

Treatment of Irretrievable Breakdown of Marriage under Hindu Law

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Introduction

Marriage is a union wherein two individuals agree to become each other's partner and start a family. Earlier marriage was regarded as indissoluble, but in the contemporary society facet of Divorce has evolved which acts as a hurdle in the continuation of the union i.e. Marriage. It was the Christians who brought in the concept of Divorce in India in the 19th century. It was in the year 1955 when the concept was adopted by Hindus with pan India effect excluding Jammu and Kashmir. Prior to 1955 there existed some acts with jurisdiction in particular states which talked about the element of divorce. Today, question of compatibility is seen to take its shape within the institution of marriage. Partners due to lack of consensus are finding ways to separate from each other. The Hindu Marriage Act of 1955 through its Section 13 has tried to incorporate every aspect related to Divorce. The Apex Court once said² that when there is breakdown of marriage for whatever reasons, it becomes clear that now the partners cannot live together as husband and wife. In such circumstances one should acknowledge the facts and should better prefer to close the chapter. Apart from Irretrievable breakdown, there are several other aspects like cruelty, Desertion, Adultery, Unsoundness of Mind etc., which are valid grounds of Divorce under Hindu Law. When we talk about Marriage in general and Divorce in particular, there are two vital theories which elaborate on the facet of Divorce. First being the No fault theory, and the second which is inherently attached to the no fault theory is the Breakdown theory. These theories give an elaborate view as to the developing Jurisprudence on Divorce. Furthermore the Law Commission of India through its reports has tried to play a decisive role in this regard. Thus it becomes crucial to give this topic a glimpse.

Aspect of Hindu Marriage Act, 1955

In Hindu Law, there have been changes made time to time. It was in the year 1955 that a separate act known as the Hindu Marriage Act of 1955 came into existence. After

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² Saroj Rani v. Sudarshan Kumar Chadha, (1984) AIR 1562.

Independence this was the first Act governing marriage which had its extent to the whole of India except the state of Jammu & Kashmir as provided in Section 1 of the Act. In this Act, there have been amendments in accordance with the need of society. In order to tackle the demands of family and its entities i.e. husband and wife, this act entails the section 13 which gives an elaboration on the aspect of Divorce in marriage. This section says that a husband or a wife can file a petition in order to dissolve their marriage. Talking specifically about the ground of Irretrievable breakdown of marriage, the Hindu Marriage Act of 1955 does not consider it valid ground for divorce as of now. Though there have been some initiatives in this regard. There was a Marriage Law Amendment Bill 2013 introduced in the Rajya Sabha which clearly depicted the provisions of making Irretrievable Breakdown of marriage as valid ground of divorce which has also been enacted under Section 13C of the Act. But unfortunately it was not considered in the Lok Sabha. Though there have been discussed in the Parliament, it is worth noticing as to how long will the Representatives take to inculcate the much awaited amendment.

Other Grounds of Divorce

The Hindu Marriage Act, 1955 through its Section 13 depicts various grounds of Divorce. Section 13 says that a husband or wife can file a petition for the dissolution of their marriage and for attaining a decree of divorce. There are various grounds mentioned which are valid and one can claim divorce relying on such grounds. The first ground is of Adultery. It says that if any person has sexual intercourse with anyone other than the spouse is guilty of Adultery. Secondly divorce can be taken if the petitioner has been treated with cruelty. Moreover the ground of Desertion acts as a valid ground for divorce. If the petitioner is deserted for continuous two years then he/she can seek the decree of divorce. If one of the partners has converted from Hindu to any other religion, then also divorce can be claimed. The situation when other party has incurable unsound mind or is suffering from a virulent form of leprosy which is also incurable then it stands as a valid ground for divorce. Also if the other party has been suffering from a venereal disease which is communicable, the petitioner gets a right to be divorced. In addition to this, if one of the party has entered any religious order and renounced the world then the spouse has divorce as the ultimate remedy. There is another provision which says that if the other party is not heard to be alive for seven years or more then also decree of divorce can be attained. As per the section 13-B, there is provision for divorce by Mutual Consent too. Both husband and wife can together file a petition for dissolution of their marriage if they have been living separately for about one year and have

mutually agreed for the dissolution. Though as of now, Irretrievable breakdown is not considered as valid ground of divorce in the eyes of law. There have been many judicial decisions in the light of this principle which clearly depicts the necessity of incorporation. In the *Naveen Kohli v. Neelu Kohli*,³ the Supreme Court in a way recommended the government to bring in amendment in the Hindu Marriage Act, 1955 and introduce irretrievable breakdown of marriage as a valid ground for divorce. This case rightly pointed out the issue because today, it is the need of the hour.

Theories of Divorce under Hindu Law

Marriage has a direct relation with the socio-economic conditions and the circumstances under which a particular marriage takes place. In this contemporary society things have changed a lot. Now marriage is not seen as a mere ritual where two individuals get to marry and spend the life with each other but it is seen as a matter of compatibility, matter of equality and it is equated on the scale of Independence. Both the entity be it the husband or the wife, wants to choose a marriage where their own personality is not superseded by the domination of other. They are in search of matrimonial relationships where everyone appreciates the significance of being independent. There are two theories which have developed elaborating on the Jurisprudential aspect. First is the No fault theory followed by the break down theory.

No Fault Theory

Earlier in Family Law, the person with fault was used to be punished. But when a marriage is solemnized, it is treated as unison between two individuals. When both individuals start their life together, they face a lot of hurdles in their matrimonial relationship. It is not always the case that only the husband or only the wife is at fault. There is a doctrine of Recrimination which says that if a person is at fault, no remedy can be given. And in order to seek matrimonial remedy one must come with clean hands. There have been situations when the tension arises due to fault on part of both the partners. It becomes really tough to depict as to whose fault was more than the other. Such situation gives rise to theory of No Fault. According to this there is no burden regarding the fault of partners. As the name suggests, it is not necessary to depict fault. There may be so many reasons behind a disturbed matrimonial relationship. Both the husband and wife instead of wasting time on fault aspect should try to bring in evidences which would prove that their marriage is now beyond the

³A.I.R. 2006 S.C. 1675.

ambit of getting repaired. Similar situations were noticed in the case of *Dastanev.Dastane*⁴ the couple was involved in proceedings for nearly a decade and the petition of the husband for want of separation was dismissed. The court held that time would elapse in finding faults. It is the time that we should adopt no fault theory and includes the concept of Irretrievable breakdown as an importance solution. In addition to this, The Law Commission of India through its 71st Report suggested for the introduction of Irretrievable breakdown of marriage because restricting grounds to specific offence cause injustice in situations where there is no fault of any party.

Applicability of Breakdown Theory

This theory is quite similar to the no fault theory. In general terms it depicts the modern view on Divorce. According to this theory, the couple which wants decree of divorce has to satisfy the court that the marriage has been broken down, there is not even a bleak chance of continuing the marriage and there are left with no desire to stay with each other. In this theory the cause of such situation is immaterial. This theory rings true because if we see the practical aspect, after a marriage cease to exist then getting divorced and turning over a new leaf is the only feasible solution. Divorce should not be restricted but instead should be seen as a solution to ward of greater difficulties. In *Madhukar v.Saral*⁵ the High Court observed that the interest of society should be taken into consideration. If there has been breakdown of marriage for some genuine reasons, then there is practically no purpose in keeping those concerned people. The Kerala High Court also in a judgment⁶ emphasized that when there arise incompatibility within minds of husband or wife then there is a break in the flow of stream i.e. institution of marriage. It is unrealistic of bringing the partners together again when their desire to live together has withered off. Thus breakdown of marriage is the ultimate panacea.

The 217th Law Commission Report

The Government of India through the Law Commission of India submitted its 217th Report titled “Irretrievable Breakdown of Marriage- another Ground for Divorce” in the year 2009. The Report acknowledged the presence of Section 13 of the Hindu Marriage ACT, 1955 and Section 27 of the Special Marriage Act of 1954. It said that both the acts provide for grounds

⁴AIR 1975 SC 1534.

⁵AIR 1973 Bom. 5557.

⁶Abu Baker Haji v. Manu Koya, AIR 1971 ILR 338 (Ker.)

for a petition for divorce; but there has been a lacuna that none of the act provides any provision of Irretrievable breakdown of marriage as valid ground of marriage. This Report acknowledged the recommendations of the 71st Report which talked on the same line with same perspective. Apart from the report there have been judicial developments which have been discussed above⁷ wherein the need to consider irretrievable breakdown of marriage have been already coined. We cannot deny the fact that a genuine marriage is an amalgamation of adjustment, cooperation, tolerance and respect for each other. Trivial issue should not affect the sanctity of marriage. The Report has used the case of *Ms. JordenDiengdeh v. S.S. Chopra*⁸ to depict the observation of the Hon'ble Supreme Court. The Court said that it has become necessary to inculcate mutual consent and irretrievable breakdown of marriage in all concerned cases as valid ground of divorce. The time has come to provide the society with a procedure of marriage which is uniform. Under the chairmanship of Hon'ble J. H.R. Khanna, the Law Commission of India suggested the same points. The 217th Report clearly pointed out that why do we tend to forget that broken marriage which is beyond the scope of getting better will injury the concerned parties, so the law should not act on the contrary notion and play with the sentiments of the parties. The Government should not ignore the suggestions made by the apex court with the help of catena of judgments. The Report specifically points out the limitation and says that the ground of irretrievable breakdown of marriage cannot be evoked if the petitioner himself/herself is at fault. Only if both the parties have lost interest to live with each other then only Court can pay heed towards it and act with caution and in best interest of the parties. Every coin has two sides. This particular Report besides delving on the positive aspect of irretrievable breakdown of marriage, it has also emphasized on the negative facets. It said that the principle of irretrievable breakdown of marriage no doubt is a great tool to ward off the hurdles of a relationship but on the same hand it cannot be used as a magic formula to obtain a decree for divorce. There was a judicial decision given in this aspect by the Calcutta High Court that in a petition dealing with the want of divorce on grounds laid down in the Hindu Marriage Act and the Special Marriage Act, then a court in such circumstances cannot accord divorce on mere ground of irretrievable breakdown of marriage.⁹ This Report also used to case of *Samar Ghosh v. Jaya Ghosh*¹⁰ to put emphasize on the Supreme Court's view on the recommendations of the previous 71st Report which talked

⁷Ibid 5.

⁸AIR 1985 SC 935.

⁹AIR 1997 Cal. 134.

¹⁰(2007) 4 SCC 511.

on the same line as this Report. Herein the Apex Court referred to the earlier Report and said that it is now appropriate to deal with the Law Commission's 71st Report on Irretrievable Breakdown of Marriage.

Glimpse on the Criticisms

Every aspect has two opposite views attached to it. It is often debated that the Irretrievable breakdown of marriage can be misused according to person's will. It is true that today the concept of family has changed in totality. Elements of democratic living, Independency have entered the domain of family. It is said that the defence of breakdown of marriage will increase the number of divorces in India and partners will be ready to seek divorce on small fight among each other. There can also be a situation where both the parties have been living apart for the time being due to some small issue. Now will the fact of them living separately constitute as the end of marriage? A situation can also be possible where for one of the party the matter may be equal to breakdown of marriage while for the other it may be with the perfect ambit of getting repaired. What would be the outcome of the Irretrievable breakdown of marriage then? Moreover the Government criticizes it saying that there is no need of this additional ground because there are already sufficient grounds present in the act.

Conclusion

The institution of marriage can only thrive if its entities i.e. the husband and wife are satisfied and happy with each other. When both the parties to marriage have lost interest in the institution of marriage and left with no desire to live with each other, in such circumstances why the agony of continuing marriage should be prolonged? It is true that in certain situation parties may be living apart due to arguments on some negligible issues. Now will the fact that they are living separately constitute as the end of marriage? The answer to this query will be a negative one. A marriage cannot be considered as an end due to trivial and insignificant matters. In the contemporary society most of the developed countries have adjusted with the changing preferences and need of people and incorporated the concept of Irretrievable Breakdown of Marriage in their Family Law. Isn't it the chance of India to be the next in the list? The Allahabad High Court recently through a judgment directed the Law Commission of the State to take appropriate steps towards the view on inculcating irretrievable breakdown of marriage as a valid ground of divorce in the Section 13 of the Hindu Marriage Act of 1955. In addition to this the Madras High Court moving one step ahead while dealing with a matrimonial dispute. It regarded the irretrievable breakdown

of marriage as a valid ground of divorce.¹¹ Thus it is clear that the Indian Judiciary has taken note on the vital aspect of irretrievable breakdown of marriage. It is quite evident from the judicial decisions which are coming from the Hon'ble courts. Both the 71st as well as the 217th Report of the Law Commission have coined the term of Breakdown of marriage and its use as a valid ground of divorce. Ultimately it is upon us, the citizens of India to ponder as to whether the time has come for such incorporation or does the nation needs more Reports to change its perspective and turn over a new leaf.

¹¹(2017) SCC Mad. 1459.