

Theories of Divorce under Hindu Family Law

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ABSTRACT: *Notion bearing divorce was unspecified earlier. Hindu law presumed marriage to be an indissoluble knot between husband and wife. Manu who pronounced that a spouse can't be delivered by her better half either by deal or by deserting, suggesting that the conjugal tie can't be cut off in any capacity. Although Hindu law does not address divorce, it was construed that if it is acknowledged as a long-standing custom, it holds legal standing. As indicated by Kautilya's Arthashastra, a marriage may be broken down by common assent on account of the unlicensed marriage type. Manu, on the other hand, doesn't really engage in divorce. It pronounces "let common constancy proceed till death; this, in a word, might be perceived to be the most elevated dharma of the couple". In this paper the author will analysis the theories of divorce in Hindu Law in depth and further discuss the methods in which a wife is entitled to claim divorce as per the law.*

KEYWORDS: *Divorce, Hindu Law, Institution of Marriage, Fault Theory, No Fault Theory.*

INTRODUCTION

The Hindu marriage itself was considered from ancient times to be bond of sacramental nature among husband with wife that stretches until death implying sacred tie that never be called off. Such sacred knot couldn't be dissolved once it has been formed. The division of spouses was considered by Hindus to be an act that breached the law of God.

They therefore did not accept separation, but it laid down provisions concerning divorce after the enactment of the Hindu Marriage Act, 1955. Matters relating divorce and other connected with it are addressed in numerous sections. Marriage may be terminated by mutual agreement in an unauthorized form of marriage, as per Kautilya in Arthashastra.

On the other hand, Manu thought that it was difficult to discontinue marriage as a sacrament and that faithfulness between the spouse and the wife ought to be conveyed until their final gasps. Under Hindu Marriage Act, 1955, however, the conditions changed after divorce was enforced.

Marriage is both a bond and a sacrifice. It is a contract because it is based on offer and acceptance and is similar to living together under an arrangement. Because of its religious connection, sentiment. On tolerance, adaptation and reverence for each other, a sound marriage is established. The partnership would not be a happy relationship on the off chance that both of companions to the marriage are not set up to live holding same side.

It will not do any good to stretch such a relationship, but rather grow animosity and resentment among the spouses. Such a marriage must therefore be dissolved to safeguard the sacredness of marriage, to decrease the quantity of despondent relationships and to forestall the valuable long stretches of life of the companions from being wasted.

Divorce means the separation of a marriage under authority of a competent court. Divorce happens when a person wishes to disrupt an onerous marital arrangement. By undergoing divorce in court, law allows for a means of getting out of an unhappy marriage. Theories have been identified as 'fault theory' and 'no fault theory' focusing on the type of divorce.

DISCUSSION

1. Divorce Meaning

By dissolving marital relations, divorce means putting an end to marriage. It is the formal breakup by judge or any court bearing competence regarding marriage. Post divorce, both husband and wife will no longer be parties. The divorce settlement requires each party to have as many new marriages as they want. In modern times, they can't adjust via settlement with one another, divorce is permitted for the spouses. In Hindu law, separation is directed by the 1955 Hindu Marriage Act. The accompanying areas of the demonstration examine dissolution:

- Reasons upon what divorce under Section 13 gets asserted,
- Additional explanations for Hindu wives who may demand divorce,
- Alternate reliefs under Section 13A during divorce hearings,
- Divorce pursuant to s.13B by mutual consent,
- Presentation of divorce petition pursuant to Section 14,
- Divorced individuals upon re-marriaget.

2. Theories resulting Divorce in India

2.1. Fault Theory

One of the partners asks the court to grant divorce focused on certain fault of the other partner in the fault theory of divorce¹. It necessitates one guilty along with one innocent party, and cure for divorce can only be found by an innocent party. The aggrieved party alone is entitled to divorce on the off chance that one of individual is liable of submitting a conjugal offense. If both parties seek divorce on the grounds of the other's guilt and both can show that the other spouse is at fault, the Court determines which one is at least at fault.²

It was based on the principle of guilt when the right to divorce or the right to break the marital bond was first incorporated into marriage law. The other partner had the right to dissolve the union only if the spouse was guilty of a marriage crime or, in other words, had breached the terms or conditions of the marriage contract.

Popular reasons for divorce have been established in almost all the divorce legislation. Under section 13 (1), nine grounds of fault were included in 1955 mentioned Act, on which either spouse can claim divorce are:

2.1.1. Adultery

In certain nations, the thought of infidelity may not be treated as an offense. Be that as it may, in the marriage infringement, according to the Hindu Marriage Act, infidelity is viewed as perhaps the main justification for looking for separation. Adultery implies a common and willful sexual connection between a wedded individual and someone else of the other gender, either wedded or unmarried. The intercourse held between the spouse and his subsequent wife, for example the individual is liable for the Adultery if their marriage is considered under polygamy.

A scenario describes, with another lady reclined upon bed, the wife found her husband, and the neighbor also reported that the husband had committed a crime. Here's a wife having a divorce.

Sachindranath Chatterjee vs Sm. Nilima Chatterjee:

Parties to case were legally married couple. After solominizing, wife was left at her home by husband. Wife had to complete her studies to find job in another city. He was regularly meeting his wife in intervals

¹ indianlawportal.co.in

² Darshan Gupta v. Radhika Gupta 2013 AIR SCW 5505

of 2-3 months. He later learned that his wife committed adultery that is, she was indulged to sexual relations with her nephew and others. Complainant enters the court reflecting adultery ground to apply for divorce and his claim has been admitted and the marriage is dissolved.

2.1.1.1. Essentials construing Adultery

- Either of partners is engaged for intercourse alongside some other member of the opposite sex, irrespective of fact that other person is married or not.
- Voluntary as well as consensual sexual intercourse is essential.
- Marriage was in existence at the commission of such act.
- Ample amount of circumstantial proof is required to make another person liable.

2.1.2. Cruelty

Both emotional and physical cruelty are part of the definition of cruelty. Cruelty in physical nature means that spouse hit another spouse or generates some body harm. But as the partner can also be psychologically abused by the other spouse, the definition of mental abuse was introduced. Mental Cruelty is the absence of compassion that adversely affects the individual's welfare. Well, the essence of physical cruelty is easy to tell, but hard to say about mental cruelty.

2.1.2.1. Things building Mental Cruelty via wife countering Husband:

- To humiliate him when friends including relatives are around.
- Calling off the pregnancy without the permission of the husband.
- To make false accusations against him.
- Not giving consent to marital physical relationship along with no valid reason.
- When wife has an affair.
- When wife lives an immoral life.
- Never ending demand of money.
- If wife behaves aggressively which is uncontrollable.
- Victimization over husband family³.

In a case, on grounds of mental cruelty, the petitioner lodged a divorce petition against his wife. He showed that his wife was violent and uncontrollable in her actions towards him and his parents, and several times she lodged a false complaint against her husband. On the basis of cruelty, the court acknowledges the appeal and grants the divorce⁴.

2.1.2.2. Reasons that amounts to mental cruelty done by husband with his better half:

- When wrong accusation are put, of adultery.
- Demand for dowry is demanded constantly.
- If husband is impotent.
- Forceful abortion of her child.

³ Ibid

⁴ II (2003) DMC 708

- Problem of drinking by husband
- Husband has affair or affairs.
- The husband lives an immoral life.
- If husband behaves aggressively which is uncontrollable.
- Humiliation by husband to wife when around of family and friends.

2.1.3. *Desertion*

Desertion implies, without any fair explanation and without his permission, the irreversible abandonment of one partner by the other spouse. In general, it confers dismissal by one spouse during the commitments of marriage.

2.1.3.1. *Essentials*

- Other spouse enduring renunciation.
- Declining marriage responsibilities.
- No rationale provided.
- Lacking consent from left spouse.

A matter where respondent goes out in this example fully with the aim of abandoning his wife. The wife eventually educated court, but the defendant established that when he left the house with the goal of deserting, he did so with the goal of abandoning his wife, he attempted for returning where petitioner stopped him from doing so. The defendant should not be held responsible for desertion in this case.

2.1.4. *Conversion*

If one of the partners, without the permission of the other partner, changes religion and converts into other, left spouse may approach court and request a divorce remedy.

Suresh Babu vs Leela

Here, husband becomes a Muslim for marrying another one. Ex-wife Leela draws case, without her permission and abuse, sought divorce on the basis of conversion.

2.1.5. *Insanity*

Insanity means that there is an unsound mind in the person. The following two conditions are insanity as a reason for divorce—

The respondent was incurably unsound-minded.

The respondent has suffered from such a form of mental illness on an ongoing or irregular basis and so much that the complainant can't decently be required to live with the respondent.

2.1.6. *Leprosy*

Leprosy is an infectious disease affecting the skin, mucous membranes, nervous system, and other organs, so forth irresistible illness. This sickness is passed along through one individual to the next. As a result, it is regarded as a legal ground for dissolution.

Swarajya Lakshmi v G. G. Padma Rao

In matter, on grounds of leprosy, husband filed a case reflecting acceptance of a divorce. He believed his wife being suffering incurable leprosy via expert's reports. He however manages to get a divorce reflecting grounds as leprosy.

2.1.7. Disease of Venereal Nature

Pursuing this definition, this constructs as valid ground for initiating divorce if the illness is in communicable form and it can be transferred to the other partner.

2.1.8. Renunciation

This means that one of the partners if wishes to renounce world to move at God's direction, remaining partner will enter the court and apply for a divorce. The group who renounces the universe is regarded as civilly dead in this definition. It is a traditional Hindu tradition and is regarded as a legitimate basis for divorce⁵.

2.1.9. Presumption of Death

In this case, relatives or friends relating to concerned person have heard no news of person being living or renounced within seven years, the person believed to have died. It is though lawful ground for separate, yet the weight of confirming lies on the gathering looking for the separation.

In addition to the reasons mentioned above, four additional reasons reflected in s.13(2) of captioned Act have been given to a wife; they are;

2.1.9.1. Pre-Act polygamous marriage

That husband has another wife, before Act's inception, alive right at petitioner's union solemnization. The other spouse should in any case be alive at the time the request is submitted.

2.1.9.2. Sodomy, Rape or Bestiality

Spouse has been blameworthy of assault, homosexuality or inhumanity since the solemnization in marriage.

2.1.9.3. Non-resumption of dwelling together after a declaration/request of Maintenance:

At the point when announcement or request has been granted whether under a suit of area 18 of Hindu Adoptions and Maintenance Act, 1956 or in segment 125 Cr.P.C., there has been no resumption of living together between the couple for one year or more.

2.1.9.4. Repudiation of marriage:

Where marriage took place when wife was minor or not more than 15 years and she called off her institution with her husband before attaining majority.

2.2. No Fault Theory

If the couple solemnized in marriage is not happy with each other they can seek divorce under this theory. For this, it is not necessary to establish that one of the party is guilty of another spouse. They made all the efforts to make their marriage work but nothing happened. The only option available to the couple who want to live apart was to establish a fault ground before the implementation of 'no fault theory' and other doesn't question it. Considering this collusive decree within matrimonial laws, it has been expressly forbidden. However, the pair were forced to cooperate to secure their freedom from the matrimonial

⁵ *Ibid.*

slavery without any other alternative. The definition of consent divorce was established in the marriage laws to address the problem faced by such couples. The intention was to encourage the couple to take legitimate rather than dishonest or collusive means to accomplish legitimate objectives.

The idea of the principle of consent implies, because people marry via consent, indicating free will, shall hold power where they can both call off their free will marriage partnership. 1976 amendment of the Hindu Marriage Act, new section 13-B added two grounds of divorce additionally for divorce by mutual consent. When parties agree that they cannot live together and are not living together from a year or more they can move forward to dissolve their marriage but with mutual agreement among them to dissolve it. Such an appeal would have been determined by the court six months after its filing, if it had not been withdrawn within 18 months.

2.3. *Marriage Theory Indissolubility*

Marriage is a rugged connection among a couple, as per this belief system. It concerns union between bones, skin including flesh. It's timeless. They have to live and die with it, even though the connections between the parties are unhappy. This is the philosophy of the Hindu Shastric Law. Neither the actions of the parties nor the death of one of them will break the union. Divorce construed as abomination. Shastric status was left behind by the Hindu Marriage Act. Even for a regenerated caste, marriage is no longer an unbreakable rope. Each Hindu is qualified for the disintegration of marriage if necessary conditions as laid down in Sections 13 and 13(B) exist. From this point of view, the mentioned Act constitutes indeed a groundbreaking legislation piece.

2.4. *Will Theory in Divorce*

Theory establishes, whenever you please, you will divorce your partner. Marriage here is more complicated than divorce, when only the reverse should be the case. The Mohammedan Law accepts this principle. Consequently, a Muslim spouse of sound mentally, can undergo separation from wife other at whatever point he so wishes lacking land allocation. He doesn't have to entail interference law official or area's legal counselor.

The opposite poles are influenced by both ideas that marriage isn't breakable and that marriage lasts during gratification of one of parties. In one sense, they are similar in that both remain irrational including unfair. First causes woman to oppression of agonizing marriage as well. Second turns marriage into a game qualifying couple who might call off it any time. In first instance, involved couples purposely turned their union into prison. Love isn't stringent incarceration to build a caring home, and there should be an escape from troubled relationships. A party may arbitrarily dissolve marriage in the second case, dismissing the sentiments, administrations, powerlessness and, most importantly, the honesty of the other party. Since Shastric Hindu Law believed in the primary hypothesis, the subsequent hypothesis issue didn't emerge. There was also no acceptance of separation at the delight of one or the other party of the marriage by the normal Hindu law that acknowledged separation among the alleged low networks. Second theory doesn't have any stand in front of The Hindu Marriage Act.

2.5. *Frustration of Marriage Theory*

For a spouse to marriage, the wedlock can be frustrated even if whether the other party isn't blameworthy of any conjugal offense. It can occur if person has endured or changed his confidence or revoked or vanished for seemingly forever due to mental unsoundness. According to this theory, in the event, an individual lean towards a delivery from a particularly pointless marriage, the person ought to be assisted. From this point of view, single way is divorce. These grounds are accepted by the Hindu Marriage Act being appropriate regarding divorce.

2.6. *Consent Theory*

According to this theory, they should be allowed to have their marriage dissolved if the husband and wife wanted to execute this for good. They are one with notion that their marriage must live. But failing to

comply with, they shall not be pressured. Persistent living together can lead forth conjugal infidelity that could lead to divorce.

For both, for parties to marriage and for society, it is favourable advantage to permit dissolution earlier than marital arrangement is ruined by the criminality or deterioration of one, sometimes both spouses. This method governing granting divorce has an additional benefit, apart from protecting the parties from moral degradation, that the Couples are not compelled to clean up after themselves publicly. They shouldn't have to accuse and reverse accuse one another, or try to maneuver one another in order to prove that rival side is a sinful. It's accepted that common assent award of separation would make a couple get separate by wresting the other hesitant gathering's assent by a negligence, say; pay off or extortion and so forth There is no authentic justification this dread. Basically, assent suggests (free assent). If a malpractice obtains the consent of a defendant, the affected party may still deny, so the court will immediately disappear and the basis for divorce. Against this theory, it is often argued that this is divorce by conspiracy in a way. A misunderstanding of the difference between agreement and conspiracy is the source of this objection. There is no question that every collusion is through consensus between the parties, but any agreement between them does not imply collusion.

2.7. Irretrievable Breakdown Theory

Poorly fitted marriages are the major human and institutional challenge. Numerous relationships don't fall flat due to the depravity of one's hand, however they simply fizzle⁶. Couples want to be good in their marriage, and they do their best, but they're struggling. Relationships frequently flop because of self-centeredness, ill-manners, hardness, impassion, and w.r.t. one of party to marriage thinks like these. Such characteristics do not constitute any marital crime. Yet, marriage remains to get executed. There are a few circumstances where companions have lived independently and separated from one another for quite a while and it is highly unlikely out for the other simply because one of the companion wishes the conjugal relationship to proceed. Over the span of time, customary, irrelevant inconsistencies are disintegrated and can be seen as the early stage struggles of early conjugal change. While the flood of life, lived in wedded commonality, can wash away more modest stones, what occurs if the progression of the stream is disturbed by die-hard inconsistency of brains? We have a weakening of the actual marriage in such a case, and the solitary way left open is extreme right law to acknowledge what is a reality and award a separation.

3. Advantages:

As the jurists have suggested, the solitary value of the hypothesis is that a marriage, which is recognized in public as a holy establishment, ought to be established anywhere nearby on which a sound marriage is fabricated that is, resilience, transformation and shared values. The partnership would not be a happy relationship if one of the spouses is unwilling to live with the other, the marriage will end. Extending relationship will do more harm than serving with good, yet will breed hatred and dissatisfaction between the participants. Therefore, such a marriage must be broken in order to preserve to lessen the quantity of miserable relationships and to forestall the valuable long stretches of the existences of the companions from being squandered.

4. Pitfalls:

The Law Commission dealt in depth, demerits of irretrievable breakdown principle in Chap. 4 of 71st Report. Report highlighted two key objections addressed are as follows:

- It's going to make divorce quick. It will encourage the spouses to break the marriage for their own enjoyment, or even for any of the spouses.
- By dissolution of marriage and being separated and dissolving the union, it urges the liable mate to exploit his own flaw.

⁶ PANDEY AVINASH, *Breakdown And Fault Theories of Divorce under Family Law of India*

CONCLUSION

Marriage is considered by Hindus to be a sacred institution. There was no framework for divorce subsequent to 1955, Hindu Marriage Act. For the Indian community then, the idea of getting divorced was a taboo. Silent victims to such a structure of rigid nature were the wives. The current situation and conditions has changed, also the society has modified. By obtaining a divorce via decree from court, law now offers a means to quit an unhappy forced institution. Women who presently don't need to subtly endure the maltreatment or mistreatment caused to them by spouses are the genuine recipient of such a provision. However, marriage system will be absolutely suspended has become the biggest fear after looking into the approach of judiciary in dealing with issue reflecting breakups in irretrievable marriage. Every philosophy has both upsides and its downsides. Their relevance fluctuates depending on the occasions. It is therefore delicate for our country's lawmakers to deal with this topic in a very careful way after considering its possible consequences in depth.

In order to see peace and harmony in society, the idea of divorce has arisen. If married couples do not live peacefully, there would be no peace in society. For legitimate purposes, the couple to the wedding cannot be permitted to live together if they do not wish to do so. Having accepted the same thing, the principle of divorce has been recognized by all cultures regardless of their religious ambitions. The fault theory and the theory of no fault also arisen based on its existence.

