the customs and special legislation granting the dissolution of marriage before its time.

## 4. DIVORCE BY MUTUAL CONSENT

### 4.1 INTRODUCTION

Fault or ground- based matrimonial litigation is time- consuming and expensive. It also involves a lot of mud-slinging thereby further embittering the relationships and thwarting prospects of amicable resolution of ancillary issues like maintenance, child-custody/ visitation and, so on. Prior to 1976, the only Indian statute which had a provision of divorce by mutual consent was the SPECIAL MARRIAGE ACT, 1954. Persons married or registered under the Act could get their marriage dissolved by mutual consent.<sup>74</sup> After the SPECIAL MARRIAGE ACT, 1954, Section 13-B of HINDU MARRIAGE ACT of 1955 introduces a revolutionary concept of “divorce by mutual consent” which is retrospective in nature so as to make it applicable to marriages whether solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976.<sup>75</sup>

Divorce by mutual consent is based on the consent theory of divorce, also known as the doctrine of ‘No Fault’ divorce. The ‘no fault’ theory of divorce is based on the fact that marriages very often fail not because of the fault or guilt of one of the spouses but because the spouses are not compatible in their temperament. Despite their best efforts, they are unable to live together as husband and the wife. Before the introduction of the theory of ‘no fault divorce’, the only avenue open to such a couple was to fabricate a fault ground where one spouse accuses the other of a matrimonial fault and the other does not contests it. This is termed as a ‘collusive’ decree and is

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<sup>74</sup> Kusum, Family Law Lectures, Family Law 1 (2003), p. 153.

<sup>75</sup> Ibid, 77

prohibited under the matrimonial statutes. To remedy the problem faced by such couples, the notion of a 'consent divorce' came to be included in matrimonial laws. The purpose was to enable couples to adopt honest rather than fraudulent or collusive means to achieve legitimate ends.<sup>76</sup>

The accord theory is a sharp departure from the sacramental believed of matrimony and brings matrimony to a level of an exclusively consensual contractual partnership. 'If spouses are free to go in into a matrimonial contract, they are equally free to remove from the contract of marriage' is the premise that laws they believed of 'consent divorce'.<sup>77</sup>

#### **4.2 EVOLUTION OF CONCEPT OF "DIVORCE BY MUTUAL CONSENT"**

After 7th century, lawful arrangements had adopted the accord theory of divorce. Quickly afterward the Bolshevik metamorphosis in 1917, the Soviet Coalition gave this theory in relations law. The parties were allowed to disappear their matrimony by a confidential deed, lacking recourse to a court of law. But because of the setbacks this examination crafted, in 1944, matrimonies might be disappeared merely alongside the interference of the courts. In 1920, in New Zealand, Serving 4 of the Divorce and Matrimonial Reasons Correction Act, 1920 provided the court the prudence to grant a administrating of divorce to the parties after they had separated for three years below a administrating of legal separation or separation order by the Magistrate or below a deed of separation or even by 'mutual consent'. Till such amendment, divorce after separation by parties on' mutual consent' was unknown under the common law tradition.<sup>78</sup>

Thereafter, this notion spread to other countries like the People's Republic of China, Eastern European Countries, Belgium, Norway, Sweden and Latin America.<sup>79</sup> This

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<sup>76</sup> Flavia Agnes, Marriage, Divorce, and Matrimonial Litigation, Volume II, p. 49-50.

<sup>77</sup> Flavia Agnes, Marriage, Divorce, and Matrimonial Litigation, Volume II, p. 49-50.

<sup>78</sup> Smruti Pahariya v. Sanjay Pahariya, AIR 2009 SC 2840.

<sup>79</sup> Diwan 1988: 36

ground was accepted under the English law in 1963 through an amendment to the MATRIMONIAL CAUSES ACT, 1950 by removing the absolute bar on collusion.<sup>80</sup>

In 1954, the SPECIAL MARRIAGE ACT (SMA) incorporated this ground, but the HINDU MARRIAGE ACT (HMA), enacted a year later, did not provide for it. This is because the SMA which provided for a civil marriage between persons belonging to any community, religion, nationality, or domicile was perceived to be for the benefit of the educated, sophisticated, and enlightened urban-based elites, whereas the HMA was meant for the vast Hindu masses who might not accept this form of divorce.<sup>81</sup>

Urging the government to incorporate this provision in Hindu law, Khanna C.J. speaking for the full bench in Ram Kali v. Gopal Dass<sup>82</sup> commented on the inadequacy of the existing divorce law in the following words:

*“It would be unreasonable and inhuman, to compel the parties to keep up the façade of marriage even though the rift between them is complete and there are no prospects of their ever living together as husband and wife.”*

Accordingly in 1976, the HINDU MARRIAGE ACT was amended and the provision of divorce by mutual consent was included as a ground under Section 13B of the Act. This ground is now incorporated into most marriage laws as a progressive step to end incompatible or acrimonious relationships.<sup>83</sup>

#### **4.3 LEGAL POSITION UNDER SPECIAL MARRIAGE ACT, 1954 AND HINDU MARRIAGE ACT, 1955.**

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<sup>80</sup> Ibid, 80

<sup>81</sup> Diwan and Diwan 1997:10

<sup>82</sup> 1971 RLR 10

<sup>83</sup> Flavia Agnes, Marriage, Divorce, and Matrimonial Litigation, Volume II, p. 50.

The legal position as regards divorce by mutual consent under the SPECIAL MARRIAGE ACT, 1954 and the HINDU MARRIAGE ACT, 1955 is discussed as below:<sup>84</sup>

### 1. SPECIAL MARRIAGE ACT, 1954

Section 28 of the Act reads as under<sup>85</sup>:

**S. 28. Divorce by mutual consent.**-(1) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court by both the parties together on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months<sup>86</sup> after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the district court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized under this Act, and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of the decree.

Section 34(1) (c)<sup>87</sup> further provides that when divorce is sought on the ground of mutual consent, the court has to satisfy itself that such consent has not been obtained by force, fraud or undue influence.

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<sup>84</sup> Professor Kusum, Family Law-1, 3<sup>rd</sup> Edn. P. 153- 154.

<sup>85</sup> Divorce by Mutual Consent.- 1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

<sup>86</sup> Prior to the 1976 Amendment Act, this period was one year minimum and two years maximum respectively.

<sup>87</sup> Duty of court in passing decrees.

In order to get relief under the provisions of this Act, it is mandatory that the marriage should either have been performed under the provisions of this Act, or registered thereunder. In *Reynold Rajamani v. Union of India*<sup>88</sup>, where the parties were married under the Indian Christian Marriage Act, 1872, and their petition for divorce by mutual consent under S. 28 of the SPECIAL MARRIAGE ACT, 1954 was dismissed, the court held that the ground could not be availed of by the parties, as they were governed by the Indian Divorce Act, 1869 which did not provide for divorce by mutual consent.

## 2. HINDU MARRIAGE ACT, 1955:

The ground of divorce by mutual consent was inserted in the HINDU MARRIAGE ACT, 1955 by an Amendment in 1976, by adding s. 13B.<sup>89</sup> The section states:

**S. 13B Divorce by mutual consent.**- (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976) on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

Section 13B(2) cautions the Courts of it duty to fight the last ditch battle to save the marriage, but when the Court is fully satisfied on the basis of the proved facts, that in

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<sup>88</sup> AIR 1982 SC 1261 : (1982) 2 SCC 474.

<sup>89</sup> Divorce by mutual consent.

the interest of justice, of the society and the individuals, marriage tie should be put to an end immediately. The section does not impose any fetter on the powers of the Court to grant instant decree of divorce. Therefore, the time table fixed by the section 13 B (2) does not apply to an Appellate Court.<sup>90</sup>

In *Yamanaji H. Jadhav v. Nirmala*,<sup>91</sup> the Supreme court has observed that the customary divorce by mutual consent is not recognizable by a court unless specifically permitted by law because in personal law customary divorce being an exception to the general law of divorce, ought to have been pleaded and established by party propounding such customs.<sup>92</sup>

#### **4.4 ESSENTIAL REQUIREMENTS FOR DIVORCE BY MUTUAL CONSENT**

The requirements which have to be complied with under this provision (Section 13 B) thus are:

1. The parties together should present a petition to the court;<sup>93</sup>
2. The parties should wait for at least six months from the date they present a petition;<sup>94</sup>
3. The parties may withdraw their petition during this time;
4. Before the expiry of eighteen months they together should make a motion to the court for passing a decree;
5. After due inquiries the court shall pass a decree.

The grounds on which a petition can be filed are:

6. The parties have been living separately for a period of at least one year;
7. The parties have not been able to live together;
8. They have mutually agreed to have the marriage dissolved;<sup>95</sup>

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<sup>90</sup> Ms. Anita Sharma v. Neel, 119 (2005) DLT 483 (Delhi.)

<sup>91</sup> AIR 2002 SC 971

<sup>92</sup> U. P.D. Kesari, Modern Hindu Law, 8<sup>th</sup> Edn. 2011, p. 151-152.

<sup>93</sup> Section 13-B(1) of the HINDU MARRIAGE ACT, 1955.

<sup>94</sup> Sailaya, in re, AIR 1995 AP 325.

It is not necessary that parties should be living under separate roofs. They might be living in the same house but not as husband and wife.<sup>96</sup> “They have not been able to live together” means that there is a state of complete breakdown of marriage. Where husband and the wife were living separate for a period of more than one year and not able to live together and they were mutually agreeing to dissolve the marriage, it was held all ingredients of the section are fulfilled.<sup>97</sup>

At the outset it may be pointed out that petition under this section can be filed only by the spouses. When both the parties are well educated and mature, the father of either party has no *locus standi* or right to be impleaded as a party in such matrimonial petitions unless the spouses or any of them is a minor or of unsound mind.<sup>98</sup>

The Karnataka High Court in ***Krishna Murthi Rao v. Kamalashi***,<sup>99</sup> observed that on filing a petition jointly by the wife and husband the following facts must be proved for getting a decree under the section-

- The parties to marriage are living separately for a period of one year or more;
- They could not live together;
- They have reached a compromise that they would dissolve the marriage; and
- That they have consented to divorce not under any force or fraud or under undue influence. The court should specifically take into consideration that the wife’s consent has not been taken by force or fraud or by influencing her. The responsibility of the court increases in those cases where the wife is found to be illiterate.

Compliance of these requirements is compulsory under the provisions of this Act. In ***Munesh v. Anasumyamma***,<sup>100</sup> a husband’s petition for divorce on the ground of desertation was dismissed as he could not prove the ground. However, pending appeal, a petition for divorce in terms of compromise recorded under O.23, R. 3 of the

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<sup>95</sup> *Girija v. Vijay*, 1995 Ker 159.

<sup>96</sup> *Sureshta Devi v. Om Prakash*, 1992 SC 1904

<sup>97</sup> *In re K. S. Subramanian and anr.*, 2002 Mad. 228.

<sup>98</sup> *Ranjana Munshi v. Taral Munshi*, (1955) 2 DMC 581 (MP); (1996) 1 HLR 130 (MP).

<sup>99</sup> AIR 1983 Karn 235.

<sup>100</sup> AIR 2001 Kant 355; ILR 2001 KAR 3459

code of Civil Procedure, 1908,<sup>101</sup> was filed. This compromise petition simply stated that since the litigation has been continuing for more than 15 years and the marriage itself is dead, both the parties have arrived at a compromise for separation. The court held that such agreement is not lawful, and no decree for divorce can be granted. It remarked: ‘such compromise runs against the scheme of provisions of Section 13<sup>102</sup> and Section 13 B<sup>103</sup> of the HINDU MARRIAGE ACT, 1955 and renders nugatory provisions of the Act.’

Under cl. (2) of s.13 B, if the petition is not kept, next, on the gesture of the parties, made not preceding than six months afterward the date of the petition and not afterward than eighteen months afterward this date, the court shall continue alongside it. Before bypassing a divorce administrating the court has to gratify itself afterward hearing both the parties and making requisite asks that averments made in the petition are true. It is merely afterward such satisfaction that a administrating of divorce by public accord could be passes. <sup>104</sup>

Hearing of the parties as contemplated under s. 13B (2) cannot be taken as mandatory; it is not necessary on the part of the court to personally hear the parties even if the circumstances do not indicate such necessity. Thus in Miloo Mishra Mohapatra v. A. K. Mohapatra <sup>105</sup>, where the husband was in the U.S. and the parties filed affidavits and all statutory formalities had been adhered to, the court, in appeal, held that the trial court could act upon their affidavits and proceed with the case.

Apart from this, s. 23(1) (bb)<sup>106</sup> further provides that in such petition, the court must satisfy itself that consent has not been obtained by force, fraud or undue influence. In situations where the awareness level may not be high, divorce by mutual consent could be a dangerous proposition. Hence, to rule out any doubts or malpractices, the court is required to record the findings so as to its satisfaction that the averments in the petition are true. Mere fact that in a petition for mutual divorce the parties

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<sup>101</sup> Compromise of suit.

<sup>102</sup> Divorce

<sup>103</sup> Divorce by mutual consent.

<sup>104</sup> Professor Kusum, Family Law-1, 3<sup>rd</sup> Edn. P. 154-155.

<sup>105</sup> (2010) 1 DMC 615 (Ori).

<sup>106</sup> Decree in proceedings

appeared before the court twice is no absolute proof of absence of any force, fraud or undue influence.<sup>107</sup>

The ability below Serving 13 B has been made extremely logically and prudently worded. The believed behind enabling parties to attain a divorce by accord is that whereas the matrimony is not useful and both the parties are convinced of this fact the regulation ought to come to their assistance and permit the matrimony to be lawfully dissolved.

Though, impulsive and hasty decisions are pursued to be checked by bestowing inbuilt safeguards, as remarked above i.e., distinct living for at least a year and a period gap amid the early gesture and the subsequent motion. The subsequent gesture cannot be filed preceding than six months afterward the early petition. It is a cooling off era, whereas parties become period to rethink. They are at the freedom to remove the petition amid these six months and eighteen months. As the rationale amid the minimum eras of six months is to furnish period to the parties for circumspection, the beyond period check of eighteen months has been endowed so that the matter does not linger on indefinitely.<sup>108</sup>

#### **4.5 IMMATERIALITY OF EXTRANOEUOS CONSDIERATIONS**

In petitions under this section, court is only concerned with voluntariness and free consent and not with other extraneous considerations. **K.S. Subramaniam v. Vasantha Devi**<sup>109</sup> is an interesting case in this context. The parties were married for over forty years with a son aged 39 years and a daughter aged 31, both married and settled abroad. They (the parties) were both pensioners with no liability towards each other and allegedly had serious irreconcilable differences. They sought a divorce by mutual consent. The trial court dismissed the petition as it was noticed that both of them were chatting with each other prior to their evidence. On this basis the court suspended their bona fides. The parties thereupon filed a revision under Article 227 of

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<sup>107</sup> Sushma Taksande v. Pramod taksande, AIR 2009 Bom 111: (2009) 3 Bom CR 753.

<sup>108</sup> Professor Kusum, Family Law-1, 3<sup>rd</sup> Edn. , p. 154-155.

<sup>109</sup> AIR 2002 Mad. 228

the constitution which was allowed. According to High Court, whatever may be the reasons, physiological or otherwise, it stands established that the parties have not been able to live together and all requirements of 13 (B) (1) were satisfied.<sup>110</sup>

#### **4.6 MARRIAGE REGISTRATION CERTIFICATE MANDATORY OR NOT?**

Marriage Registration Certificate cannot be insisted upon as a pre-condition for entertaining a petition for divorce by mutual consent. In the case of V. G. Rajilal v. State of Kerala<sup>111</sup>, where after the enactment of Kerala Registration of Marriages (Common) Rules, 2008, all marriages solemnized in the state are required to be registered. The Rules are prospective and there is no stipulation neither in the Rules nor in the HINDU MARRIAGE ACT, 1955 that petitioners have to produce a marriage certificate as a pre-condition for a petition under s. 13B. It was held that the court had no jurisdiction to insist upon a marriage certificate.<sup>112</sup>

#### **4.7 WAIVER OF ONE YEAR SEPARATION-**

As to whether the statutory period of one year separation before filing of a petition by mutual consent could be waived, the Karnataka High Court<sup>113</sup> held in the affirmative. The husband was employed in England and the wife in India; there were no chances of their reunion. The court held that there was no reason as to why they should not be relieved from the matrimonial bondage. Both are highly educated and the only hope is a divorce by mutual consent to enable them to rearrange their life matrimonially and career-wise. The relevant considerations before granting the exemption are:

- Maturity and comprehension of spouses;
- Absence of coercion/ intimidation/ undue influence;

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<sup>110</sup> Professor Kusum, Family Law-1, 3<sup>rd</sup> Edn., p. 155-156.

<sup>111</sup> AIR 2010 Ker 146

<sup>112</sup> Professor Kusum, Family Law-1, 3<sup>rd</sup> Edn., p. 156.

<sup>113</sup> *Sweety E.M. v. Sunil Kumar*, AIR 2008 Kant 1: (2007) 6 Kar LJ 244

- Duration of the marriage;
- Absence of possibility of reconciliation
- Lack of frivolity;
- Lack of misrepresentation or concealment;
- Age of spouses and deleterious effect of continuation of a sterile marriage on the prospects of remarriage.

The case was remanded to trial court for further necessary action. It is submitted that once the case is remanded, the period of separation would in all probability exceed the one year statutory requirement sought to be waived.

In *Ms. Priya v. Sanjay Gaba*<sup>114</sup>, the parties were only two months short of the statutory period of one year, the parents of the girl had arranged a match for her and the boy was going abroad. Their request for waiver of two months period on the plea that if this period is not waived it would cause great hardship, was granted. The trial court had rejected the plea but the same was granted on appeal by the High Court which observed that there is no point in making the parties wait for another two months when all issues between them had been settled. The court observed<sup>115</sup> that the power of waiver of any statutory period vests only in the Supreme Court in exercise of its special jurisdiction under Article 142 of the Constitution.

The constitutional vires of Section 13B of HINDU MARRIAGE ACT, 1955, was challenged in *Miten v. Union of India*.<sup>116</sup> It was argued that the period of one year separation is unconstitutional, arbitrary and tantamount to artificial classification which is impermissible and such condition is contrary to the object sought to be achieved and the pre-condition of one year separate living as contemplated by Section 13 B, and that it was unreasonable and caused a lot of hardship and inconvenience which has the effect of interfering with the fundamental freedom guaranteed under the Constitution. The parties in this case had been married for hardly six months. The family court rejected the petition for mutual consent divorce. The petitioners

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<sup>114</sup> (2004) I HLR 640: 2004 (109) DLT 825

<sup>115</sup> Anil Kumar Jain v. Maya Jain, AIR 2010 SC 229 : (2009) 10 SCC 415

<sup>116</sup> (2009) I DMC 93 (Bom-DB).

thereupon, filed a writ petition on the ground that the reasons recorded by the family court for rejecting their petition were unconstitutional. By a very detailed judgement, the court dismissed the petition. The following observations are significant:

*“The School of thought advocating instant dissolution of marriage on the pretext of social freedom has obviously not found favor with the legislature. There is no justification for the court to grant such a meaning to the provisions of the Section. (p 109)*

In this context ***Saumya Ann Thomas v. Union of India***,<sup>117</sup> is a very significant judgment under S. 10A (1)<sup>118</sup> of the Indian Divorce Act, 1869. The period of separation required for filing of a divorce petition by mutual consent is two years under this Act. This was challenged as being arbitrary, and ultra vires article 14 and 21 of the Constitution of India. While the separation period under other personal law is one year, the two year period under the Indian Divorce Act, 1869 infringes the right to equality of those governed by this Act; and further, the prolonged waiting period only brings agony and unhappiness in their life of the spouses. After having analyzed the facts in great details, the court came to the conclusion that the stipulation of the higher period of two years of separation indeed offends the mandate of equality and right to life under articles 14<sup>119</sup> and 21<sup>120</sup> of the Constitution. In order “to avoid the vice of unconstitutionality” the court resorted to the principle of severability and held that the stipulation of two years can be read down to one year. Thus “the stipulation in section 10 A (i) of the Indian Divorce act, 1869 that the parties have been living separately for a period of two years or more” was declared to be unconstitutional.

#### **4.8 WAITING PERIOD BETWEEN TWO MOTIONS: Whether MANDATORY OR NOT?**

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<sup>117</sup> (2010) II DMC 526 (Ker- DB)

<sup>118</sup> Dissolution of marriage by mutual consent.

<sup>119</sup> Equality before Law

<sup>120</sup> Protection of life and personal liberty

There have been conflicting judgements on this regard that whether the courts should mandatorily wait for a period of six months as given in the sub section (2) of Section 13BA reference may be made to a few cases on the point which indicate that the courts are inclined to dispense with the waiting period if the circumstances of the case demand so. In Re, Gandhi Venkata Chitti Abbai,<sup>121</sup>, criminal proceedings under s. 498 A of the Indian Penal Code,<sup>122</sup> 1860 and maintenance proceedings under s. 125 of Code of Criminal Procedure, 1973<sup>123</sup> were already pending. On the intervention of the village elders and friends, the parties agreed to obtain a divorce by consent. Under the terms of the compromise, the maintenance settled was [payable to the wife only after the divorce. She, therefore, filed an application before the senior sub-judge for proponent of the divorce. The same was rejected. Hence the appeal. The High Court held that there was no possibility of revival of marriage in this case. It observed:

*“Having liberated the process of divorce by mutual consent..... It will not serve any purpose in directing the parties to continue the agony for six more months.”*<sup>124</sup>

And further:

*“If Section 13B (2) is read as mandatory, the very purpose of liberalizing the policy of decree of divorce by mutual consent will be frustrated more so when the parties started living separately for a considerable time. Thus s. 13B (2) though is mandatory in form is directory in substance. Hence the argument that the period of six months for the second motion cannot at all be waived is not sustainable in law.”*

In this context the following observations of the court in Om Prakash v. Nalini,<sup>125</sup> may also be referred:

*“The great Telegu poet Vemana said that the broken iron can be joined together but not broken hearts. Parties have been living apart and their wedlock has now virtually*

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<sup>121</sup> AIR 1999 AP 91

<sup>122</sup> Husband or relative of husband of a woman subjecting her to cruelty- Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

<sup>123</sup> Order for maintenance of wives, children and parents

<sup>124</sup> AIR 1999 AP 91

<sup>125</sup> AIR 1986 AP 167 at 170.

become a deadlock. Chances had completely faded away. In these circumstances we think it just and proper to grant decree of divorce straight away.”

In the **Gandhi Venkata Chitti Abbai**<sup>126</sup> case, the court observed that- “If Section 13-B (2) is read as mandatory, the very purpose of liberalizing the policy of decree of divorce by mutual consent will be frustrated more so when the parties started living separately for a considerable time. Thus s 13-B (2) though is mandatory in form is directory in substance. Likewise, in the case of **Dinesh Kumar Shukla v Neeta**,<sup>127</sup> it was held that the waiting period is directory in nature and it can be brought down from 6 months( provided the mandatory requirements of s 13-B (1) are fulfilled) when all efforts at reconciliation failed.

But, in the case of **Hitesh Narendra Doshi v Jesal Hitesh Joshi**,<sup>128</sup> it was held that “the provision has a definite purpose and object, i.e. giving time to the parties for introspection and reconciliation. That purpose and object stares at us so clearly by the language expressed in s 13-B (2) of the Act robbing away the right of the court from considering the petition earlier than six months.”

Likewise, in **Haresh Kumar Premshankar v. Harshaben Chhotulal**,<sup>129</sup> the parties had been residing separately for over 17 years and in the course of divorce proceedings filed by the husband, the parties agreed to a divorce by mutual consent. The Court, after making necessary financial arrangements for the wife, waived the waiting period and granted immediate divorce.

In **Manish Goel v. Rohini Goel**<sup>130</sup>, the parties filed simultaneous petitions, one under s. 12 for annulment and the other under s. 13B, at different forums. They also file an application for waiver of the six months statutory provision, which was turned down

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<sup>126</sup> AIR 1999 AP 91

<sup>127</sup> AIR 2005 MP 106

<sup>128</sup> AIR 2000 AP 364

<sup>129</sup> (1991) AIHC 4412: (2000) 1 GLR 515 (Guj.)

<sup>130</sup> AIR 2010 SC 1099

on the ground that the trial court was not competent to waive it and such waiver was permissible only under the directions of the Apex Court vide judgment in Anil Jain v. Maya Jain.<sup>131</sup>

The parties then straight went to the Supreme Court under Article 136 of the Constitution<sup>132</sup> as a matter of the right. Rejecting the same, the court held:

*“... It is an extraordinary jurisdiction vested by the Constitution in the court with implicit trust and faith and thus extra-ordinary care and caution has to be observed while exercising this jurisdiction. There is no vested right of a party.... Thus unless it is shown that exceptional and special circumstances exist that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity warranting review... such exercise should not be done. The power under Article 136 cannot be used to short circuit the legal procedure....”*

Also according to the court, the statutory period of six months for filing the second motion has been prescribed for providing the opportunity to parties to reconcile and withdraw the petition.

In the case of Ashok Hurra v Rupa Ashok,<sup>133</sup> it was held that “in exercise of its extraordinary powers under Article 142 of the Constitution, the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in s. 13-B of the Act. This doctrine of irretrievable break-down of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution<sup>134</sup>.”

Therefore, the courts have been inclined more towards waiving off this period if the circumstance of the case demands so and where there is no chance of reconciliation between the parties. Also, Supreme Court by way of its extraordinary powers as provided under Article 142 of the Indian Constitution can grant divorce without

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<sup>131</sup> 2009 (10) SCC 415

<sup>132</sup> Special Leave to appeal by the Supreme Court

<sup>133</sup> AIR 1997 SC

<sup>134</sup> Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.

waiting for 6 months if it is satisfied that the marriage is irretrievably broken down. However, this power is restricted only to Supreme Court. There is still uncertainty whether High Courts and Family Courts have to mandatorily wait for a period of 6 months. But as it is evident from many cases where there is no possibility of reconciliation between the parties and the marriage has been broken down irretrievably, the courts should follow the spirit of law more than the formal requirements of the section.<sup>135</sup>

It may be mentioned here that the Marriage Laws (Amendment) Bill, 2010 seeks to do away with this waiting period of six months.

Marriage Laws (Amendment) Bill, 2010 states:

At present, a petition for grant of a decree of divorce on the ground of mutual consent could be presented by both the parties to the marriage together before the court under sub-section (1) of section 13B of the HINDU MARRIAGE ACT, 1955 and similarly under sub-section (1) of section 28 of the SPECIAL MARRIAGE ACT, 1954. Under sub-section (2) of section 13B and that of section 28 respectively, the parties have to move a motion jointly not earlier than six months after the date of presentation of the petition referred in sub-section (1) and not later than eighteen months after the said date for the said purpose. It has been observed that in several cases one of the parties do not turn up for filing the motion jointly with the other party under sub-section (2) of section 13B of the HINDU MARRIAGE ACT, 1955 or under sub-section (2) of section 28 of the SPECIAL MARRIAGE ACT, 1954, as the case may be, leading the party desirous of obtaining a decree of divorce hapless and remediless. In order to mitigate such hardships and to allow divorce in cases of complete failure of such marriages, it is proposed to amend sub-section (2) of section 13B of the HINDU MARRIAGE ACT, 1955 and sub-section (2) of section 28 of the SPECIAL MARRIAGE ACT, 1954, respectively, by doing away with the aforesaid condition of moving motion subsequently.<sup>136</sup>

#### **4.9 WHETHER CONSENT CAN BE UNILATERALLY WITHDRAWN**

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<sup>135</sup> Professor Kusum, Family Law-1, 3<sup>rd</sup> Edn. , p. 160.

<sup>136</sup> THE MARRIAGE LAWS (AMENDMENT) BILL, 2010 by Shri M. Veerappa Moily, M.P.)

On this issue, there have been conflicting interpretations by the courts. There have been contrasting judgements on this issue. The controversy is that since under this section both parties have to file a joint petition for divorce how can one party unilaterally withdraw from it. Also, one of the purposes of giving a time period of six months is to allow parties to re-think their decision and if one of the party decides to withdraw from it, why should it not be allowed to do so.<sup>137</sup>

The majority of the High Courts were of the view that such consent can be rescinded and unilaterally withdrawn before the second joint motion.<sup>138</sup> The pother view was that once the consent was given, it was not open for any party to withdraw the same.<sup>139</sup> In view of *Sureshta Devi v. Om Prakash*,<sup>140</sup> wherein the Supreme Court held that consent is not irrevocable and may be withdrawn by any party at any time before the decree, the earlier cases have only academic significance. A brief reference may however, be made of two cases<sup>141</sup> where courts had held that consent once given cannot be withdrawn in order to indicate change in judicial attitudes.

In *Jayashree Ramesh Londhe v Ramesh Bhikaji*<sup>142</sup> the court held that once a joint petition by mutual consent was filed, no party could withdraw from it without the consent of both the parties. In *Jayashree v. Ramesh*, a wife filed a petition for divorce or, in the alternative, for judicial separation. Later, this was withdrawn and on the same day, a joint petition for divorce by mutual consent under s. 13B was filed. During the intervening period, the husband changed his mind and made an application to the District Court stating that he did not want to give divorce. His argument was that he was indecisive at the time of joint petition and released thereafter that they could live amicably. The wife however, was insistent on divorce. The District court, under these circumstances, refused to grant the decree. On appeal to the High Court, the main issue was whether a party to a joint divorce petition could withdraw his/ her consent. After analyzing the provisions of s. 13B of the HINDU MARRIAGE ACT of

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<sup>137</sup> Professor Kusum, Family Law-1, 3<sup>rd</sup> Edn. P. 163.

<sup>138</sup> Harcharan Kaur v. Nachhatar Singh, AIR 1998 P&H 27

<sup>139</sup> Jayashree v. Ramesh, AIR 1984 Bom 302

<sup>140</sup> AIR 1992 SC 1904 : (1991) 2 SCC 25

<sup>141</sup> Harcharan Kaur v. Nachhatar Singh, AIR 1998 P&H 27 and Jayashree v. Ramesh, AIR 1984 Bom 302

<sup>142</sup> AIR 1984 Bom 302

1955 and Or. 12 of the Code of Civil Procedure, 1908<sup>143</sup>, the court came to the conclusion that such a petition could not be withdrawn without the consent of both the parties. According to the Court, the crucial time for the consent under s. 13B was the time when the petition was filed. If the consent was free and not vitiated, it was not permissible for nay party to nullify the petition by withdrawing the consent. In view of this, the decree of divorce by consent was granted.

Likewise, in **Harcharan Kaur v. Nachhatar Singh**, the wife retracted her consent and the trial court dismissed the divorce petition. The High court allowed the husband's appeal against dismissal. The court remarked:<sup>144</sup>

*“If both the parties had voluntarily consented to file the petition for dissolving the marriage by mutual consent and all the other mentioned in sub-section (1) of Section 13 B of the Act are fulfilled, it will not be open to the party to withdrawal the consent”*

Thus, in both cases, the court held that the consent cannot be unilaterally withdrawn by any one party, and the crucial time for determining consent is the time when the initial petition is filed.

The Supreme Court has, however, set the matter at rest in **Sureshta Devi v. Om Prakash**,<sup>145</sup> by holding that the consent of both the parties should be there when they move the court for a divorce decree. Thus, if one of the parties withdraws consent there can be no decree under this section. This interpretation is in conformity with the objective behind the section which provides for an interregnum to enable the patties to reflect. It is a cooling off period. Counselling, introspection, passage of time and good offices of friends and relatives can at times b of great help in ironing out the differences. The initial joint application does not affect the marriage bond until they move the second joint motion. This is the legal position of which the parties are aware whatever be the desirability or genuine of the withdrawing party the statutory position

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<sup>143</sup> Rule 5 of this Order provides restriction on withdrawal of a petition or claim by one petitioner without the consent of each other

<sup>144</sup> AIR 1986 P& H, pp. 201-202

<sup>145</sup> AIR 1992 SC 1904: (1991) 2 SCC 25

which has been reinforced by the Supreme Court in the above case is that the consent of both the parties should subsists until the decree is passed.<sup>146</sup>

In *Rachna Jain v. Neeraj Jain*<sup>147</sup> where after all settlements were made pursuant to an agreement to dissolve the marriage by consent and thereafter the husband not only retracted but remarried the court took a very serious view. The Court, held that if the Husband's unilateral withdrawal were to be accepted, it would lead to an anomalous situation, where the wife would be left high and dry saddled with a dead marriage whereas the husband who has resorted to fraud enjoys his freedom and another marriage which is bigamous.

Reference may be made to a recent case from the Delhi High Court,<sup>148</sup> where contempt cases against wife's father has been initiated. To state the facts in brief, the wife had moved the Delhi High Court against her husband charging him with domestic violence. Her father filed the cases on her behalf because she was bedridden with multiple sclerosis. The couple presently lives in Germany. However, the wife, through her father informed the Delhi High Court Mediation Center that a divorce by mutual consent should be agreed upon for a sum of Rs. 12 lakhs. The husband, allegedly, deposited the amount with the registry if the High Court in March 2010 consequent to the settlement. However, on November, 1 the wife's father has stated that he was not willing to comply with the terms of agreement signed in March. This, according to the Court is willful violation of the terms of settlement. Notice for contempt proceeding has now been issued against the father of the wife for breach of undertaking given to the court.

Recent judgment of the Delhi High Court in *Satinder Pal Singh v. Daman Preet*<sup>149</sup> is very significant in this context. Initially it was a husband's divorce petition and the wife also filed an application for maintenance under s. 125 of Cr. P.C. and some criminal complaints against him. Later they agreed to proceed by mutual consent on

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<sup>146</sup> Kusum, "Matrimonial Adjudication under Hindu Law," in S. K. Verma and Kusum, Fifty Years of the Supreme Court, 2001, pp. 231-268; Kusum, 'Divorce by Mutual Consent,' Journal of Indian Law Institute, Vol 29, 1987, pp. 110-114.

<sup>147</sup> 2005 (2) HLR 725

<sup>148</sup> "HC orders contempt case against man", Hindustan Times, Nov. 18, 2010

<sup>149</sup> (2009) I DMC 196 (Del)

the husband paying her rupees eight lakhs and her with FIR's against him quashed. The husband also got a draft prepared and arranged for return of her stridana but the wife resiled. The court held that though it cannot force her to make a statement for divorce by mutual consent but looking at the tendency of using courts as tool to extract money, it thought it necessary to, give appropriate directions viz: her case under s. 125 would not proceed unless she abides by the compromise; FIR's pending against the husband would not proceed in terms of the compromise, and the court where divorce is pending would continue with the suit. Interim maintenance was also refused to her because of her tactics to extract more and more from the husband by changing advocates and resiling from the compromise.<sup>150</sup>

The law as explained in the *Sushreta Devi's*<sup>151</sup> case still holds well that is the parties can withdraw consent unilaterally. But Supreme Court using its power as provided under Article 142 of the Constitution can grant divorce even if the wife or husband withdraws its consent during the proceedings in the lower court and prior to the passing of the decree.

The position is thus clear that depending upon the facts and the circumstances of the case, the Supreme Court may waive the requirement of six months waiting period as well as the requirement of subsisting consent till the decree.

#### **4.10 WHETHER MERE SILENCE TANTAMOUNTS TO WITHDRAWAL**

A party who initially consents to a divorce by mutual consent cannot frustrate the proceedings so as to deny divorce to the other party simply by remaining silent. In *Suman v. Surendra Kumar*,<sup>152</sup> after filing a joint consent petition for divorce and recording of statements, the husband did not appear on the date fixed for hearing. There were several adjournments but he remained absent and sent no information either. The family court held that no decree could be passed in the absence of both the parties. On appeal against this by the wife, the family court order was set aside. It was held that if, during the period of interregnum viz. 6 to 18 months, either party wished

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<sup>150</sup> Professor Kusum, Family Law-1, 3<sup>rd</sup> Edn. p. 165.

<sup>151</sup> AIR 1992 SC 1904: (1991) 2 SCC 25

<sup>152</sup> AIR 2003 Raj 155 : (2003) IDMC 805

to withdraw, he/ she can approach the court and convey the same but this cannot be left as a matter for inference to be drawn by the Court. “When the husband has himself left the matter for inference, the inference ought to be drawn in favor of the consent rather than for absence of consent,” the Court remarked.

The court held:

*“Silence cannot be taken to amount to withdrawal of consent.... If he was withdrawing his consent for dissolution of marriage by a decree of divorce by way of mutual consent, nothing prevented him from taking that stand before the family court at the time of second motion. The husband, on the other hand, decided to adopt a course of silence in order to further harass the wife. We are not inclined to take a too technical view of s. 13(2) of the Act and fall in the same error as the family court did. Merely because the second motion was not signed by both the parties, it cannot be said that the consent of the husband was missing at the second stage. On account of absence of the husband, rather we would like to take a view that the consent to the decree of divorce being granted has to be presumed. What is more important is consent of the parties. Format is not important. Substance is to be seen.”*<sup>153</sup>

#### **4.11 NO EX-PARTE ON ON PRESUMPTION OF CONTINUATION OF CONSENT-**

While silence cannot be construed as withdrawal of consent, in a petition for divorce by mutual consent, in petition for divorce by mutual consent there can be no presumption either that consent continues even where one of the parties fails to appear on the stipulated date. In *Smruti Paharia v. Sanjay Pahariva*,<sup>154</sup> after six months of the first motion the husband failed to appear. The case was twice was adjourned because proper summons were not sent. However, five days before the date of hearing the wife applied for immediate hearing of the case the same very day and the court

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<sup>153</sup> Professor Kusum, Family Law-1, 3<sup>rd</sup> Edn., p. 169-170.

<sup>154</sup> 2009 (7) SCLAE 331 : AIR 2009 SC 2840 : (2009) 13 SCC 338

heard and passed an ex-parte divorce on the preponed date. On the husband's challenge the same was set aside. The Apex Court strongly disapproved the grant of the decree and observed that the primary basis in marriage is the consent of the parties and thus the revocation of the relationship itself must be consensual.<sup>155</sup>

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<sup>155</sup> Professor Kusum, Family Law-1, 3<sup>rd</sup> Edn. , p. 170.

## 5. PERTINENT CASE LAWS OF DIVORCE BY MUTUAL CONSENT

### (1) Ashok Hurra v. Rupa Bipin Zaverri<sup>156</sup>

**Note-** Decree of divorce by mutual consent passed even when the wife withdraw her consent. Marriage having been “emotionally and practically dead”, the Supreme Court, in exercise of Special Jurisdiction under article 142 of constitution, granted divorce.

This was a petition for divorce by mutual consent under section 13B of the HINDU MARRIAGE ACT, 1955. The parties lived together for about fourteen years. The relationship however was not cordial, and they filed several civil and criminal cases against each. Ultimately, they agreed to have the marriage dissolved by mutual consent. About eight months after filing the divorce petition, the husband pressed his application for divorce and notice was sent to the wife. There were several adjournments and unsuccessful attempts by the trial court for reconciliation. Within one year of filing of the petition, the husband entered into another marriage and also had a child. The wife filed criminal cases for declaring the marriage illegal and the child illegitimate. After about 19 months of the filing of the petition, the wife withdrew her consent.

Can a divorce decree by consent be passed even after the consent has been withdrawn by one of the parties was the question involved.

The trial court dismissed the husband’s petition on the ground that the wife had withdrawn her const. on appeal, a single judge of the Gujarat High court set aside the order on the ground that the wife has not withdrawn her consent within the period of 18 months and also that the marriage had irretrievably broken.

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<sup>156</sup> AIR 1997 SC 1266: (1997) 4 SCC 226

The decree was passed with the effect from the date of the petition. Against this order, the wife filed a letters patent appeal before the division bench of the High court, which set aside the order of the single judge. The grounds for this were- there was no consent as the wife had withdrawn; irretrievable breakdown of marriage is no ground for divorce and even if the court were to exercise its special powers, it would not like to exercise the jurisdiction in a case where the party's conduct is reprehensible.

The husband appealed to the Supreme Court. Exercising its jurisdiction under Article 142 of the Constitution, the court passed a divorce decree subject to the husband paying an amount of Rs. 10 Lakhs, plus Rs. 50,000 as litigating expenses to the wife. The grounds for the relief were:

1. The marriage had irretrievably broken and there was no point in prolonging the agony of the couple who have been litigating in various courts;
2. There is no delay in the disposal of the matter;
3. The wife had not withdrawn the petition within the period of 18 months, and also, no case was made out for revocation of the consent, like fraud, undue influence or mistake; and
4. The husband had married again and had a child from the second marriage.<sup>157</sup>

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<sup>157</sup> Kusum, Family Law 1 3<sup>rd</sup> Edn., p. 431.

## 2. Pooja Deswal v. Sagar Deswal<sup>158</sup>

Section 13-B of the HINDU MARRIAGE ACT, 1955 (HMA) provides for divorce or termination of marital bond by way of mutual consent of the parties to such a relationship. The present revision petition was filed to determine question whether statutory waiting period of six months referred to in Section 13-B(2) of the HMA can be waived/ condoned by the Court?

The reason stated in the application for seeking waiver of six months period in moving the second motion was that the parties to the petition are quite young and have been living separately from each other for the last more than two years and both of them being well educated and mature have decided to determine the conjugal relationship after due deliberations and a series of mediations.

The Court observed that the provision relating to obtaining divorce by way of mutual consent was intended to liberalize the provisions relating to divorce. The Legislature purposely chose not to add any Proviso granting relaxation to the conditions imposed under Section 13B (1) and/or 13B (2) of HMA. Section 13B is an exception to the proceedings under any other provision before the court of competent jurisdiction for dissolution of marriage between the parties because in a petition under Section 13B of the Act there is no burden of proof on either of parties and the Court is granted power to dissolve the marriage between the parties by a decree of divorce on the ground of mutual consent.

The Court can pass decree for divorce on mutual consent only upon satisfaction of the grounds stated therein and subject to the satisfaction of the period specified in law and is not vested with any specific or even general power to condone or waive the period stipulated either under Section 13B(1) or under Section 13B(2) of the Act. Once such a petition is filed, the court has to satisfy itself of the statutory requirements and thereafter, the parties are expected to take out a second motion which again has to be

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<sup>158</sup> P&H HC, 09.06.2014

a joint motion but not earlier than six months and not later than 18 months of the first motion.

The parties still have to satisfy the court that the said petition was not withdrawn and the court is expected to record its satisfaction after hearing the parties and on making such enquiry as it thinks fit that the averments in the petition are true, court may pass a decree declaring the marriage to be dissolved on the ground of mutual consent. Just because the parties would have to wait for a period of six months from the date of presentation of the first motion, cannot be termed as hardship or an undue hardship making a case to deviate from rule of plain interpretation.

Even the Supreme Court also in one of its 2009 decision, had held that only Supreme Court, in special circumstances can pass appropriate orders to do justice to the parties in a given fact situation by invoking its powers under Article 142 of the Constitution, but in normal circumstances the provisions of the statute have to be given effect to. The revision petition was accordingly dismissed.<sup>159</sup>

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<sup>159</sup> <http://www.tcl-india.net/node/198>-Six months waiting period for second motion in divorce by mutual consent: no hardship to parties #indianlaws by Anupam Srivastava,

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### 3. Neeti Malviya vs Rakesh Malviya<sup>160</sup>

A three-judge Bench of the Supreme Court will decide whether a decree of divorce by mutual consent can be granted without waiting for the statutory period of six months as contemplated under Section 13-B (2) of the HINDU MARRIAGE ACT.

Justices D.K. Jain and C.K. Prasad referred this issue to a three-judge Bench for determination, as in several cases the court, in exercise of its extraordinary powers under Article 142 of the Constitution (to do substantial justice), had been passing a decree of divorce by mutual consent without waiting for the six-month period. On this basis, family courts and High Courts had also been granting divorce without waiting for the period.

The need for referring the issue to a three-judge Bench arose from conflicting judgments given by two different Benches. In the first instance, taking note of a number of cases where a decree of divorce by mutual consent had been granted by various courts, it was held that only the Supreme Court in exercise of its powers under Article 142 could pass orders before the expiry of the six-month period.

However, in another judgment it was held that no court had the competence either to issue a direction contrary to law or direct an authority to act in contravention of the statutory provisions. Even while exercising powers under Article 142, the Supreme Court could not ignore the statutory provisions or exercise power merely on sympathetic grounds.

The Bench of Justices Jain and Prasad said it could be gathered that both decisions did not altogether rule out the Supreme Court exercising its powers under Article 142, yet “it would be appropriate to refer the matter to a Bench of three judges in order to have a clear ruling on the issue for future guidance.”

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<sup>160</sup> (2010) 6 SCC 413

Accordingly, the Bench referred the issue — “whether the period of six months prescribed under Section 13-B (2) could be waived or reduced by this court in exercise of its jurisdiction under Article 142.”

In the instant case, Neeti Malviya filed a petition for transfer of the divorce case filed by her husband from a court in Karnataka to a court in Madhya Pradesh. During the pendency of the matter, it was reported that the parties had arrived at a settlement to go for divorce by mutual consent and that the husband should deposit Rs. 60 lakh in her favour. However, during a hearing it was brought to the notice of the court that there were two different judgments and the question was raised whether the six-month period could be waived in this case. It was in this context the matter has been referred to the Chief Justice of India for being posted before a three-judge Bench.

The Bench, while directing that the matter be listed for further hearing in November, said that in the meantime the parties should file a joint petition under Section 13-B for grant of divorce by mutual consent in terms of the settlement.<sup>161</sup>

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<sup>161</sup><http://www.thehindu.com/news/national/can-divorce-by-mutual-consent-be-granted-before-statutory-sixmonth-period/article445702.ece>. *Issue referred to three-judge Bench of Supreme Court in view of conflicting judgments by J. Venkatesan.*

#### **4. Manish Goel v. Rohini Goel<sup>162</sup>**

**Note.-** Divorce by mutual consent under section 13-B, (HMA)<sup>163</sup> waiver of six months period, Court will exercise jurisdiction under Article 142 of constitution only in exceptional circumstances.

This is a significant judgment of the Apex Court where it clarified that extra-ordinary powers vested in it under Articles 136<sup>164</sup> and 142<sup>165</sup> of the Constitution can be exercised only under exceptional circumstances and nobody has a vested right to approach the court for this.

To state the facts in brief. Two highly qualified spouses fell out very soon after marriage. The husband filed a case under section 12 of the HINDU MARRIAGE ACT, 1955<sup>166</sup> for annulment of the marriage at gurgaon, and the wife filed petitions under the Domestic Violence Act, 2005 at Delhi she also lodged several complaints against him and his family members under various provisions of the Indian Penal code.

However, on the intervention of family members and friends they arrived at a compromise in proceedings pending before the Mediation centre whereby they agreed to settle all their disputes and have their marriage dissolved by mutual consent. Consequently, an application for divorce by mutual consent under section 13-B of the HINDU MARRIAGE ACT was filed in the Family Court at Delhi and their statement was recorded. However, they moved another application for waiver of six months period for filing the second motion which was rejected by the Family Court on the ground that it was not competent to do so and such waiver is permissible only under directions of the Supreme Court vide judgment in Anil Kumar Jain v. Maya Jain<sup>167</sup>.

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<sup>162</sup> AIR 2010 SC 1099: (2010) 4 SCC 393

<sup>163</sup> Divorce by mutual consent

<sup>164</sup> Special Leave to appeal by the Supreme Court

<sup>165</sup> Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.

<sup>166</sup> Voidable Marriages

<sup>167</sup> (2009) 10 SCC 415

Thereupon a special leave petition was filed by the petitioner/appellant in the Supreme Court where it was argued that there is no prohibition in law in entertaining the present petition under Article 136 of the constitution against the order of the Family Court and further that the relief sought could be granted only by the Supreme Court, hence he has a right to approach this Court for the relief.

The Court expressed its unhappiness in the manner in which the matter was handled and argued. The court observed:

*“..... the parties merely being highly qualified, have claimed even to be higher and above the law, and have a vested right to use, misuse and abuse the process of the court.”*

During pendency of a petition for dissolution of marriage before a competent court at Gurgaon they filed a petition for divorce by mutual consent before the family court in Delhi. *“Such a procedure adopted by the petitioner amounts to abuse of the process of the court”*, the court remarked. As to the jurisdiction under article 136 of the Constitution the court stated that it is an extra-ordinary jurisdiction vested by the Constitution in the Court and therefore extra-ordinary care and caution has to be observed while exercising it. No party has a vested right to invoke this. Such a course can be resorted when there is some injustice done which needs to be eradicated or there is a question of law of general public importance.

Exercise of special powers under Article 142 of the Constitution was sought as, according to the appellant, the case presents special features warranting exercise of such power. The court conceded that it has been exercising such power for dissolving a marriage which is “totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted. Divorce decree has been granted to put quietus to all litigations between the parties and to save them from further agony”.

In this case, the petitioner abused the process of the court by approaching different forums for the same relief, even otherwise, the court held, the statutory period of six

months for the second motion under section 13-B(2) has been prescribed to give an opportunity to the parties to rethink. Further, in this case there has been no obstruction to the stream of justice, nor any injustice caused which requires to be eradicated, nor even any question of general public importance involved. Since none of above contingencies existed in this case, the court refused to entertain the petition. Thus the same was accordingly dismissed.<sup>168</sup>

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<sup>168</sup> Professor Kusum, Family Law I -3<sup>rd</sup> Edn. p 443-444.

6. **LEGAL POSITION OF DIVORCE BY MUTUAL CONSENT UNDER PARSİ, CHRISTIAN AND MUSLİM LAWS.**

**6.1 PARSİ LAW:**<sup>169</sup>

Divorce by mutual consent was incorporated in the Parsi Marriage and Divorce Act, 1936, by an amendment of 1988.<sup>170</sup> The relevant provisions are:

**S. 32B. Divorce by mutual consent.**—(1) Subject to the provisions of this Act, a suit for divorce may be filed by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Parsi Marriage and Divorce (Amendment) Act, 1988, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved:

*Provided* that no suit under this sub-section shall be filed unless at the date of the filing of the suit one year has lapsed since the date of the marriage.

(2) The Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized under this Act and the averments in the plaint are true and that the consent of either party to the suit was not obtained by force or fraud, pass a decree declaring the marriage to be dissolved with effect from the date of the decree.

It is momentous to note that the Parsi Matrimony and Divorce Act, 1936 does not furnish for each interregnum amid the filing of the petition and the subsequent motion. Thus, lacking each period lag the court could grant the administrating afterward verifying the averments in the petition, and additionally that the accord of whichever party was obtained by power or fraud. Thus, it should imply that if there was no power or fraud after the petition was jointly filed, there cannot be each removal unilaterally.

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<sup>169</sup> Professor Kusum, Family Law 1, 3<sup>rd</sup> Edn. p. 171-172.

<sup>170</sup> Section 32 B ins. by the Parsi Marriage and divorce (Amendment) Act, 1988, s.9.

## **6.2 CHRISTIAN LAW:**

Under the Indian Divorce Act, 1869, prior to the Indian divorce (Amendment) Act, 2001, there was no provision for divorce by mutual consent. There have been hard cases where courts realized the hardships of the parties and the futility of retaining the marriage tie but in absence of any provision enabling parties to obtain a decree a divorce by consent, no effective relief could be given.

**Reynold Rajamani v. Union of India**<sup>171</sup> is a pertinent, though unfortunate, case in this context. To state the facts briefly; a marriage was solemnized under s. 27 of the Indian Christian Marriage Act, 1872. After about 12 years of marriage, the couple presented a joint petition for divorce by mutual consent under s. 28 of the SPECIAL MARRIAGE ACT, 1954. The trial court dismissed their application since the ground of mutual consent under the SPECIAL MARRIAGE ACT, 1954 could not be invoked in a case of the marriage governed by the Indian Divorce act, 1869 and the act did not provide for divorce by consent.

A writ petition to the Delhi High Court against this order was also filed. In appeal to the Supreme Court, the couple applied for permission to amend their joint petition to enable them to rely on s. 7 of the Indian Divorce Act, 1869 read with s. 1(2) (d) of the MATRIMONIAL CAUSES ACT, 1973 of England. The amendment was allowed and they filed an amended petition in the trial court seeking divorce on the ground that they had been living separately for over two years and the marriage had irretrievably broken. Having failed at the trial court and the High Court, the parties approached the Supreme Court. According to the Supreme Court, the expression “principles and rules” does not refer to grounds on which a suit may be instituted. Courts cannot extend or enlarge legislative policy by adding a provision which was never enacted there.

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<sup>171</sup> AIR 1982 SC 1261: (1982) 2 SCC 474.

In *Elizabeth v. Abraham*,<sup>172</sup> confirmation of a decree of dissolution granted by a lower court on basis of a compromise was refused by the High Court on the ground that the Indian Divorce Act, 1869 does not permit divorce on such ground.<sup>173</sup>

The amended Indian Divorce Act, 1869 has brought about significant changes in the Christian divorce law.<sup>174</sup> Divorce by mutual consent has also been introduced by inserting a new S. 10A. This reads as follows:

**S. 10A Dissolution of marriage by mutual consent.**- (1) Subject to the provisions of this Act and the rules made thereunder, a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Indian Divorce (Amendment) Act, 2001, on the ground that they have been living separately for a period of two years or more, that they have not been able to live together and they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and making such inquiry, as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of decree.

### **6.3 MUSLIM LAW:**

Under Muslim Law, a divorce may take place also by mutual consent of the husband and the wife. Existence of any prior agreement or delegation of authority by the husband is not necessary for a divorce by common consent. It may take place any time whenever the husband and wife feel that it is now impossible for them to live with mutual love and affection as desired by God. A divorce by mutual consent of the

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<sup>172</sup> AIR 2000 Bom 276: (2000) 2 MhLJ 414

<sup>173</sup> Professor Kusum, Family Law 1, 3<sup>rd</sup> Edn. p. 172.

<sup>174</sup> Indian Divorce (Amendment) Act, 2001

parties is a peculiar feature of Muslim law. Before 1976 there was no such provision under Hindu Law.<sup>175</sup>

There are two forms of divorce by mutual consent:

1. **KHULA [319(2)]** - It means divorce by the wife with the consent of her husband on the payment of something to him.

Quran lays down about Khula that:

*“.....and if you fear that they(husband and wife may not be able to keep within the limits of Allah, in that case it is no sin for either of them if the woman releases herself by giving something to the husband”*

Essentials of Valid Khula:

1. **Competence of Parties:** Husband and wife must be of sound mind and must have achieved the age of puberty.
2. **Free Consent:** the offer and acceptance of Khula must be made with the free consent of the parties
3. **Formalities:** There should be an offer made by the wife to the husband. The offer of Khula must be accepted by the husband. Offer and acceptance may be either oral or in writing. The offer and acceptance must be made at one sitting, i.e. at one place of meeting.
4. **Consideration:** For her release the wife has to pay something to the husband as compensation. It may be any sum of money or property.

2. **MUBARAT [319(3)]** - In Mubarat both the parties are equally willing to dissolve the marriage. Therefore, in Mubarat the offer for separation may come from either the husband or the wife to be accepted by the other. So who takes the initiative is irrelevant here. One of the important features is that here both the parties are equally interested in the dissolution of marriage so no party is legally bound to

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<sup>175</sup> Professor Kusum, Family Law 1, 3<sup>rd</sup> Edn. p. 173-174.

compensate the other by giving some consideration. Same conditions as Khula also apply in Mubarat. It is similar to divorce by mutual agreement under section 24 of the SPECIAL MARRIAGE ACT, 1954 and under section 13-B of the HINDU MARRIAGE ACT, 1955.<sup>176</sup>

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<sup>176</sup> Professor Kusum, Family Law 1, 3<sup>rd</sup> Edn. p. 173.

## **7. CRITICAL ANALYSIS OF DIVORCE**

Hindu law regards marriage as a sacrament which is indissoluble and eternal. Marriage is the foundation of closely knit societies. As much as marriage is bliss, it needs constant attention and refinement to let it stay blissful. Sometimes there are small issues that give rise to anger, depression and dissatisfaction from marriage. Modern living has many benefits but it also had many pitfalls. One such pitfall is the rise in the number of divorce cases every year. The divorce rise in India has almost doubled over in 5 years. Even the comparatively conservative state of Punjab has seen increase by 150% in the number of marriage breaking.<sup>177</sup>

However, when there is a clash of expectation between individuals and hidden agendas are involved or the mutual trust between partners is broken, the marriage ceases to exist in spirit and remains only on papers. The complexity of modern society and its possible consequences such as fast changing socio-economic conditions, the disintegration of the joint family structure, the rapid development of industrialization and urbanization, education and employment and laws giving equal status and rights to women, led a tremendous impact on the institution of marriage.

### **7.1 ANALYSIS OF DIVORCE BY MUTUAL CONSENT:**

On the analysis of the Section 13-B of the Hindu Matrimonies Act which provides divorce by mutual consent it has been concluded that such section provides an opportunity of friendly resolution of arguments amid parties and saves time and money. The necessities as mentioned are that beforehand filing a combined petition for divorce parties has to be living separately for an era of at least one year. As it has been remarked out that earlier living separately does not vitally connotes physical

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<sup>177</sup> “The Economic Rights & Entitlement of separated Women India” study paper conducted by Team Researchers, Women Activists and Lawyers for Economic Reaerach Foundation of India, between October, 2008 & September, 2009.

separation, what is vital is that parties are not fulfilling marital obligations and not living as husband and wife.

The subsequent necessity is that the parties have not been able to live together. The fact that both the parties have filed a combined petition by mutual consent is indicative of the fact that parties have not been able to live together. Merely thing that is vital is that the consent has been obtained freely and not by method of power, fraud or undue impact as the finished intention of public accord will be vitiated if accord is not free. Later parties have filed a combined petition for divorce fulfilling all the requisite conditions they are given a period era of six months and not extra than eighteen months afterward that they have to file a subsequent gesture and courts afterward hearing the parties and scrutinizing the averments in the petition bypass a administrating of divorce.

The three points of contention are that whether the waiving the period of six months is needed or directory, the subsequent is that can parties unilaterally remove their consent and third that whether silence at the subsequent period should number to tantamount to withdrawal. There have been contrasting judgements on the early two issues. Several High Courts have adopted dissimilar views in the clarification of the section 13-B. High Courts have grasped that the period of six months is needed as each the section mentions whereas Courts have adopted the spirit of regulation extra than the technical words of the section and have administrated out that the such period is directory if there is no chance of reconciliation amid the parties.

Though, Supreme Court employing its extraordinary powers under Article 142 of Constitution can bypass the administrating of divorce lacking staying for a period of 6 months. Also, Supreme Court in a case of Sushreta Devi has ruled out that the petition of divorce can be kept unilaterally. On the third subject the courts have administrated out that silence or not materializing for hearings will not number to removal of consent.

## 8. CONCLUSION

In ancient India marriage was considered as perpetual alliance, but in some exceptional cases divorce might have been accepted as it appears from the Smritis but, the fields or the grounds on which divorce can be sought were restricted merely to the guilt or fault theory. Merely if each of the spouses has completed a blunder that is not satisfactory in matrimony, a divorce might have been granted. The thoughts like divorce by mutual consent or irretrievable breakdown of marriage were not there. The most vital thing is that these thoughts were manipulated merely to the scriptures but they were hardly rehearsed, as existence was impossible for lady afterward a divorce.

The adjustments made in the regulation of divorce are too far and undesirable. These adjustments have nearly modified the nature of Hindu marriage. The early abilities of the HINDU MARRIAGE ACT considering divorce have been liberalized by the Marriage (Amendment) Act, 1976. Too far liberalization can be perceived from the bypassing of Marriage (Amendment) Act, 1976. It decreased the period limits for insufficient fields and it added new fields of divorce. With these adjustments, it nearly modified the sacramental nature of Hindu marriage.

In the absence of any specific provision there are practical difficulties in settlement of dispute between the parties of a divorce petition. For example in the existing legal frame work if a suit/petition is filed by one party to a marriage on fault ground under Section 13 of HINDU MARRIAGE ACT and the parties agree for settlement with the help of counselor or mediator or otherwise and they decide to part ways, with or without a condition of alimony by the husband to wife, the pending petition u/s 13 of HINDU MARRIAGE ACT is required to be withdrawn for filing a petition U/s 13B of HINDU MARRIAGE ACT.

In such a situation not only a further lengthy process as contemplated in Section 13 B is to be adopted but it also acts counterproductively as the parties who have already lost trust on each other are always in doubt about intention of other party. Any such agreement will not be enforceable in a court of law at the instance of one party only, as in the present frame work a petition U/s 13B can be filed by both parties and by mutual consent only.

There is always a doubt that in case, in furtherance of the compromise the plaintiff withdraws his/her petition for divorce filed under Section 13 of HINDU MARRIAGE ACT, after paying the part or full amount of alimony or otherwise, the other party will not withdraw from its promise and will take the petition for divorce by mutual consent to its logical conclusion.

The law rather permits a party to petition by mutual consent to withdraw the joint petition filed under Section 13B of HINDU MARRIAGE ACT, making the whole exercise futile and leaving the plaintiff/ the another party in a situation where its petition on the ground of fault, filed under Section 13 of HINDU MARRIAGE ACT, has been withdrawn with the bar created under order 23 R 1 (4) <sup>178</sup>CPC, which precludes it from instituting a fresh suit in respect of such subject matter and thus leaving it without a remedy.

It is of the opinion that the legislature cannot continue to be in a state of oblivion, apathetic to a situation where efforts are to be made for faster resolution of family disputes and then parties are to be left to lurch in state of confusion and despair.

In this background and from the aforesaid legal position dynamics of law has brought to a point where it is felt that there is a need to make amendment in law relating to divorce under HINDU MARRIAGE ACT so that parties who arrive at settlement during process of Mediation or A.D.R. or as result of efforts u/s 23(2) of HINDU MARRIAGE ACT or under Section 9 of Family Courts Act or otherwise during pendency of a divorce petition U/s 13 of HINDU MARRIAGE ACT, may not be required to abandon or withdraw the petition U/s 13 of HINDU MARRIAGE ACT for

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<sup>178</sup> Withdrawal of suit or abandonment of part of claim.

following the lengthy and tardy process of 13B of HINDU MARRIAGE ACT besides danger of dragging itself into a remedy less situation.<sup>179</sup>

## **9.REFERENCES**

### **Bare Acts:**

- The Constitution of India
- The HINDU MARRIAGE ACT, 1955
- The Hindu Marriage (Amendment) Act, 1964.
- The Indian Divorce (Amendment) Act,2001
- The Indian Penal Code, 1860
- The Civil Procedure Code, 1908
- The Marriage Laws (Amendment) Bill, 2000
- The Dissolution of the Muslim Marriage Act, 1939
- The Baroda Hindu Divorce Act, 1931
- The Madras Act of 1933
- The Marriage Laws (Amendment) Act, 1976
- The Parsi Marriage and Divorce Act, 1936
- The Code of Criminal Procedure Code, 1973
- The Indian Christian Marriage Act, 1872,
- The Converts Marriage Dissolution Act, 1866
- The MATRIMONIAL CAUSES ACT, 1973
- The MATRIMONIAL CAUSES ACT, 1857
- The MATRIMONIAL CAUSES ACT, 1923
- The Saurashtra Hindu Divorce Act, 1952
- The Madras Hindu Bigamy Prevention and Divorce Act, 1949
- The Hindu Divorce Act, 1947
- The Hindu Marriage Validity Act, 1949
- The Hindu (Bigamy Prevention and Divorce) Act. 1949

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<sup>179</sup> SETTLEMENT OF HINDU DIVORCE PETITION BY COMPROMISE: NEED OF AN AMENDMENT by Pradeep Pant

- The Anand Marriage Act, 1909
- The Majority Act, 1875
- The Indian Divorce act, 1869
- The Domestic Violence Act, 2005

**Books:**

- Mulla, Principles of Hindu Law, Vol II, 19<sup>th</sup> Edn. (Lexis Nexis Butterworths)
- Kusum, Family Law 1, 3<sup>rd</sup> Edn, 2011 (Lexis Nexis Butterworths)
- Dharmashastras- The Sacred Law of the Aryans
- Flavia Agnes, Family Law – Marriage, Divorce & Matrimonial Litigation, , Volume II (Oxford University Press)
- Dr. Paras Diwan & Peeeyushi Diwan, Modern Hindu Law, 21<sup>st</sup> Edn. 2012, (Allahabad Law Agency, Faridabad)
- Dr. U. P. D. Kesari, Modern Hindu Law, 8<sup>th</sup> Edn. 2011, (Central Law Publications)
- B. M. Gandhi, Hindu Law, 2<sup>nd</sup> Edn. 2003 (Eastern Book Co. Lucknow)
- Hari Singh Gaur, Hindu Code (1973 Edn.) Vol. 1 Chap. III
- R.K. Agarwala, Hindu Law, 21st Edn. 2003, (Central Law Agency, Allahabad.)
- Dr. Paras Diwan- Family Law, 6th Edn. 2001, (Allahabad Law Agency, Faridabad (Haryana)).
- Kusum, “Matrimonil Adjudciaction under Hindu Law,” in S. K. Verma and Kusum

**Commissions, Journals, Verses, Reports:**

- The Law Commission 59<sup>th</sup> Report on the HINDU MARRIAGE ACT, 1955 and the SPECIAL MARRIAGE ACT, 1954
- The Law Commission 71<sup>st</sup> Report on the HINDU MARRIAGE ACT 1955- Irretrievable Breakdown of Marriage as a ground of divorce.
- Changes in the ground of divorce in India by Avinash Kumar Sharma
- Law and the People, 157
- Mortimer Committee's report, January 1964
- J. Duncan M. Derrett, "The Death of a Marriage Law: Epitaph for the Rishis" (1978)
- J. Duncan M. Derrett, A Critique of Modern Hindu Law, (1970)
- Fifty Years of the Supreme Court, 2001
- 'Divorce by Mutual Consent, 'Journal of Indian Law Institute, Vol 29, 1987, pp. 110-114.
- The Economic Rights & Entitlement of separated Women India" study paper conducted by Team Researchers, Women Activists and Lawyers for Economic Research Foundation of India, between October, 2008 & September, 2009.
- Settlement of Hindu Divorce Petition by compromise: need of an amendment by Pradeep Pant.

**Websites:**

- [www.hindustimes.com](http://www.hindustimes.com)
  - <http://www.thehindu.com/news/national/can-divorce-by-mutual-consent-be-granted-before-statutory-sixmonth-period/article445702.ece->
  - <http://www.tcl-india.net/node/198>-Six months waiting period for second motion in divorce by mutual consent: no hardship to parties #indianlaws by Anupam Srivastava
  - [www.lawcommissionofindia.nic.in](http://www.lawcommissionofindia.nic.in)
-