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INTERNATIONAL JOURNAL

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INTERNATIONAL JOURNAL
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SUITABILITY OF 'IRRETRIEVABLE BREAKDOWN OF MARRIAGE' THEORY IN CURRENT SCENARIO

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INTRODUCTION:

Under the Hindu Customary Law, marriage has been since time immemorial considered as a very sacred relationship which is the beginning of a partnered journey of births. The husband and wife in the Hindu culture have been metaphorically regarded as the two wheels rotating in the chariot of marriage. Prior to the commencement of the Hindu Marriage Act, 1955, the institution of marriage was regarded as indissoluble and permanent for lives. Interestingly, it was for this reason that the concept of divorce did not exist prior to the codification of the Hindu laws. Even after the death of a spouse, marriage was not regarded as dissolved as it was considered to be eternal (sometimes said to remain intact for the next seven consecutive births of the couple).

However, when either of the wheels in the chariot of marriage stops rotating around the axis of love, emotions and adjustment, the chariot of marriage cannot run further. The more friction, the more chance the chariot has of losing its balance. It was for this reason that the concept of divorce was introduced in the Hindu Marriage Act, 1955, right from the commencement of the Act, under Section 13 which lays down the general grounds on the basis of which either party to the marriage may present a petition praying for a decree for dissolution of the marriage by way of divorce.

Several of these grounds for divorce and the terms related thereto mentioned under the said section have been interpreted by the Supreme Court of India and various High Courts. For instance, the term “cruelty”¹ was vividly interpreted by the apex court.

Since the commencement of the statutory Hindu law, the concept of divorce has evolved with the changes in the needs of our dynamic society. Starting from the grounds of divorce enumerated under Section 13 which is based on the fault theory, the divorce concept evolved to include the provision for divorce by mutual consent given by the husband and wife under Section 13-B of the Hindu Marriage Act². And now, the suitability of the introduction of the theory of “Irretrievable breakdown of marriage” (also called ‘breakdown theory of divorce’) is a debatable issue. The conceptualisation of this theory is a result of the changes in the framework of marital relationships and various legal developments happening around the globe. This theory propounds that where the marriage has got irreparably broken with seemingly no possibility for reconciliation, then the marriage should be dissolved by a decree for divorce. This concept has been several times sought to be applied in the Indian scenario, particularly under the Hindu Marriage Act, 1955, and the Special Marriage Act, 1954. Efforts have been made both by the judiciary as well as the legislature in this regard. While the legislature has attempted the formulation of this theory as a statutory enactment, the judiciary has through its varied judgments in exercise of its powers under Article 142 of the Indian Constitution, attempted to establish the theory as judicial precedence. However, the “Irretrievable breakdown of marriage” theory is not free from criticisms and the suitability of its application in the Indian scenario has often been called into question and criticised through various arguments against its insertion in the Act. In this research paper, I shall study various aspects of this theory so as to reach a conclusion about its suitability in the current scenario in India.

¹ Narayan Ganesh Dastane v. Sucheta Dastane AIR 1975

² Inserted by Marriage Laws (Amendment) Act, 1976 (68 of 1976), S.8

Law Commission's Recommendation:

Four decades ago, in light of the changes in the needs of the marital relationships in our dynamic society, the Law Commission initiated a comprehensive review of whether existing laws should include the irretrievable breakdown of marriage as another ground for divorce. The commission looked into existing laws and also thoroughly studied the observations in the Supreme Court judgments and recommended the need for the inclusion of the irretrievable breakdown of marriage as a ground for obtaining a decree for divorce.

The Eighth Law Commission of India, under Justice H.R. Khanna's chairmanship, in its Report No. 71 of 1978, titled "*The Hindu Marriage Act, 1955 - Irretrievable Breakdown of Marriage as a Ground of Divorce*"³ recommended certain amendments to be made in Hindu Marriage Act, 1955, and also the Special Marriage Act, 1954, to include this theory as a new ground for divorce. It was contended in the report that the provisions for divorce under both of these Acts are inadequate to deal with the issue of irretrievable breakdown of marriage. The report suggested that the Acts be amended to insert provisions to deal with this issue.

Again in the year 2009, the 18th Law Commission of India under Justice AR. Lakshmanan's chairmanship, presented its Report No. 217 of 2009, titled "*Irretrievable Breakdown of Marriage – Another Ground for Divorce*".⁴ The report reiterated the need for the inclusion of this concept by an amendment in the Hindu Marriage Act and the Special Marriage Act as a new ground for divorce. It also suggested that before granting a decree for divorce on this ground, the court should assess whether suitable financial arrangements have been made for the parties to the marriage and their children.

According to the Law Commission's recommendation, a period of three years of continuous separation would be an appropriate period of time to assume that the marriage has indeed broken down irretrievably. This recommendation was included as a ground for divorce in the Marriage Laws (Amendment) Bill, 2013, which recommends that the Hindu Marriage Act, 1955, shall include this ground through the insertion of a new section (discussed later in this research paper).

³ Law Commission of India's 71st Report, presented in 1978

⁴ Law Commission of India's 217th Report, presented on March 30, 2009

The Supreme Court made a reference to the 71st Report of the Law Commission of India in the case of *Samar Ghosh v. Jaya Ghosh*⁵, and considered the question whether divorce should be based only on the fault of a party (fault theory or under Section 13), or should it also be based on the theory of irretrievable breakdown of marriage? The court was of the opinion that it would be suitable to summarise the suggestions of the said Report.

If the Law Commission's proposal is implemented, it would be greatly helpful to a large number of couples since it will eliminate the need to openly discuss and prove the fault of the other party so as to get the decree for divorce. It would be particularly helpful in those cases where neither the plaintiff nor the respondent is at fault, as far as Section 13 is concerned, but the absence of any emotional bonding or desire to live together in harmony makes it necessary to dissolve the marriage by divorce. Although Section 13-B seems to be a solution in such cases, however, if a party withholds his or her consent for divorce in order to harass the other party despite living separately for a sufficiently long period of time, then the ground of irretrievable breakdown of marriage would be the only recourse.

Breakdown Theory Of Divorce:

The breakdown theory of divorce may be defined as a failure in the marital relationship to such an extent that no reasonable probability exists for the spouses to ever live together again as husband and wife. There is no love, emotional bond or any intention of the parties to ever reconcile for cohabitation. Either party to the marriage may claim that such a situation has arisen between them and the marital relationship has virtually ceased to exist.

The present statutory provisions for divorce under the Hindu Marriage Act and also the Special Marriage Act have no application in those marital cases where there has been irretrievable breakdown of marriage to the extent that divorce is perhaps the ultimate relief to the parties. Although the Law Commission of India recommended the addition of this theory in its 71st report of 1978, it has still not been incorporated as a ground for bringing an end to the marital relationship by means of divorce in the Hindu Marriage Act.

⁵ (2007) 4 SCC 511

In the case of *Naveen Kohli v. Neelu Kohli*⁶, the Supreme Court observed that irretrievable breakdown of marriage is not a ground recognised by law under the Hindu Marriage Act. At the same time, the Court advised the Government of India to consider amending the Hindu Marriage Act, 1955, to include irretrievable breakdown of marriage as a ground for granting a decree of divorce. Although this theory has nowhere been expressly mentioned as a ground for divorce in any Act, several judgments of the Supreme Court in the exercise of its jurisdiction under Article 142 of the Constitution have led to the evolution of this theory in Indian perspective and it has also been applied in some cases to give relief to those parties who are purposelessly living in wedlock with no intention or hope for reconciliation.

How The Court Applies Breakdown Theory: Article 142

Since the '*Marriage Laws (Amendment) Bill, 2013*' (discussed later in this research paper) has not been enacted so far, therefore presently there is no statutory provision which expressly defines what "irretrievable breakdown of marriage" actually means and what factors are required to apply the breakdown theory of divorce. However, the Supreme Court, in exercise of its jurisdiction under Article 142 of the Indian Constitution, can grant a decree of divorce if it is satisfied that there is no possibility for reconciliation between the parties. Article 142 exclusively confers the power on the Supreme Court of India, to pass any decree or make any order necessary to provide complete justice in any case or matter before it. Such jurisdiction in the marital cases dealing with divorce is exercised in those cases where the court is fully convinced that the marriage has completely broken down beyond any possibility for restoration of conjugal relations between the couple.

In the case of *Kanchan Devi v. Pramod Kumar Mittal*⁷, the Supreme Court held that the marriage between the husband and wife has irretrievably broken down and that there is no possibility for reconciliation between the parties. The court exercised its powers under Article 142 of the Constitution and directed that the marriage between the parties shall stand dissolved by a decree of divorce.

⁶ AIR 2006 SC 1675

⁷ AIR 1996 SC 3192

Through various judgments, the Supreme Court has held that in those cases wherein the situation in terms of conjugal relations is so gross that the parties to the marriage cannot possibly live with each other and there is no prospect for future cohabitation, then the Court may pass a decree for divorce. In *Hitesh Bhatnagar v. Deepa Bhatnagar*⁸, the Apex Court held that only when it is impossible to save the marital relationship despite all efforts and the marriage is broken beyond any repair, the court can grant a decree for divorce for having been irretrievably broken.

In *V. Bhagat v. D. Bhagat*⁹, the court held that the irretrievable breakdown of marriage cannot be taken as the only criterion for dissolving the marriage by divorce. Thus, other considerations ought to be taken into account by the court. The current position is that the court has discretionary power in deciding whether or not the marriage has been irretrievably broken and whether it should be dissolved by granting a decree of divorce or should the petition be dismissed.

In a certain case¹⁰, the Supreme Court refused to grant a decree of divorce on the ground of irretrievable breakdown of marriage. The court was of the opinion that generally an order ignoring the statutory provisions cannot be granted by the court. Hence, it follows that the general rule is that the statutory provisions have to be followed and the dissolution of marriage in case of breakdown of marriage has to be exceptionally used and with caution. Like any other extraordinary remedy, it has to be used when the conjugal relations have become so unbearable that it is absolutely necessary to bring the marriage to an end.

⁸ (2011) 5 SCC 234

⁹ (1994) 1 SCC 377

¹⁰ *Manish Goel v. Rohini Goel* (2010) 4 SCC 393

Section 13 (1-A) And Breakdown Theory:

Since the breakdown theory of divorce has not been expressly included anywhere in the Hindu Marriage Act or any other law, it is currently not a statutorily recognised provision. Nonetheless, in cases where the court finds it necessary to apply this doctrine, Section 13 (1-A) of the Act comes to the rescue. This section was initially not a part of the Act and was inserted by an amendment¹¹ in 1964.

Section 13 (1-A) nowhere mentions the expression “irretrievable breakdown”. However, the two conditions laid down under this section are very similar to the contemplation of the breakdown theory and therefore applied in cases of irretrievable breakdown of marriage. The section provides that either party to the marriage may file a suit for the grant of decree of divorce on the ground that

- (i) Where a decree for judicial separation¹² was passed in an earlier proceeding between the husband and wife, they have not resumed cohabitation for a period of at least one year¹³ from the date of passing of such decree; or
- (ii) Where a decree for restitution of conjugal rights¹⁴ has been passed in an earlier proceeding between the husband and wife, there has been no such restitution of conjugal rights between them for a period of at least one year¹⁵ from the date of passing of such decree.

If either of the conditions mentioned above is satisfied, the court regards the marriage to have been irretrievably broken with no hope for reconciliation. The basis of this assumption is the fact that in spite of the decree for judicial separation or for restitution of conjugal rights, as the case may be, there was no resumption of cohabitation. Therefore, it is considered safe to assume that the parties cannot live together again and the marriage has irretrievably broken down. A decree for dissolution of marriage by divorce is thereafter granted to liberate the parties.

¹¹ Act 44 of 1964, S.2

¹² S. 10, Hindu Marriage Act, 1955

¹³ Substituted by Act 68 of 1976, S. 7, for “two years”.

¹⁴ S. 9, Hindu Marriage Act, 1955

¹⁵ Substituted by Act 68 of 1976, S. 7, for “two years”.

The Paradox With Section 13 (1-A):

Generally in divorce laws, as Section 13 of the Hindu Marriage Act, only the aggrieved party (for instance, the person who has been deserted by his or her spouse without a sufficient cause) has the right to file a divorce petition. The guilty person (for instance, the person who has deserted his or her spouse) cannot claim divorce for his or her own guilt. However, under Section 13 (1-A), even if a party has failed or willingly refused to comply with the decree for restitution of conjugal rights for a period of one year, then he or she may also under clause (ii) of Section 13 (1-A) apply for a decree of divorce despite being himself or herself at fault.

For instance, 'A' and 'B' are husband and wife respectively. One day, 'B' left the house and started living separately for no sufficient cause and despite numerous attempts on the part of 'A' to reconcile with her, she did not return. 'A' filed a petition in the court for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955, and the court granted a decree for the same. However, 'B' willingly denied complying with the decree. After a period of one year, 'B' filed a petition in the court seeking divorce under the Section 13 (1-A) on the ground that there has been no resumption of cohabitation for a period of one year from the date of passing of the decree for restitution of conjugal rights. Now, the facts clearly show that it is not a case of irretrievable breakdown of marriage but an intentional and unreasonable denial to cohabit with the husband with the intent to get divorce in absence of any sufficient cause of action.

Thus, if either of the conditions laid down under this proposed section of the Bill is satisfied, then notwithstanding which party is at fault, the marriage may get dissolved by a decree for divorce. It is absurd that this section makes no distinction between an innocent party and the guilty party, as both have been given the right to apply for a decree of divorce for the same cause of action. This is evidently against the principle of equity.

Therefore, the theory cannot be strictly implemented on the basis of the conditions laid down under the section. The court must apply its mind instead of strictly following the statutory provisions. Otherwise, there are high chances for an increase in divorce rates as getting a decree for divorce would be easier and the parties at fault would be waiting for the required period with zero connection with the other party, thus causing mental distress to the latter and shattering their hopes for reconciliation.

Analysis Of Marriage Laws (Amendment) Bill, 2013

The Marriage Laws (Amendment) Bill, 2013, was passed by the Rajya Sabha¹⁶ during the tenure of the previous government, to further amend the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 so as to include the irretrievable breakdown of marriage as a new ground for the grant of the decree for divorce. However, the Bill could not be passed by the Lok Sabha owing to the change in the union government and the various criticisms of the Bill. Thus, the Bill has still not become an Act as it lacks the support of the Lok Sabha and the assent of the President of India.

In Section 3 of the Bill, it has been proposed that in the Hindu Marriage Act, 1955, after Section 13-B, four new sections viz. Sections 13-C, 13-D, 13-E and 13-F should be inserted.¹⁷ The Bill intends to introduce the concept of irretrievable breakdown of marriage in the form of Section 13-C under the Hindu Marriage Act.

As per the Bill, under the proposed Section 13-C, either party to the marriage may present a petition for divorce on the ground that the marriage has broken down irretrievably. The only condition required to be satisfied before a decree for dissolution of marriage by divorce is granted is that the husband and wife are living separately for a continuous period of at least three years, immediately before the presentation of the petition.

On the basis of the evidence produced in support of the argument that the parties to the marriage have been living separately for a period of not less than three years, if the court is satisfied that the marriage has broken down irretrievably, it shall pass a decree granting divorce to the parties.

If the wife is the respondent in such a proceeding, then she may oppose the grant of decree of divorce under the proposed Section 13-D, on the ground that she would face grave financial hardship if the marriage is dissolved by divorce. The court shall then consider all circumstances including the conduct of the parties, their interest and also the interest of any children of the parties.

¹⁶ Passed by the Rajya Sabha on 26th August, 2013.

¹⁷ S. 3, Marriage Laws (Amendment) Bill, 2013.

Upon these considerations, if the court opines that dissolving the marriage would lead to grave financial hardship to the respondent and that it would be wrong in all circumstances to dissolve the marriage, it shall –

- (a) Dismiss the petition; or
- (b) Stay the proceedings until arrangements to eliminate the hardship have been made.

This right to oppose the grant of decree under the proposed Section 13-D, on the ground that grave financial hardship would be caused to the respondent if the marriage is dissolved by a decree of divorce is available only to the wife. The husband has been given no right under the Bill to oppose the decree of divorce on any ground.

Comparison Between The Bill And Section 13 (1-A):

While the Marriage Laws (Amendment) Bill, 2013, expressly mentions and comprehensively deals with the irretrievable breakdown of marriage, the concept of irretrievable breakdown of marriage is only implicit under Section 13 (1-A) of the Hindu Marriage Act, 1955. It is submitted that the latter is not a pure application of the breakdown theory of divorce as it is indirect and also it does not expressly mention it.

The Section 13 (1-A) is indirect because for its applicability, it is a required condition that before a petition could be presented for a decree of divorce on the either of the grounds mentioned therein, a minimum period of one year¹⁸ must have elapsed after the passing of a decree for either judicial separation or for restitution of conjugal rights in a previous proceeding between the parties. We know that for the passing of either of the two decrees, there must have been an allegation with respect to any of the grounds mentioned under Section 13 of the Act. This points out the fact that there must have been an alleged fault on the part of either the husband or the wife in a previous proceeding between them.

This implicates two findings:

- a) That the fault theory of divorce is impliedly involved in this section as relief cannot be claimed in absence of an alleged fault in a proceeding in which the husband and wife were parties.

¹⁸ Substituted by Act 68 of 1976, S. 7, for “two years”.

- b) That this section is not purely a remedy in cases of irretrievable breakdown of marriage as its application is indirect and more troublesome as a former decree must exist in order to apply for relief under this section.

Thus, we find that Section 13 (1-A) does not sufficiently address the need for the inclusion of irretrievable breakdown of marriage as a ground for divorce. It is totally indirect and therefore upsetting for the parties seeking divorce on this ground. Therefore, there is an actual need for the passing of the Marriage Laws (Amendment) Bill, 2013, with the necessary amendments.

Suitability Of Breakdown Theory In Current Scenario

Today, our Indian society is much receptive to newer ideas. The collective thinking of society with respect to the institution of marriage has undergone a sea change in the last few decades. People wanting to tie the knot are nowadays more focused on seeking compatibility in their life partner than looking for individual traits. They look for someone with whom they have a good bonding and with whom they can share their emotions and fears besides sharing the same roof. Qualities such as like-mindedness and a sense of understanding are more important today than the idea of a flawless bride or a bridegroom. Thus, the fairy quest for a 'prince charming' or a 'snow white' is no longer the most sought idea of a perfect spouse.

Acceptance, adjustment, and mutual respect are the foundations of a successful marriage. The high rate of inflation and low income among a large proportion of the workers especially among the millennial generation has forced people to disregard the old concepts when looking for a bride or a bridegroom. Now both husband and wife work freely to financially support their household and the patriarchal concept of seeking a 'house-wife' is no longer much in demand.

This has positively led to the change that the individuals are now more focused than ever on looking for a bond of compatibility in marriage to lead their lives together in harmony as life partners. It is sometimes argued that divorce on the ground of irretrievable breakdown of marriage would become a very simple way to end the marital ties, which may threaten the social structure of the Indian society.

Some people are concerned that the sacredness of marital relationships would be jeopardised by the inclusion of the breakdown theory of divorce. However, the recent divorce trends suggest that the cause of action behind the presentation of a petition for divorce is now not confined to the fault of a spouse but it encompasses issues that are often free from a mere dispute. If the parties to the marriage find that there is no compatibility in their marital relationship and the mutual differences are so severe that there is no scope for an adjustment, they look for ways to end their marital ties instead of suffering in an unhappy and dysfunctional relationship. Thus, the provisions for divorce, if made available only on grounds of the fault theory of divorce as given under Section 13 would be insufficient to deal with the present-day divorce cases.

In light of these considerations, it is humbly submitted that the concept of irretrievable breakdown of marriage is well suited to the needs of the present-day society and its application in the current scenario in India would be highly beneficial to a large section of the society. The concerns associated with the inclusion of this ground can be well addressed by its application in a careful and prudent manner. The power of the Court to grant a decree of divorce on the ground of irretrievable breakdown of marriage ought to be used only in those cases where it is absolutely needed in the best interests of both the parties and their children (if any).

CONCLUSION:

When two persons are tied not by love but merely by a legal bond and they can't live together in peace, it's unfair to keep them chained by a marital tie. In such a condition it is best to liberate them from the ties of a dysfunctional marriage so that they may proceed to live the remaining years of their life in peace and on their own terms. It is reasonable to assume that the marital bond joining them has completely broken down when the parties have been living separately for a sufficiently long period of time and one of them has filed a divorce petition in the court. The court should first make efforts to reunite the parties and save the marriage; but, if it is not possible then the decree for divorce should be granted.

The grant of a decree of divorce on the ground of irretrievable breakdown of marriage would be particularly beneficial in those cases where the marital relationship has completely broken down with no trace of any emotional attachment or any intent to reconcile, but one of the parties to the marriage is not willing to give consent for divorce with the sole intention to frustrate the other party's right for relief from a dysfunctional marriage. Thus, where a party intentionally withholds his or her consent for a divorce by mutual consent under Section 13-B, and none of the grounds of fault as enumerated under Section 13 virtually exists, this theory would prove a boon for such stressed persons.