Hindu Law of Marriage

Nature of Marriage

Marriage has been, since the ancient times, one of the most important social institutions. It implies the union of man and woman in body and soul. Sociologists have offered various definitions of marriage, among them being Malinowski's i.e 'a contract for the production and maintenance of children' whereas according to Robert H Lowie, marriage is 'a relatively permanent bond between permissible mates.'

The concept of marriage is to establish a relationship between husband and wife. Based on Hindu law, the marriage is a sacred tie and last of ten sacraments that can never be broken. Also, it is a relationship that is established by birth to birth. Based on smritikars even death cannot break this relationship.

There are three characteristics of the sacramental nature of marriage:

- It is an enduring bond of the husband and wife which is permanent and tied even after death and they will remain together after the death.
- Once it is tied cannot be untied.
- It is a religious and holy union of the bride and groom which is necessary to be performed by religious ceremonies and rites.

The Hindus attach religious sentiments to marriage. To them, marriage is a sacrament which must be performed in order to attain salvation. Being catalyzed by the explosive economic, social and cultural changes that have molded the needs of people in Indian society, the aims, functions and motives of Hindu marriages have kept on evolving with the demand of its constituent members. Arranged marriages are shattering, divorce rates soaring and new paradigms of sex and relationships are being explored. New norms are being formed and we live in a constant molten state of confusion. The concept of Hindu marriage has undergone a drastic change – the entire focus has now shifted from marriage being a *holy sacrament* to a *formal contract*.

Traditional approach to marriage has changed. Before, it was seen as a compulsory bond and unmarried life was considered a taboo. Though Hindu marriage was considered to be sacrosanct and indissoluble; the Hindu marriage Act, 1995 permits divorce on various grounds of adultery, cruelty, unsoundness of mind, mutual consent, etc. The Act also lays down restitution of conjugal rights in cases of desertion. This has virtually affected the stability of marriages and, divorces are happening on a rampant scale. Also, Live in relationships are being preferred over marriages for convenience reasons.

In traditional India, rules of exogamy and endogamy were followed by Hindus. Today, as per the Hindu Marriage Act, inter religious and inter caste marriages are permitted. Difference between Anuloma and Pratiloma marriages are eradicated by legal provisions. Today, persons are permitted to marry within the same gotra and pravara. Consanguineous marriage that is marrying within sapinda relationship is prohibited the Hindu marriage act, 1955.

Earlier, there was no particular age limit for marriage- child marriage was practiced abundantly in India. Today, relief for child marriage can be obtained under the Child Marriage Restraint Act-1929, Civil law, Criminal law and Matrimonial law. The bridegroom must have completed the age of twenty one years and the bride, the age of eighteen years at the time of marriage. Adult marriages or late marriages by educated people are preferred over child marriage in order to gain economic independence, career achievement, higher education, etc.

Formerly, marriages only required religious and social approval but in modern times, it requires legal sanction as well.

Major Changes brought about by the Hindu Marriage Act, 1955[6]

i. Bigamy has been disallowed under the Act. Persons committing bigamy are to be punished under the I.PC.
ii. The degree of sapinda relationship has been curtailed. The Act has further (i) Laid down the list of prohibited degree of relation between whom a valid marriage could not be solemnized.
iii. The Act also prescribes the minimum age for marriage (21 for boys and 18 (11) for girls). Ancient Hindu law did not prescribe any such age for marriage.
iv. Legitimacy has been conferred on many of such children who were born of void and voidable marriages.
v. The Act has provided several 'matrimonial reliefs' such as restitution of conjugal rights, judicial separation, nullity of marriage and divorce. The concept of divorce was not recognized by the ancient Hindu law.
vi. Provisions for alimony and maintenance have been made.
vii. Wide discretionary powers have been conferred on the courts for the custody, education and maintenance of children of the parties.
viii. The Act provides for the first time the registration of Hindu marriage.

VALIDITY OF HINDU MARRIAGE

Section 5 of the Hindu Marriage Act lays down that a marriage may be solemnized

between any two Hindus, if the following conditions are fulfilled, namely

i. neither party has a spouse living at the time of marriage;(Bigamy)

ii. at the time of marriage, neither party
    a. is incapable of giving a valid consent owing to unsoundness of mind. Or
    b. though capable of giving a valid consent, has been suffering from mental disorder of such a kind as to be unfit for marriage and the procreation of children, or
    c. has been subjected to recurrent attacks of insanity or epilepsy;
iii. the bridegroom has completed the age of 21 years and the bride age of 18 years;
iv. the parties are not within the degrees of prohibited relationship, unless custom or usage permits such marriage;
v. the parties are not sapindas of each other, unless the custom or usage permits such marriage.

(i) Bigamy

Before 1955, Hindus could practice polygamy (having several wives) or polyandry (having several husbands). Now, under the Hindu Marriage Act, only monogamy is permitted (.e. one is permitted to have only one wife or husband at a time). A person who marries during the lifetime of his or her spouse, provided that the first marriage is not null and void, commits the offence of bigamy. Sec. 11 of the Act makes a bigamous marriage void and Sec. 17 makes it a penal offence under Sec 494 and 495, Indian Penal Code punishable with imprisonment up to 7 years)

For prosecution for bigamous marriage, the first marriage should be perfectly valid and should've been solemnized according to proper ceremonies. Thus if the first marriage is void, a person can't be prosecuted for bigamy. Also, if the first marriage is voidable and a court's decree annulling first marriage has been obtained, can't be prosecuted for bigamy.

In Bhaurao v State of Malawi AIR 1965 SC 1964), the bigamy was in issue. It was held that a marriage without the performance of essential ceremonies laid down in Sec. 7 is not a valid marriage. The second marriage in this case was performed in gandharva form. The prosecution failed to establish that the ceremonies observed by the parties were the only essential ceremonies in the community of the parties.

In Dr. NA Mukherji v State AIR 1969 All 489), the court held invalid the ceremony f exchange of garlands in the Kali temple after walking seven steps, an imitation of saptapadi. The court observed that the mere intention of parties, however serious, will not make them husband and wife and the accused will escape prosecution even if he deliberately performed a defective ceremony. Thus, there is a lacuna in the law relating bigamy under Hindu Jaw. The persons who perform bigamous marriage can't be guilty if they omit, deliberately or inadvertently by mistake), to perform the essential ceremonies of marriage. Further, a married person can keep a concubine. The solution lies in prescribing a ceremony for all Hindu marriages, and by providing for registration of marriages (registration is not compulsory under the Hindu Marriage Act).

In Sarla Mudgal V Union of India (AIR 1995 SC 1531), the Supreme Court put a check on the practice of Hindus to embrace Islam in order to contract a second marriage. In this case, the husband already married under Hindu law, embraced Islam and solemnized a second marriage under Muslim law. It was held that the second marriage would be invalid because unless and until the first marriage is dissolved by a decree under the Hindu Marriage Act, the second marriage during subsistence of the first one would he in violation of the Hindu Marriage Act, which strictly professes monogamy. Such marriage would amount to bigamy punishable under Sec. 494, IPC. A marriage, which is in violation of "any provisions of law",would be void under Sec. 494, IPC.

As far as the judicial remedies are concerned, in case of bigamy, the aggrieved spouse can initiate criminal proceedings, can claim divorce and file a petition for maintenance allowance. The aggrieved spouse can also seek an injunction, to restrain erring spouse from remarrying, from the court under the Code of Civil Procedure. In the case of bigamous marriage, the "second wife" has no status of wife, but she can start criminal proceedings against the erring spouse if she was not aware of the existence of the first marriage of the erring spouse. It is important to note that the first wife cannot petition for nullity under Sec 11. only second wife could do so. However, the first wife may file a declaratory suit under the Specific Relief Act.

(ii) Mental Capacity (Soundness of Mind)

A marriage on account of lack of mental capacity is voidable at the instance of the other party. The mental conditions specified in Sec. 5 (1) relate to pre-marriage conditions and not to post marriage mental conditions for which other reliefs like divorce is available. Further, mere mental weakness foolishness, idiosyncrasy and excessive sentimentalism are not covered. A person is unfit for marriage if he/ she is unable to carry out the ordinary duties and obligations of marriage Bennett v. Bennett (1969) All ER 539].

The word 'epilepsy' has been removed from Sec. 5 (ii) (c) of the Hindu Marriage Act, 1955 and Sec. 4 (b) (iii) of the Special Marriage Act, 1954 by Secs. 2 and 3 respectively of the Marriage Laws (Amendment) Act, 1999,

(iii) Child Marriage

A child or minor's marriage is a perfectly valid marriage under the Hindu law (P V. Venkataramana v State AIR 1977 A.P. 43). It is neither void nor voidable. The Hindu V Marriage Act only provides for some punishment for such marriage under Sec 18 (imprisonment up to 15 days or a fine up to Rs. 1,000 or both). A child is void under the Special Marriage Act, 1954

The Child Marriage Restraint Act, 1929) as amended in 1978), applies to a communities in India and prohibits child marriages. But the Act does not affect the validity of child marriage, which is governed by the personal law of the parties to marriage. The Act is a penal legislation and provides for punishment for the violation of its provisions. Under the Act, a male above the age of 21 years marrying a girl below 15 years is punishable with imprisonment up to 3 months and is also liable to fine. A similar punishment has been prescribed for the persons who conduct, rect, promote or perform a child marriage The offences under the Act are cognizable. It may be noted that the court Kas power to issue an injunction to prohibit a child marriage from being performed, in the interest of the child, under civil jurisdiction and under the Child Marriage Restraint Act.

Doctrine of Factum Valet

In Sivanandy v Blhaganatlyamma (AIR 1962 Mad 400), it was held that a marriage under Hindu law by a minor male is valid even though no consent of the parents/ guardians was obtained. The marriage under the Hindu law is sacrament and not contract; a minor can't enter into a contract but can perform necessary 'samskaras'. According to the doctrine of factum valet a fact cannot be altered by hundred texts What ought not to be done becomes valid when done) The doctrine in the case of minor's marriage, which was solemnized, couldn't be undone by reason of a large number of legal prohibitions to the contrary. Sec. 4 of the H. M. Act lays down that old Hindu law as it prevailed before 1955 is to continue if no provision is made with respect to that in the Act or if it is not inconsistent with any provision of the Act. In old Hindu law, such marriages were valid.

According to the doctrine of factum valet, where an act is done and finally completed, though it may be in contravention of hundred directory texts, the fact will stand and the act will be deemed to be legal and hiding. The doctrine was applied by the British Courts in India on grounds of equity, justice and good conscience. The doctrine applies only to directory and not mandatory texts of Hindu law The texts which prescribe rules for the guardian's consent to the marriage are merely directory However, the non-observance of essential ceremonies of marriage cannot be overlooked or cured by applying this doctrine, as this is in contravention of the mandatory text of Hindu law.

(iv) & (v) Prohibition on Account of Relationship by Blood or Affinity

All systems prohibit marriage among near relations. According to the rule of exogamy, a person is not permitted to marry within the same tribe. The shastric prohibition of marrying within the same gotra and pravara or sapinda falls under this head.However, today, sagotra or sapravara marriage is valid.

The Hindu Marriage Act.prohibits marriage on account of sapinda relationship The term 'sapinda has been explained by Vijnaneshwara - pinda' means body and sapında' are those persons who are particles of same body. Two persons are said to be sides of cach other if one is

a lineal ascendant of the other within the limits of sapinda relationship, or if both are sapindas to the common ancestors.

Sec. 3 (f) has limited the extent of sapinda relationship to 5 degrees in line of ascent through the father and 3 degrees in the time of ascent through the mother. Un the 'Smritis', the sapinda relationship extends, in the line of ascent to 5 degrees through the mother and 7 degrees through the father.

As per Sec. 3 (g) of the Act, two persons cannot marry if they are related to cach other within the degrees of prohibited relationship" viz.

i. if one is a lineal ascendant of the other, or
ii. if one was the wife or husband of a lineal ascendant or descendant. the other [Thus, a person can't marry his father's wife (step mother), grandfather's wife, etc.; similarly, he can't marry the wife of his so, of son's son, etc.; likewise, a girl can't marry her mother's husband her daughter's husband, etc.], or
iii. if one was the wife of the brother, or the father's brother's wife grandmother's brother's wife, or
iv. if the two are brother and sister, uncle and niece (eg, mama-bhanji, chacha bhatiji), aunt and nephew (eg. mausi- bhanja, bhua- bhatija), or children of a brother and sister or of two brothers or two sisters (1.e. cousins),

Explanation to Sec. 3 (1) and (g) lays down that the relationship includes legitimate as well as illegitimate relationship, relationship by full, half and uterine blood, and relationship by adoption as well as by natural birth. When both the parents (father and mother) of two persons are same, it is relationship by full blood; when father is common and mothers are different, it is 'relationship by half blood'; when mother is same and fathers are different, it is relationship by uterine blood'.

It is also laid down under Sec. 5 (iv) and (v) that if a custom permits, a marriage between two sapinda or between two persons within the degrees of prohibited relationship, will be valid. For instance, among the Jats of Punjab marriage with brother's widow, and in South India marriage with one's sister's daughter are recognized by customs.

A marriage in violation of the requirement of sapinda relationship and degree of prohibited relationship is void. In addition to this, the party guilty of performing such a marriage may be sentenced to a term of imprisonment up to one month or with fine up to Rs. 1,000 or with both (Sec. 18).

NULLITY OF MARRIAGE

There are two types of impediments or bars to a marriage: absolute and relative. ILan absolute bar-exists a marriage is void, while if a relative bar exists, a marriage is voidable.13

Void Marriages

A void marriage is void ab initio ie. does not exist from its very beginning. It is called a marriage because two persons have undergone the ceremonies of marriage, but as they absolutely nck the capacity to marry they cannot become husband and wife. A void marriage is no marriage and no legal consequences flow from it. It can neither be approbated nor can it be ratified.

A decree of nullity is not necessary in case of a void marriage Even when d court passes a decree it merely declares an existing fact i.e. the marriage is null and void. It is not the court's decree which renders such a marriage void. However, a decree is sought when the parties want to be certain of their legal position to avoid subsequent complications and that the court may grant ancillary reliefs, such spousal maintenance, custody of children, etc. It may be noted that only either n party to the marriage can file a petition for nullity, and if one of the parties dies, the other cannot file such a petition.

The grounds of void marriage under the Hindu Marriage Act (Sec. 11) are

1. Bigamy.
2. Parties sapindas to each other.
3. Parties are within the prohibited degrees of relationship.
4. Essential ceremonies of marriage are not performed (not mentioned in Sec. 11).

These grounds (discussed earlier) apply only to marriages solemnized after the commencement of the Act, i.e. after 18 May 1955; to the pre-Act marriages the old Hindu law of nullity applies.

Voidable Marriages

It is a perfectly valid marriage so long as either party to the marriage does not avoid it on a petition and a decree of the court annuls it Thus, if one of the parties does not petition for annulment of marriage, the marriage will remain valid., If one of the party dies before the marriage is annulled, no one can challenge the marriage 5 The parties to a voidable marriage cannot perform another marriage without first getting a decree declaring their first marriage as void, otherwise they will be guilty at bigamy while any party to a void marriage may perform a second marriage without getting it annulled and the party will not be guilty of bigamy.

Once a voidable marriage is annulled the decree is given retrospective effect from date of the marriage. The marriage is deemed to have been void for all purpose from its inception and

parties are deemed to have never been husband and wife. The rule has its origin in the doctrine of ecclesiastical (English) law of indissolubility of marriage either marriage exists forever or never. It may be noted effect of a decree of nullity of marriage has been almost equated with the that of a divorce decree. It may also be noted that a wife' of void marriage cannot direct maintenance under Sec 125 of the Criminal Procedure Code of India, though wife of voidable marriage can.

The grounds of voidable marriage under the Hindu Marriage Act are laid down in Sec. 12(1). The grounds are available in respect of both the pre-Act and the post-Act marriages. These grounds are:

1. Impotency of the respondent.
2. Respondent's incapacity to consent and mental disorder.
3. Consent of the petitioner obtained by fraud or force.
4. Concealment of pre-marriage pregnancy by the respondent.

(a) impotency

Before the 1976 Amendment to the Hindu Marriage Act, it was laid down that "if at the time of marriage one of the parties to marriage was impotent and continues to be so till the presentation of the petition", the other party could sue for annulment of marriage. The 1976 Amendment reworded the clause thus, "the marriage hasn't been consummated on account of impotency of the respondent". Thus, now respondent must be impotency at the time of consummation of marriage.

Impotency means practical impossibility of consummation of marriage, i.e. inability to perform or permit performance of the complete act of sexual intercourse'. Thus artial or imperfect, difficult and painful intercourse amounts to impotency. However, sexual intercourse, which is incomplete occasionally, does not amount to Impotency (Shakuntala v Om Prakash AIR 1981 Del 53). Consummation is sometimes referred to as vera copula, which consists of erection and intromission.

Impotency is usually either physical, or mental. The latter includes emotional, psychological or moral repugnance or aversion to the sexual act. If

impotency can be cured by medical treatment or surgery, it would not amount to impotency, unless the respondent refuses to undergo treatment Rajendra v Shanti AIR 1978 P & H 181; M. v M. (1956) 3 All ER 769]. Mere barrenness (bhaani) or sterility (incapability for procreation) or no-uterus does not amount to impotency, when the wife was capable of having sexual intercourse.

(b) Mental Unsoundness

A marriage on account of lack of mental capacity is voidable at the instance of the other party. The mental conditions specified in Sec. 5 (1) relate to pre-marriage conditions and not to post marriage mental conditions for which other reliefs like divorce is available. Further, mere mental weakness foolishness, idiosyncrasy and excessive sentimentalism are not covered.

(c) Fraud or Force

Absence of free consent renders the marriage voidable under Sec. 12 (1) (c) of the Act. However, it is important to note that no consent do not invalidate the marriage as absence of consent do not make a marriage voidable. The requirements of the ground under Sec. 12 (1) (c) are:

i. consent of the petitioner was obtained by fraud or force,
ii. the petition must be presented within one year of the discovery of fraud or cessation of force,
iii. the petitioner mustn't have lived with the respondent (as husband or wife after the discovery of fraud or cessation of force. A single act of sexual intercourse after such discovery will be fatal to the petition.

Force' implies coercion or undue influence. Mere pressure or strong advice persuasion, etc., will not amount to forçe, unless there is use of actual or physical force and threat to use force. Similarly, not every misrepresentation or concealment amounts to 'fraud'. The fraud vitiates of the consent should relate to the nature of ceremony or any material fact or circumstance concerning the respondent (it is immaterial whether such fact or circumstance is curable or remediable, P v K. AIR im Bom 400). The fact should be such as to cause an interference with the marital life and pleasure of the couple.

Where the parties went through a ceremony of marriage without any intention the husband's part to regard it as a real marriage, it amounts to fraud. Fraud could on to the identity of the party; thus, if A goes to G and says that he is B, on that representation G marries him. It has been held the concealment of serious disease, religion or caste, and illegitimacy amount to fraud. Similarly, non-disclosure of marriage status (c. divorcee amounts to fraud. Likewise, inability to bear a child material fact and should be disclosed (if known before the marriage.

Concealment of pre-marriage unchastity (and even delivery of illegitimate child) does nat Amount to fraud under the English and Indian law. However, in P K it was held that suppression of the fact of immoral life before the marriage would be a feud.

Where the fraud was committed by the petitioner's father to the petitioner (concealed the age of bridegroom), the court allowed the petitioner (bride) to avoid the marriage (Babui v Ram AIR 1968 Pat 190). It may be noted that the fact of the husband being 'adopted' son does not amount to a material fact (though 'illegitimacy has been held to be a material fact). Under the

Hindu Adoptions and Maintenance Act, 1956, adopted son' is the son of his parents for all purposes'.

A minor girl can avoid the marriage under Sec 12 (1) (c) if she was married against her consent and wishes. She can also take the plea of consent of her guardian being obtained by fraud, when the marriage was performed before the Child Marriage Restraint (Amendment) Act, 1978 came into force. Sec 12 (1) (c) prior to the 1976 Amendment read: That the consent of the petitioner, or the consent of the guardian in marriage of the petitioner, was obtained by force or fraud.

(d) Pre-marriage Pregnancy

According to the Dharamashastra, if a man unknowingly married a pregnant woman, she is his wife and the child born to her is his child, known as sahadaja. But if he married a pregnant woman without any knowledge of her pregnancy he has the power to repudiate the marriage (Manusmriti, IX, 73). Somebody else's child cannot be foisted on the husband.

The ground is 'pre-marriage pregnancy' and not 'pre-marriage unchastity'. The latter is not a ground of voidable marriage.

The requirements of the ground under Sec. 12 (1) (d) are:

i. the respondent was pregnant at the time of marriage, from a person other than the petitioner,
ii. the petitioner, at the time of marriage, didn't know about it,
iii. the petition must be presented within one year of marriage (under Parsi law, it is two years of marriage),
iv. marital intercourse didn't take place with the petitioner's consent after (w the discovery of respondent's pregnancy by the petitioner.

The burden of proof is on the petitioner. Wife's admission of pre-marriage pregnancy plus the fact that the husband had no access to her before marriage is sufficient to establish her pre-marriage pregnancy (Mahendra v Sushila AIR 1965 384).Medical evidence may also be given.

CHILDREN OF VOID AND VOIDABLE MARRIAGES:

LEGITIMATE AND ILLEGITIMATE CHILDREN

Although distinction between legitimate and illegitimate children is still maintained, there is a tendency in most of the countries including India to blur this distinction In this regard, two

trends are discernible. One is to confer the status of legitimacy on some type of illegitimate children. The other is to confer rights of legitimate children on illegitimate children.

Under the Hindu law, an illegitimate child has never been considered as filius nullius and his relationship with both parents was recognized. One species of an illegitimate child, called dasiputra (son born to a permanently and exclusively kept concubine) was accorded a definite status in his father's family, although his status inferior to the aurasa (natural) son, inasmuch as he had no right of inheritance or survivorship in the presence of natural son.

Broadly speaking, a child born within lawful wedlock has been considered to be a legitimate child, and a child who is born outside the lawful wedlock to be an illegitimate child. Sec. 112 of the Indian Evidence Act, 1872, lays down a rule of presumption in this regard. It lays down that child born within the lawful wedlock (at any time, even soon after the marriage), or m a child born within 280 days of the dissolution of marriage by death or divorce, will be conclusively presumed be the child of his father, provided the mother remained unmarried.

In some countries, like England, there is a tendency to confer a status of legitimacy of illegitimate children. Such children are known as “legitimated" children. Legitimation is a legal process by which status of legitimacy is conferred on the children born outside the lawful wedlock, by subsequent marriage of parents. Legitimation by acknowledgement or recognition (by putative father) is also common in some countries, like France. In India, institution of legitimation is unknown, only Muslim law recognizes legitimation by acknowledgement in a limited way.

The position regarding the children of void and voidable marriages-under the Hindu Marriage Act Sec. 16 and Special Marriage Act (Sec. 26) is:

i. Children of annulled voidable marriages are legitimate in the same way as children of an otherwise valid marriage are.
ii. Children of annulled voidable and void marriage, are legitimate but they will inherit the property of their parents alone and of none else.

    It may be noted that before the 1976 Amendment to the Hindu Marriage Act, a status of legitimacy was conferred on the children of those void marriages, which were declared null or void. If a marriage was not declared null and void, the children remained illegitimate. The position has been remedied by the 1976 Amendment. Now such a declaration (Le a decree of nullity) is not required to confer a status of legitimacy.

    Under Sec. 16, by a fictio juris (legal fiction), a child born of a void or voidable marriage is deemed to be the legitimate child of his parents (as if such a marriage had been valid). It may be noted that Sec. 16 comes into play only if a marriage was proved to have taken place, but which is otherwise void or voidable. So, where there has been no marriage at all Sec. 16 cannot be invoked, and legitimacy cannot conferred on any child.

iii. If the marriage is void or voidable under any other provision of the law, except Sections 11 and 12 (which Jays down the grounds of void and voidable marriages), the children will be illegitimate. Such a case will be, for instance, when the marriage is void for lack of performance of valid ceremonies

It is interesting to note that the Indian Divorce Act, 1869 (applicable to Christians and persons married under the Special Marriage Act) lays down that where a marriage is annulled on the ground of bigamy but it is shown that the subsequent marriage was contracted in good faith and with full belief of the parties that the former spouse was dead, or when a marriage is annulled on the ground of insanity, children begotten before the decree, will be legitimate.

RESTITUTION OF CONJUGAL RIGHTS

The necessary implication of marriage is that parties will live together. The restitution of conjugal rights' means that if one of the parties to the marriage withdraws from the other's society, the latter is entitled to compel the former to live with him or her. Thus, it is a positive relief which aim to preserve marriage and not at disrupting it as in the case of divorce or judicial separation. The remedy has its origin under the Jewish law.

Sec. 9 of the Hindu Marriage Act provides this relief. The court, on being satisfied of the truth of the statement made in such petition and that there is no legal ground why the application should not be granted (this relates to bars to matrimonial relief) may decree restitution of conjugal rights. Where there was no valid marriage between the parties, the decree could not be granted. Similarly, when both the parties are not Hindus, Sec. 9 will not apply The term "conjugal rights" means matrimonial rights i.e. the right of the parties to society and comfort of each other The word "society" means companionship, cohabitation i.e. consortium (living together as husband and wife).

The words withdrawal from the society of other" mean withdrawal from the totality of conjugal relationship, such as refusal to stay together, refusal to have marital intercourse and refusal to give company and comfort.

In withdrawal from the society, there is an element of 'desertion. Desertion obviously amount to withdrawal from the society. However, to establish withdrawal from the society, it is not necessary to prove legal desertion. It can be less than legal desertion. It is a total repudiation of cohabitation. Thus, a couple which is sharing the same household, rejection by one of the physical relationship coupled with difficulties of normal affection does not amount to withdrawal from the society.

A petitioner shall be entitled to a decree of Restitution on establishing that he or she has a desire to resume matrimonial co-habitation and to perform all matrimonial obligations. A petition for restitution of conjugal rights will fail, even if it is established that the respondent

has withdrawn from the other's society, where there is a reasonable excuse" for doing so (as laid down in Sec. 9). In sum, the following will amount to reasonable excuse:

A. a ground for relief in any matrimonial cause (eg if petitioner is guilty of cruelty or is an impotent the petition will fail),
B. an act, omission or conduct, which makes it impossible for the respondent to live with the petitioner.

The matrimonial misconduct should be weight and grave'; mere temperamental incompatibilities, inexplicable conduct using rough language in public, or bef guests, residing of aged parents in matrimonial home, husband's refusal to wife's place have been held not to constitute reasonable excuse.

The following have been held to amount to 'reasonable excuse:

- Husband's insistence that wife must live with his parents or persistent nagging of wife by husband's parents (Shanti v Balbir AIR 1971 Del 293

- Husband is keeping a concubine or addiction to drink/ drugs accompanied by violent temper or husband's overbearing, domineering and dictatorial conduct [Timmus v Timmy's (1953) 2 All ER 187].

- Husband's extravagance in living.

- Husband forces wife to take drink before guests or to eat meat (if she is vegetarian) (Chandra v Saroj AIR 1975 Raj 88).

- Husband's false accusations of adultery or immortality.

Thus, 'cruelty' (whether physical or mental) has often been the major cause of withdrawal by one spouse from the society of the other. As far as burden of proof' is concerned, Explanation to Sec. 9 lays down that the initial burden to prove that the respondent has withdrawn from the society of the petitioner is on the petitioner, and once that burden is discharged it is for the respondent to prove that there exists a reasonable excuse for the withdrawal.