Hindu Law of Divorce

JUDICIAL SEPARATION

It is viewed as a lesser evil than divorce, since it leaves open the door for reconciliation. Decree of judicial separation does not dissolve the marriage bond but merely suspends marital rights and obligations during the subsistence of the decrees parties continue to be husband and wife but not obligated to live together; neither party is free to remarry.

Sec. 10 of the Hindu Marriage Act provides for judicial separation. The grounds for judicial separation are the same as the grounds for divorce viz. fault grounds (prior to 1976, the provisions relating to divorce were more stringent than those for the grant of judicial separation). Where a decree for judicial separation has been passed, the court may on the petition of either party rescind (cancel the decree if it considers it just and reasonable to do so (a divorce decree cannot be so rescinded). Sec. 13 (1A) (i) lays down that if after a decree of judicial separation parties have not resumed cohabitation for a period of one year, either party may seek divorce.

If the parties, during the subsistence of the decree of judicial separation, commit sexual intercourse then the decree could be declared neutralized or ineffective. Such an act has no effect on the decree of divorce. In case one of the spouses dies during the subsistence of the decree of judicial separation, the other will succeed to his/her property. It is important to note that the matters relating to alimony and maintenance of wife and children may be agitated both after a decree of divorce as well as judicial separation.

courts have been given discretionary power to grant judicial separation instead of divorce in a petition for divorce, even though no such prayer is made in the petition (Sec. 13-A: Alternate relief in divorce proceedings). However, if divorce petition is filed on the ground of change of religion, renunciation of world or presumption of death, the court has no power to pass a decree of judicial separation in place of divorce decree.

DIVORCE

Once it came to be established that marriage was a civil contract, it was the next logical step to recognize that it was also a dissoluble union. The lofty ideals of liberty and equality also undermined the strongly considered indissoluble aspect of marriage However, as marriage is also regarded as a social institution and not me transaction between two individuals, therefore, it was argued that there was a social interest in preservation and protection of the institution of marriage. The institution of marriage was hedged with legal protection.

Thus, the marriage came to be regarded as a 'special contract, which could not be put to an end like an ordinary contract. The primary objective of the Hindu Marriage Act is to preserve and protect the marriage, rather than allow it to disintegrate. Under the old Hindu law, divorce was not recognized, except where allowed by custom. Under the Act also, divorce is neither favoured nor encouraged, it is permitted only on certain serious specified grounds. A period of one year has been fixed to give maximum opportunities of mutual adjustment after a decree-of-judicial separation. Similarly. a period of one year should have elapsed between the date of marriage and the presentation of a divorce petition.

A marriage can be dissolved only if one of the spouses is found guilty of such acts and conduct which undermined the very foundation of marriage. This led to the emergence of the offence or guilt theory of divorce.

Offence or Guilt or Fault Theory

Divorce is regarded as a mode of punishing the guilty party who had committed a matrimonial offence and thus, rendered him or herself unworthy of consortium. The offence must be one that is recognized as a ground of divorce, viz. adultery, cruelty or desertion.

The guilt theory, on the one hand, implies a guilty party, and on the other, it implies that the other party is innocent i.e. in no way party to or responsible for the ne of the guilty party. Thus, if one party condone the acts of the guilty party, no divorce can be granted. Similarly, if cruelty is provoked, divorce will be refused. In this way, the bars to matrimonial relief were evolved.

Recognition of grounds like insanity and epilepsy led to renaming of 'guilt theory as the 'fault theory. If one of the parties has some fault in him or her, marriage could be dissolved whether this fault is his or her conscious act (adultery, etc.) or providential (insanity, etc). Originally under the Hindu Marriage Act, 1955, divorce was based only on the fault theory. The consent theory and breakdown theory were introduced later on.

Consent Theory (Free Divorce)

According to this theory, parties to marriage arc as 'free' to dissolve a marriage, as they are to enter it. Freedom of marriage implies freedom of divorce. In may happen that two parties who've entered into a marriage with free consent may, later on, realize that they made a mistake and they cannot live together harmoniously. The very basis of marriage is mutual fidelity, and if for any reason the parties feel that it cannot continue, they should've freedom to dissolve the marriage. Further, an unhappy family is a breeding ground for delinquent children.

Breakdown Theory

This theory represents the modern theory of divorce. A fundamental shift in the policy was discernible from the judicial recognition of the view that the purmo divorce law was not to punish the guilty but to protect the innocent spouse. The problem that the modern law faces is a marriage has in fact broken down irretrievably, may be on account of fault of either or both parties (e.g. both had committed adultery), or on account of neither (e.g. incompatibility of temperament), then, is there any sense in continuing such union which would serve no social and individual interest: The guilt theory found to be deficient as it recognizes divorce only on certain specific grounds.

The breakdown of marriage is defined as "such failure in the matrimony relationship or such circumstances adverse to that relation that no reasonable probability remains for the spouses again

living together as husband and wife" (If a marriage has broken down beyond all possibilities of repair, than it should be brought to an end without looking into the causes of breakdown and without fixing any responsibility on either party. Such marriage should be dissolved even if one of the parties to the marriage does not desire it. The empty shell is to be destroyed with the maximum fairness and minimum bitterness, distress and humiliation [Law Commission of India, 715 Report, Reforms of the Grounds for Divorce).

In Yousuf v Sowramma (AIR 1971 Ker 261), the learned judge said: "While there is no rose which has no thorns but if what you hold is all thorn and no rose, better throw it away. The ground for divorce is not conjugal guilt but breakdown of marriage"

Sometimes the determination of the question whether in fact a marriage has broken down or not is left to the courts. At other times, the legislature lays down the criterion of breakdown of marriage and if that is established, the courts have no option but to dissolve the marriage (See Sec. 13 (1A)]

Position in the Modern Hindu Law

Section 13 of the Hindu Marriage Act. 1955, recognizes all the three theories of divorce, and divorce can be obtained on the basis of any one of them. Sec, 13 (1) contains eight 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 c 13 (2) provides four additional fault grounds to the wife. Thus, 12 fault grounds grounds of breakdown of marriage was inserted by the 1964 Amendment (these are at present contained in the Act. Sec. 13 (1A) which recognizes two grounds were previously part of the fault grounds. Sec. 13 B which recognizes divorce by mutual consent was inserted by the 1976 Amendment.

(a) Fault Grounds of Divorce

Adultery [Sec. 13(1)(i)- Prior to 1976 Amendment, for this ground (i.e. voluntary sexual intercourse with non-spouse after the solemnization of marriage) the petitioner had to prove that the respondent was living in adultery (is, a continuous period acts of sexual intercourse). Now, one single act of adultery is enough. It may be noted that adultery is a matrimonial offence punishable under Sec. 497, IPC.

If the second marriage is void, then intercourse with the second wife will amount to extra-marital intercourse. It may be noted that a mere attempt at sexual intercourse will not amount to adultery. Further, it seems that sex-act is necessary. A wife who allows her to be artificially inseminated with semen provided by a person other than her husband is not guilty of adultery .

The act of sexual intercourse must be consensual or voluntary. Thus, a spouse is not guilty of adultery if the act is committed under intoxication or unconsciousness (or lack of mental capacity to consent) or by force/ fraud (e.g. kidnapped and raped). Also, if a sex-act is committed under a mistake that the co-respondent is his or her spouse, it will not amount to adultery. The very fact that such acts are committed in extreme secrecy forbids direct proof of actual intercourse and the courts have always accepted circumstantial evidence. Such evidence which establishes 'preponderance of probabilities' is enough (e.g- a woman discovered in a compromising position with a man in a room); it need not be

proved beyond all reasonable doubt. Mere admission of the respondent in cross-examination is not enough to prove adultery as held in Anandi v Raja AIR 1973 Raj 94.

Vasectomy is not a conclusive proof of adultery unless proper semen test has been taken as laid down in Chiruthakuthy v Subramanian AIR 1987 Ker 5.

Cruelty Sec. 13(1) (i-a)]- Of all the matrimonial offences, cruelty is probably the most difficult to define. What may amount to cruelty in one case may not amount to cruelty in another case. In Russel v. Russel , cruelty defined as "conduct of such a character as to have cause danger to life, limb or bodily or mental, or as to give rise to a reasonable apprehension of such death. Reasonable apprehension' is no more necessary under the Indian law and it is enough that the respondent has treated the petitioner with cruelty after the solemnization of marriage. Further, intention or motive is not an essential element of cruelty. Th unintentional act may amount to cruelty [Sayal v Sarla AIR 1961 Punj. 125.

Intention as an element of cruelty in England was finally rejected in William v Williams (1963) 2 All ER 994. The court observed that the main concern of it was to give protection to the suffering spouse. It may be no that an act or conduct which has an intention to injure, will certainly constitute cruelty.

The Supreme Court has observed that the concept of cruelty is fast changing. The concept is to be viewed against the background of the way of life of the n their economic and social condition, their culture, sense of values, etc. Therefore precedents cannot always be relied upon (Shobha Rani v M. Reddi AIR 1988 SC 121.

Cruelty may be physical or mental) In the modern matrimonial law, mental cruelty is a very important aspect of legal cruelty (Dastane v Dastane AIR 1976)

In Jyotish v Meena (AIR 1970 Cal 266), held that utter indifference, callousness and apathy on the husband's part towards his wife with whom he lived like a stranger under the same roof, amounted to cruelty. 'Constructive or remote-controlled' cruelty is a term of (mental) cruelty which may not by itself, but indirectly associated with situations amounting to cruelty.

Some of the instances of cruelty includes:

- False accusations of adultery or unchastity
- demand of dowry
- persistent refusal to have marital intercourse/ refusal to have children
- impotence (birth of a child (illegitimate) within 6 months of marriage
- drunkenness
- threat to commit suicide
- wilful, unjustifiable interference by one spouse and continuous ill treatment e.g. rough or domineering conduct
- hurling of insults at the husband and his parents
- incompatibility of temperament case of broken-down marriage

These act do not constitute cruelty:

(1) ordinary wear and tear of married life e.g. neglect or want of affection, use of vulgar, obscene or rude language
(2) wife's Isal to resign her job
(3) wife's quarrelling with mother-in-law
(4) non-payment of interim maintenance
(5) desertion per se, etc."

Insanity is no longer a defence to cruelty. Provocation or self-defence is still good defence to a charge of cruelty (eg. where one spouse provokes the other and the other spouse acts cruelly, or where one spouse acts cruelly to protect against cruelty of other spouse). Acquiescence to the acts or conduct of the defendant is also a good defence, but submission to acts must be voluntary If the petitioner has no option but to submit, he or she cannot be precluded from basing the ground upon these acts.

The cruelty, like adultery, need not be proved beyond all reasonable doubt. may be proved on balance of probabilities. It is a welcome step to depart from the rigid test of "beyond all reasonable doubt" particularly when in modern law, adultery, desertion, and cruelty are not so much regarded as matrimonial offences, but more or less as instances leading to breakdown of marriage.

Desertion [Sec. 13(1) (i-b)}- Desertion has been defined as permanent forsaking or abandonment of one spouse by the other without any reasonable cause and without the other's consent or against the wish of such party, and includes willful neglect. Desertion is a total repudiation of obligations of marriage It is a withdrawal not from a place but state of things. Thus, there is a desertion If a spouse does not leave the matrimonial home but refuses to fulfill his other marital obligations (constructive desertion).

The desertion may be actual, constructive, or wilful neglect. The respondent must've deserted the petitioner for a continuous period of not less than 2 years immediately preceding the presentation of the petition. In all, the following five elements a necessary to constitute a desertion. All these five must co-exist, to make it a ground for divorce:

- the factum of separation,
- animus deserendi (intention to desert),
- desertion should be without any reasonable cause,
- desertion should be without the consent of other party, and
- statutory period of two years.

In actual desertion, it is necessary that respondent must've forsaken or abandoned the matrimonial home, accompanied by a permanent intention to desert. At any time when animus and factum co-exist, desertion commences. Thus, abandonment in a state of temporary passion, anger, or delusion (e.g. wife thinks that it would not be safe to live with her husband) without intending cohabitation to cease permanently, will not amount to desertion. Similarly, when a spouse is forced to leave the matrimonial

home, it will not amount to desertion. In fact, in that case the spouse who forced the other spouse to leave the house will be guilty of desertion (Shyam Chand v Janki AIR 1966 H.P. 70).

It not necessary that intention must precede the factum. Thus, where a spouse leaves the home with no intention to abandon it, but later on, he forms an intention not to return and consequently he failed to return, then it will amount to desertion. The party, intends bringing cohabitation to an end, and whose conduct in reality causes who its termination, commit the act of desertion (jyotish Chandra v Meena AIR 1970 Cal 266).

Further, where the respondent leaves the matrimonial home with an intention to desert but subsequently shows an inclination to return and is prevented from doing so by the petitioner, the respondent is not guilty of desertion. To constitute desertion it 1s necessary to prove that the deserting spouse persisted in the intention desert throughout the statutory period of two years (Bipin Chandra v Prabhavati AIR 1957 SC 176). Most of the cases of desertion relate to our typical joint family background in which the wife, not able to adjust, had left the matrimonial home or had been forced to leave it (Lachman v Meena AIR 1964 SC 40).

Even in constructive desertion' factum of separation has to be established. It just be established that there is nothing else left in the parties' relationship except their living under the same roof (Jyotish Chandra v Meera). Wilful neglect is designed o cover constructive desertion. It adds new dimensions to the notion of desertion, in as much as if the offending spouse consciously neglects the other party without any intention to desert, it would nonetheless amount to desertion. It would be a wilful neglect to fulfill basic marital obligations, such as denial of company or denial of marital intercourse. Failure to provide maintenance may also amount to wilful neglect.

Termination of desertion- Desertion is a continuing offence. It can be put to an end either before or after the statutory period has run out. Once desertion begins, it continues day after day, till it is brought to an end by the act or conduct of the deserting spouse. It also means that the offence of desertion is not complete even if the period of two years is complete; it may still be brought to an end by the act of the deserting spouse. It is inchoate (ie. incomplete) and becomes complete only when the deserted spouse file a petition for matrimonial relief. In this respect, desertion differs from the other grounds such as adultery or cruelty.

In Bipinchandra case, the wife was clearly in desertion, but she expressed an intention to resume cohabitation before the husband filed a petition for divorce, and, thus, terminated the desertion. Thus, the guilty party can bring desertion to an end. Desertion may come to an end by resumption of cohabitation by mutual consent (complete reconciliation, not temporary) when separation becomes consensual genuine offer of reconciliation (animus revertendi ie. intention to return) with no conditions or qualifications a supervening event may remove the duty to cohabit (eg deserted spouse commits an act which justifies the other to continue to live apart).

Conversion [Sec. 13 (1) (ii)- If the respondent has ceased to be a Hindu by conversion to another religion, divorce may be obtained. It may be noted that mere renunciation of Hinduism does not make him cease to be Hindu and so does leading a very unorthodox life so much so as to cat beef and decry all Hindu gods and goddesses, he will cease to be Hindu when he converts to another religion (non-Hindu faith such as Islam, Christianity or Zoroastrianism) . Conversion should be in accordance with rites and

ceremonies or formalities laid down by that religion to which conversion is sought. It is also not necessary that after conversion the respondent must practice his new faith.

The conversion of the respondent does not amount to automatic dissolution of marriage. Thus, if a Hindu husband converts himself as Mohammedan, none of his obligations as husband towards the Hindu wife come to an end. The petitioner has to file a petition to obtain a decree of divorce. The petition can be filed only by the non-convert spouse and not by the convert spouse (as it would amount to taking advantage of one's own wrong). If a petitioner chooses to live with the convert spouse, there is nothing to debar him or her from doing so in the case of a wife, she may ask for separate residence and maintenance). A right under Sec. 15 (1) (i) can be exercised by a party who continues to be a Hindu.

Insanity (Sec. 13 (1) (iii)}- Where the respondent has been incurably of unsound mind, or 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, divorce may be obtained.

Explanation to the clause defines "mental disorder" as 'mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder/ disability of mind and includes schizophrenia". Mental disorder like schizophrenia should be of such quality that the petitioner is not reasonably expected to live with the respondent (Ram Narayan v Rameshwari AIR 1989 SC 149).

Venereal disease [Sec. 13 (1) (v)]- Where the respondent has been suffering from venereal disease in a communicable form, divorce may be obtained. It may be noted that the venereal disease includes AIDS. In Mr. X v Hospital Z (AIR 1999 SC 495), the Supreme Court observed that a person suffering from AIDS prior to marriage must be injuncted from entering into marriage.

Renunciation (Sec 13 (1) ()]- Where the respondent has renounced the world by entering into any religious order, divorce may be obtained A mere hag is not enough, the respondent (sanyasi) must enter into a religious order, Le go to some ashrama with a view to living the remaining part of his life permanently there. Again, merely entering into any holy order may not amount to renunciation of world. For instance, when a Sikh becomes a granthi or a Hindu becomes a pujari or mahant, he does enter into a holy order, yet he is not required to renounce the world.

Presumption of death [Sec. 13 1) (vi)]- The basis of this ground is Sec. 108, Indian Evidence Act, according to which a person who is not heard alive by his relations and near ones for a period of seven years is deemed to be legally dead. Thus, a petitioner may obtain a decree for dissolution of marriage on this ground. Once the marriage is dissolved, the petitioner is free to marry again and even if the missing spouse returns the next day of the passing of the decree or much before the second wedding, he/ she can do nothing. I however, if the second marriage were performed on the basis of presumption of death without getting the first marriage dissolved, the petitioner would be guilty of bigamy and the second marriage will be void; no person other than the missing spouse can challenge it.

Wife's Special Grounds of Divorce

Besides the grounds available under Sec 13 (1), a wife has been provided additional grounds of divorce under Sec. 13 (2).

(1)Pre-Act polygamous marriage [Sec 13 (2) - This ground under the Hindu Marriage Act is the natural corollary to the introduction of monogamy. The first wife of pre-Act marriage may file a divorce petition on the ground that her husband has remarried. Similarly, the second wife of the pre-Act marriage may file a divorce petition on the ground that her husband's first wife was alive at the time of solemnization of marriage. In either case, the other wife should be alive at the time of the presentation of petition. It does not matter that the petitioner wife is aware of the other wife or not. Similarly, it is immaterial whether the petitioner wife is living with the husband or separately at the time of commencement of the Act.

The ground will be available if both the marriages are valid. The Hindu Marriage Act did not rightly render the Pre-Act bigamous/ polygamous marriages void but provides relief of divorce to any wife of polygamous marriage. Today, this ground is no longer of any practical importance.

(2) **Rape, sodomy or bestiality Sec. 13 (2)** (ii): Under this clause the commission of the offence of rape, sodomy or bestiality (unnatural offences) by the husband gives the wife a right to divorce him. An attempt by the husband is not covered. Further, the offence should be subsequent to the marriage of the petitioner.

A man is not guilty of raping his own wife unless she is under the age of 15 years (Exception to Sec. 375, IPC). In a wife's suit for divorce on this ground, it is necessary for her to show that the husband was prosecuted and convicted for the offence. Even if the husband is discharged on the charge of rape, etc., she can sue for divorce.

In either case the burden of proof for establishing the ground wife; thus, she has to prove the offence de novo (afresh) in the matrimonial proceedings.

(3) Non-resumption of cohabitation after a decree/ order of maintenance Sec. 13 (2) (iii)]- Under this clause, if a wife has obtained an order of maintenance under Sec. 125, Cr.P.C. or a decree under Sec 18, Hindu Adoption and Maintenance Act, and cohabitation between the parties hasn't been resumed for one year or upwards after the passing of the order/ decree, she may sue for divorce evident that this ground has been enacted as a fault ground.

(4) Repudiation of marriage [Sec 13 (2) (iv)]- Under this clause (Option of Puberty), a wife who has married before she had attained the age of 15 years, and who had repudiated the marriage after attaining the age of 15 years but before attaining the age of 18 years (irrespective of the fact whether the marriage has consummated or not) may bring the petition of divorce on that basis. Under the Hindu law, a child marriage is a valid marriage. Now this clause provides some relief to those Hindu girls who were married against their wishes below the age of 15 years. However, no such relief is provided to a boy who is married below the age of 15 or 18 or 21 years.

The repudiation may be express (oral or written e.g. sending a registered letter to husband) or implied from the conduct of the wife (e.g. she left her husband and refuse to come back). The repudiation must be made before the attainment of the age of 18 years. A petition for divorce on this ground can

obviously be filed after she attains the age of 18 years. Thus, a repudiation of marriage and dissolution of marriage is not the same thing.

(b) Divorce by Mutual Consent

There are cases when parties Sec. 13 B (inserted by 1976 Amendment), which provides for divorce by mutual consent, has following essential ingredients:

Subject to the provisions of this Act, a joint petition for divorce by both the spouses may be presented to the District Court.

The petition should state that they've been living separately for a period of 1 year, and haven't been able to live together, and that they've mutually agreed to live separately,

The words "living separately" only means not living as husband and wife, they may live in the same house. What seems to be necessary is that they have no desire to perform marital obligations (state of complete breakdown of marriage

After the presentation of the petition, the parties have to wait for 6 months though not for more than 18 months, and then to move a motion in the court that divorce be granted. Thus, between 6 to 18 months, after the presentation of first petition Sec. 13B (1)], the parties have to jointly move a 'second petition [Sec. 13B (2)].

If no motion is moved within 18 months, the petition shall stand dismissed. The waiting period of 6 to 18 months from the date of filing petition has 6 months cooking period if other conditions are been held directory by some High courts Roopa v Prabhakar AIR 1994 Kant 12) and not by others (Satyabhama v Narendra AIR 1997 Ori 47). Rajasthan High Court has held that the court has power to grant divorce even after the expiry of that time or even before the expiry of 6 months, fulfilled (Santosh v Virendra AIR 1986 Raj 128).

At the time of second petition, the court shall after hearing the parties and making such inquiry as it thinks fit that a marriage has been solemnized and that the averments made in the petition are true pass a decree.

(vi) The court must in every case be satisfied that the consent of neither party has been obtained by force, fraud or undue influence (Sec. 23 (1)(bb)]

(vii) Collusion [Sec. 23 (1)(c) may be pleaded as a bar to petition for divorce on the basis of mutual consent.

However, a compromise' application agreeing to divorce submitted by the parties can be a basis of divorce, though it should not be collusive. In fact, it is possible now dissolve a marriage by agreement between the parties although none of the grounds on which the court may dissolve marriage, be found to exist. In Santosh v Virendra, a petition for divorce on the ground of cruelty and desertion was allowed to be converted to a petition for divorce by mutual consent, ignoring the formality of a joint petition quired under Sec. 13 B. However, in a petition for divorce by mutual consent, no her ground of divorce can be taken (Ravi v Sharda AIR 1978 M.P. 44).

(vii) No appeal against a divorce decree under Sec. 13B shall lie unless the party finds himself or herself deceived.

Unilateral Withdrawal of Consent by One Party In Sureshta Devi v Om Prakash (AIR 1992 SC 1909), the Supreme Court laid down that if one of the parties withdraws consent unilaterally it would be withdrawal of consent. Mutual consent should continue till the divorce decree is granted. Sec. 13 B (2) requires the court to hear the parties which means both the parties. If one of the parties at that stage says that "I have withdrawn my consent", the court cannot pass a decree of divorce by mutual consent. If the court is held to have the power to make a decree solely on the basis of initial petition, it negates the whole idea of mutuality and consent for divorce.

Bụt in a recent case, Ashok Hurra v Rupa (1997) 4 SCC 226, the Supreme Court has left the question open. In this case divorce was granted even though the wife had unilaterally withdrawn the consent as the marriage was found to be irretrievably broken down. The court further observed that Sureshta Devi should be reconsidered. It is submitted that the view taken in Ashok Hurra case appears to be correct, as in cases of divorce by mutual consent marriage has in fact broken down irretrievably and no use will be served in keeping it alive.

(c) Irretrievable Breakdown of Marriage

Sec. 13 (1A) (inserted by 1964 Amendment), which provides the grounds of irretrievable breakdown of marriage, lays down that either party to a marriage (solemnized before or after the Act) may present a petition for divorce decree on the ground:

- that there has been no resumption of cohabitation for a period of 1 year or upward after the passing of a decree for judicial separation,
- that there has been no restitution of conjugal rights for a period of 1 year or upward after the passing of a decree for Restitution.

As is evident, either party can seek a divorce, irrespective of the fact that decree judicial separation or Restitution has been obtained by the other spouse. Prior 964, this right was available only to that spouse in whose favour such a decree to was passed and thus, only innocent party could avail it (this right was part of the Pounds before 1964). The concept of irretrievable breakdown of marriage makes no distinction between a guilty and innocent party.

The 1964 Amendment has not touched Sec 23, as to its application to all matrimonial causes, including divorce under Sec. 13 (1A). Sec. 23 (1) (a) provides mi to relief to the petitioner on the ground that he is not taking advantage of his own wrong or disability,

In Dharmendra Kumar v Usha Kumar (AIR 1977 SC 2218), the Supreme Court, however, held that mere non-compliance with the decree of Restitution does not constitute a wrong under Sec. 23 (1) (a). To be such a 'wrong', the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be a serious misconduct Under Sec 13 (1A) (), the party is not taking advantage of his own wrong, but availing a legal right.

In Saroj Rani v S.K Chadha (AIR 1984 SC 1562), held that the husband's refusal to or failure to make efforts at resumption of cohabitation or his failure to pay alimony doesn't amount to his taking advantage of his own wrong In this case, also held that 'consent' decrees (passed by courts after making

conciliation efforts) per se are not collusive under Sec. 23 (1) (c). A consent decree can also be the basis Sec. 13 (1A).

However, in a recent case, T. Srinius v T. Varalak shmi (AlR 1999 SC 595), the Supreme Court has again ruled to the effect that Sec. 23 (1) (a) shall be applicable to Sec. 13 (1A).

3. BARS TO MARRIAGE AND MATRIMONIAL RELIEF

Bar to Remarriage

As far as the bar to remarriage is concerned, a 'one-year bar to divorce' has been provided under the Hindu Marriage Act. Sec. 14 enacts a "fair trial" rule, according to which no marriage may be dissolved unless period of one year has elapsed after solemnization of the marriage, though in the case of "exceptional hardship to the petitioner or 'exceptional depravity' on the respondent's part, the marriage may be dissolved earlier by the court In such cases, the court has also to give due weight actors such as whether there is a reasonable probability of a reconciliation een the parties, as also to the interest of children (if any) of the marriage

It is also provided under Sec. 14 that if it appears to the court, at the time of the hearing of the petition, that the leave of the court (to present such a petition within one year of the marriage) had been obtained by misrepresentation or by a concealment of the true nature of the case, the court may dismiss the petition or may pass a decree for divorce with a condition that such a decree shall not operate until one year expires from the date of the marriage.

Sec. 15 lays down that the persons divorce under the Act may marry at any time after the divorce decree (before 1976, there was a one year restriction, provided there is no right of appeal against the decree or if a right, the time for appealing has expired or the appeal has been dismissed.

Precautions to be taken by Court before Passing a Decree (Bars to Matrimonial Relief)[25]

The petitioner to succeed in his petition should not merely prove the fault of the respondent on the basis of which he seeks the matrimonial relief, but should also be able to cross the bars to such relief before his petition will be granted. The burden of proof is on the petitioner. Some of the word, such as collusion and delay apply to all matrimonial relief, while some apply only to divorce. Most of the bars are based on the maxim, one who comes to equity must come with clean hands

Sec. 23 of the Hindu Marriage Act deals with the following bars: (a) Doctrine of strict proof (b) Taking advantage of one's own wrong or disability (c) Accessory (d) Connivance (e) Condonation (1) Collusion (g) Delay, and (h) Any other legal ground. All bars are absolute bars and if a bar exists the petitioner cannot be granted relief (Under English law, some bars are discretionary bars ie. depends upon the discretion of the judge). A decree passed in disregard to these bars is a nullity.