-Dr. Ajay Nathani

Precedents on the Hindu Marriage Act

Section 2(2).-Applicability of Act.-Marriage between members of Scheduled Tribe.-Governed by Santal customs and usage.-Hindu Marriage Act has no application.

In this appeal the parties are admittedly tribals, the appellant being a Oraon and the respondent a Santhal. In the absence of a notification or order under Article 342 of the Constitution they are deemed to be Hindus. Even if a notification is issued under the Constitution, the Act can be applied to Scheduled Tribes as well by a further notification in terms of sub-section (2) of Section 2 of the Act. it is not disputed before us that in the Constitution (Scheduled Tribes) Order 1950 as amended by Scheduled Castes and Scheduled Tribes Order (Amendment) Acts 63 of 1956, 108 of 1976, 18 of 1987 and 15 of 1990, both the tribes to which the parties belong are specified in Part XII. It is conceded even by the appellant that "the parties to the petition are two Tribals, who otherwise profess Hinduism, but their marriage being out of the purview of Hindu Marriage Act, 1955 in the light of Section 2(2) of the Act, are thus governed only by their Santhal Customs and usage." *Surajmani Stella Kujur (Dr.) vs. Durga Charan Hansdah,* AIR 2001 SC 938 : 2001(3) SCC 13 : 2001(2) JT 631

Section 3(a) & 29.-"Custom and usage".-Importance of in relation to applicability of Hindu Marriage Act.

The importance of the custom in relation to the applicability of the Hindu Marriage Act has been acknowledged by the legislature by incorporating Section 29 saving the validity of a marriage solemnised prior to the commencement of the Act which may otherwise be invalid after passing of the Act. Nothing in the Act can affect any right, recognised by custom or conferred by any said enactment to obtain the dissolution of a Hindu Marriage whether solemnised before or after the commencement of the Act even without the proof of the conditions precedent for declaring the marriage invalid as incorporated in Section 10 to 13 of the Act. *Surajmani Stella Kujur (Dr.) vs. Durga Charan Hansdah,* AIR 2001 SC 938 : 2001(3) SCC 13 : 2001(2) JT 631

Sections 5(i), 11, 12 and 16.-Second marriage with living spouse.-Permissibility.-The customs under the old Hindu Law have no application and the marriage contracted with a person whose spouse from earlier marriage was living is void *ab initio* and not voidable. Clause (i) of Section 5 lays down, for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. It was urged on behalf of the appellant that a marriage should not be treated as void because such a marriage was earlier recognised in law and custom. By reason of the overriding effect of the Act as mentioned in Section 4, no aid can be taken of the earlier Hindu Law or any custom or usage as a part of that Law inconsistent with any provision of the Act. So far as Section 12 is concerned, it is confined to other categories of marriages and is not applicable to one solemnised in violation of Section 5(i) of the Act. Sub-section (2) of Section 12 puts further restriction on such a right. The cases covered by this section are not void ab initio, and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective. The marriages covered by Sectopm 11 are void ipso jure, that is, void from the very inception, and have to be ignored as not existing in law at all and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose. It is also to be seen that while the legislature has considered it advisable to uphold the legiitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child. The marriage of the appellant must, therefore, be treated as null and void from its very inception. *Smt. Yamunabai Anantrao Adhav v. Anantrao*

Shivram Adhav and another, AIR 1988 SC 644: 1988(1) SCC 530: 1988 SCR 809: 1988(1) Scale 184: 1988(1) JT 193

Section 5(ii)(a)(b), 12(I)(b).-Cancellation of marriage.-Unsound mind of spouse.-Onus of bringing case heavily lies on petitioner seeking annulment of marriage on ground of unsound mind or mental disorder.-Merely that wife refused to cohabit for a short period not sufficient to say that she was unfit for marriage and procreation of children.

To draw an inference that the respondent has been suffering from mental disorder merely from the fact that the spouses had no cohabitation for a short period of about a month is neither reasonable nor permissible. To brand the wife as unfit for marriage and procreation of children on account of the mental disorder it needs to be established that the ailment suffered by her is of such a kind or such an extent that it is impossible for her to lead a normal married life. This is the requirement of law as appears on fair reading of the statutory provisions. *R. Lakshmi Narayan vs. Santhi,* AIR 2001 SC 2110 : 2001(4) SCC 588 : 2001(S1) JT 213

Section 9.-Restitution of conjugal rights.-Validity of provision.-The provision serve a social purpose to offer inducement for husband and wife to live together.-Consequences for disobedience are only if it is wilful without any impediment.-The provision is not arbitrary and unconstitutional. It is significant to note that unlike a decree of specific performance of contract, for restitution of conjugal rights, the sanction is provided by court where the disobedience to such a decree is willful i.e. is deliberate, in spite of the opportunities and there are no other impediments, might be enforced by attachment of property. So the only sanction is by attachment of property against disobedience of a decree for restitution of conjugal rights where the disobedience follows as a result of a willful conduct i.e. where conditions are there for a wife or a husband to obey the decree for restitution of conjugal rights but disobeys the same in spite of such conditions, then only financial sanction, provided he or she has properties to be attached, is provided for. This is so as an inducement by the court in appropriate case when the court has decreed restitution for conjugal rights and that the court can only decree if there is no just reason for not passing decree for restitution of conjugal rights to offer inducement for the husband or wife to live together in order to give them an opportunity to settle up the matter amicably. It serves a social purpose as an aid to the prevention of break-up of marriage. *Smt. Saroj Rani v. Sudarshan Kumar Chadha,* AIR 1984 SC 1562: 1984(4) SCC 90: 1985(1) SCR 303: 1984(2) Scale 118: 1984 MLR 306

Sections 9 and 23.-Restitution of conjugal rights.-Consent decree.-Collusive decree.-A decree for restitution of conjugal rights passed by consent of parties is not a collusive decree and does not disentitled the husband to get a decree of divorce. A consent decree in all cases could not be said to be a collusive decree and where the parties had agreed to passing of a decree after attempts had been made to settle the matter, in view of the language of Section 23 if the Court had tried to make conciliation between the parties and conciliation had been ordered, the husband was not disentitled to get a decree. *Smt. Saroj Rani v. Sudarshan Kumar Chadha,* AIR 1984 SC 1562: 1984(4) SCC 90: 1985(1) SCR 303: 1984(2) Scale 118: 1984 MLR 306

Section 10(1)(a).-Desertion.-Ingredients of.-It not only implies a separate living but there must be determination to end the marriage.-Re-marriage of husband cannot necessarily be a reasonable cause fo desertion. Desertion within the meaning of Section 10(1)(a) of the Act read with the Explanation does not imply only a separated residence and separate living. It is also necessary that there must be a determination to put an end to marital relation and cohabitation. Without *animus deserendi* there can be no desertion within the meaning of Section 10(1)(a). The consideration that in case the husband remarries the wife is entitled to separate residence and maintenance under the Hindu Married Women's Right to Separate Residence and Maintenance Act 1946 or any other enactment could not be utilised as a reason for coming to the conclusion that the fact of the remarriage of the husband must necessarily afford a reasonable cause for desertion. Ordinarily when

it has been expressly stated that an enactment is meant for codifying the law the court is not at liberty to look to any other law. The Act not only amends but also codified the law of marriage and it has made fundamental and material changes in the prior law. Section 4 of the Act gives overriding effect to its provisions. Therefore unless in any other enactment there is a provision which abrogates any provision of the Act or repeals it expressly or by necessary implication the provisions of the Act alone will be applicable to matters dealt with or covered by the same. *Smt. Rohini Kumari v. Narendra Singh,* AIR 1972 SC 459: 1972(2) SCR 657: 1972(1) SCC 1

Section 10(1)(b) and Section 23(1)(b).-Condonation of cruelty.-Determination of.-Couple leading normal sexual life after incident of cruelty constitutes condonation. The evidence of condonation consists here in the fact that the spouses led a normal sexual life despite the respondent's acts of cruelty. This is not a case where the spouses, after separation, indulged in a stray act of sexual intercourse, in which case the necessary intent to forgive and restore may be said to be lacking. Such stray acts may bear more than one explanation. But if during cohabitation the spouses, uninfluenced by the conduct of the offending spouse, lead a life of intimacy which characterizes normal matrimonial relationship, the intent to forgive and restore the offending spouse to the original status may reasonably be inferred. There is then no scope for imagining that the conception of the child could be the result of a single act of sexual intercourse and that such an act could be a stark animal act unaccompanied by the nobler graces of marital life. One might then as well imagine that the sexual act was undertaken just in order to kill boredom or even in a spirit of revenge. Such speculation is impermissible. Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfilment. Therefore, evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof that the other spouse condoned that cruelty. Intercourse, of course, is not a necessary ingredient of condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and has been received back into the position previously occupied in the home. But intercourse in circumstances as obtain here would raise a strong inference of condonation with its dual requirement, forgiveness and restoration. That inference stands uncontradicted, the appellant not having explained the circumstances in which he came to lead and live a normal sexual life with the respondent, even after a series of acts of cruelty on her part. *Dr. N.G. Dastane v. Mrs. S. Dastane,* AIR 1975 SC 1534: 1975(2) SCC 326: 1975(3) SCR 967

Section 10(1)(b) and Section 23(1)(b).-Cruelty.-Aggressive behaviour.-Causing calculated insult to husband.-Threat to end life and ruin life of husband, amounts to cruelty. This is not a case of mere austerity of temper, petulance of manners, rudeness of language or a want of civil attention to the needs of the husband and the household. Passion and petulance have perhaps to be suffered in silence as the price of what turns out to be an injudicious selection of a partner. But the respondent is at the mercy of her inflexible temper. She delights in causing misery to her husband and his relations and she willingly suffers the calculated insults which her relatives huried at him and his parents the false accusation that, "the pleader's Sanad of that old hag of your father was forfeited," "I want to see the ruination of the whole Dastane dynasty", "burn the book written by your father and apply the ashes to your forehead", "you are not a man" conveying that the children were not his; "you are a monster in a human body", "I will make you lose your job and publish it in the Poona newspapers".-these and similar outbursts are not the ordinary wear and tear of married life but they became, by their regularity, a menance to the peace and well-being of the household. Acts like the tearing of the Mangal-Suttra, locking out the husband when he is due to return from the office, rubbing chillie powder on the tongue of an infant child, beating a child mercilessly while in high fever and switching on the light at night and sitting by the bedside of the husband merely to nag him are acts which tend to destroy the legitimate ends and objects of matrimony. Assuming that there was some justification for occasional sallies or show of temper, the pattern of hebaviour which the respondent generally adopted was grossly excessive. The conduct of the respondent clearly amounts

to cruelty within the meaning of Section 10(1)(b) of the Act. Under that provision, the relevant consideration is to see whether the conduct is such as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for him to live with the respondent. The threat that she will put an end to her own life or that she will set the house on fire, the threat that she will make him lose his job and have the matter published in newspapers and the persistent abuses and insults hurled at the appellant and his parents are all of so grave an order as to imperil the appellant's sense of personal safety, mental happiness, job satisfaction and reputation. Her once-too-frequent apologies do not reflect genuine contrition but were merely impromptu devices to tide over a crisis temporarily. *Dr. N.G. Dastane v. Mrs. S. Dastane,* AIR 1975 SC 1534: 1975(2) SCC 326: 1975(3) SCR 967

Section 10(1)(b).-Cruelty.-Nature of.-Distinction with English Law.-Danger to life, limb or health if necessary.-Likely apprehension of injury to reputation.-Scope of expression. The inquiry therefore has to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. It is not necessary, as under the English law, that the cruelty must be of such a character as to cause "danger" to life, limb or health or as to give rise to reasonable apprehension of such a danger. Clearly, danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other. If the danger to health arises merely from the fact that the spouses find it impossible to live together as where one of the parties shows as attitude of indifference to the other, the charge of cruelty may perhaps fail. But under Section 10(1)(b), harm or injury to health, reputation, the working-career or the like, would be an important consideration in determining whether the conduct of the respondent amounts to cruelty. Plainly, what we must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles of English law, but whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the respondent. The Court has to deal, not with an ideal husband and an ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near-deal one will probably have no occasion to go to a matrimonial Court for, even if they may not be able to drown their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures. The simple trivialities which can truly be described as the reasonable wear and tear of married life have to be ignored. If is in the context of such trivialities that one says that spouses take each other for better or worse. In many marriages each party can, if it so wills, discover many a cause for complaint but such grievances arise mostly from temperamental disharmony. Such disharmony or incompatibility is not cruelty and will not furnish a cause for the dissolution of marriage. *Dr. N.G. Dastane v. Mrs. S. Dastane,* AIR 1975 SC 1534: 1975(2) SCC 326: 1975(3) SCR 967

Section 11 and 5.-Legally wedded wife.-Concurrent finding of fact.-Interference with.-Suit for ejectment and possession of suit properties filed by widow of owner.-Concurrent finding of trial Court and first appellate Court that plaintiff was not legally wedded wife of owner.-High Court observed that findings were recorded by courts below on conjectures and surmises during wrong inferences from facts proved ignoring material evidence such as judgments of Consolidation Courts brought on record and status of plaintiff as legally wedded wife of owner in previous proceedings was not taken into consideration.-High Court rightly held that plaintiff was legally wedded wife of owner of suit property. *Vishnu Prakash and another vs. Sheela Devi and others,* AIR 2001 SC 1862 : 2001(4) SCC 729 : 2001(4) JT 396

Section 12(1)(a).-Impotency.-Proof of.-Necessity to establish that impotency continued till institution of marriage. A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. The condition must be one, according to the

statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings. In order to entitle the appellant to obtain a decree of nullity, as prayed for by him, he will have to establish that his wife, the respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings. *Yuvraj Digvijay Singh v. Yuvrani Pratap Kumari,* AIR 1970 SC 137: 1970 (1) SCJ 261: 1970(1) SCR 559: 1969(2) SCC 279

Section 12(1)(a).-Impotency.-Invincible repugnancy to sexual act.-Possibility of consummation in future not ruled out.-Petition for divorce is not maintainable. So far as the charge of `invincible repugnance to the sexual act' on the part of the respondent is concerned, it is only necessary to refer to the finding of the High Court that the allegation had not been proved but that, on the other hand, lack of proper approach by the appellant for consummating the marriage might have been responsible for non-consummation. It is the further view of the High Court that the evidence of the appellant that he went on making attempts on several occasions for consummation of the marriage cannot be believed. Neither of the two Courts have found that the marriage cannot be consummated in future and they have not also accepted the appellant's plea that the respondent had always resisted his attempts to consummate the marriage. When once the finding has been arrived at that the appellant has not established that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding, the inevitable result is the dismissal of the appellant's application under Section 12(1)(a) of the Act. *Yuvraj Digvijay Singh v. Yuvrani Pratap Kumari,* AIR 1970 SC 137: 1970 (1) SCJ 261: 1970(1) SCR 559: 1969(2) SCC 279

Section 12(1)(d).-Annulment of marriage.-Pregnancy at the time of marriage.-Determination of.-Proof of.-Statement of Doctor who was not a gynaecologist but had knowledge of midwifery as an obstetrician could be relied.-Delivery of the child within eight months of marriage.-Annulment of marriage, affirmed. *Baldev Raj Miglani v. Smt. Urmila Kumari,* AIR 1979 SC 879: 1979(3) SCC 782: 1981(1) DMC 133: 1979 MLR 305

Section 12(1)(d).-Pregnancy at the time of marriage.-Determination of.-Admission by the wife that she conceived prior to marriage but by her husband.-Remand of matter on the question that if she was conceived after marriage, not permissible as the parties are bound by their admission. *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati,* AIR 1965 SC 364: 66 BomLR 681: 1965 MPLJ 509: 1964(7) SCR 267

Section 12(1)(d).-Pregnancy at the time of marriage.-Determination of.-Considerations for. The main question for determination in this case is whether the child born to the respondent on August 27, 1947 could be the child of the petitioner, who, on the finding of the Courts below which was accepted by learned counsel for the respondent before us, did not cohabit with the respondent earlier than March 10, 1947, Counting both the days, i.e. March 10 and August 27, the total period between those dates, comes to 171 days. The child born to the respondent is said to have weighed 4 pounds, the delivery being said to be normal. The child survived and is said to be even now alive. It is not disputed that the usual period of gestation from the date of the first coitus is between 265 and 270 days and that delivery is expected in about 280 days from the first day of the menstruation period prior to a woman conceiving a child. The statements by the respondent in her letters to the petitioner about the enlargement of her abdomen and the quickening of the foetus fits in with her pregnancy being of a longer duration than one starting on or after March 10, 1947, or nationally starting 14 days earlier. It is true that no allegation of any kind has been made about the respondent's general immorality or about her misconducting with someone at the time when the child born to her could be conceived. The mere fact that her character in general is not challenged does not suffice to rebut the conclusion arrived at from the various circumstances already discussed. Section 114 provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to facts of the particular case. The conclusion we have arrived at about the child born to the respondent being not the child of the appellant, fits in with the presumption to be drawn in

accordance with the provisions of this section. People in general consider that the child born, being of a gestation period of 185 days, cannot be a fairly mature baby and cannot survive like a normal child. Medical opinion, as it exists today and as is disclosed by textbooks on Obstetrics and Gynaecology, however, refer to some rare exceptions of live-births even with a gestation period of a few days less than 180 days. But we have not found it possible to accept the respondent's case of the conception having taken place from and after March 10, 1947.Section 112 of the Evidence Act provides that the fact that any person was born during the continuance of a valid marriage between his mother and any man shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. The question of the legitimacy of the child born to the respondent does not directly arise in this case, though the conclusion we have reached is certain to affect the legitimacy of the respondent's daughter. However, the fact that she was born during the continuance of the valid marriage between the parties cannot be taken to be conclusive proof of her being a legitimate daughter of the appellant, as the various circumstances dealt with by us above, establish that she must have been begotten sometime earlier than March 10, 1947, and as it has been found by the Courts below, and the finding has not been questioned here before us, that the appellant had no access to be respondent at the relevant time. *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati,* AIR 1965 SC 364: 66 BomLR 681: 1965 MPLJ 509: 1964(7) SCR 267

Section 12.-Decree on admission.-Permissibility.-The fact that the courts ordinarily do not pass decree in divorce cases on the basis of admission is a rule of prudence and not a rule of law and in appropriate case, the court is not precluded from passing of decree on the basis of admission of the party. It is true that in divorce cases under the Divorce Act of 1869, the Court usually does not decide merely on the basis of the admissions of the parties. This is a rule of prudence and not a requirement of law. That is because parties might make collusive statements admitting allegations against each other in order to gain the common object that both desire for personal reasons. A decision on such admissions would be against public policy and is bound to affect not only the parties to the proceedings but also their issues, if any, and the general interest of the society. Where, however, there is no room for supposing that parties are colluding, there is no reason why admissions of parties should not be treated as evidence just as they are treated in other civil proceedings. Section 58 of the Evidence Act *inter alia* provides that no fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which by any rule of pleading in force at the time they are deemed to have admitted by their pleading. Rule 5 of Order VIII, C.P.C., provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleadings of the defendant, shall be taken to be admitted except as against a person under disability. Both these provisions, however, vest discretion in the Court to require any fact so admitted to be proved otherwise than by such admission. Rule 6 of Order XII of the Code allows a party to apply to the Court at any stage of a suit for such judgment or order as upon the admissions of fact made either on the pleadings or otherwise he may be entitled to, and empowers the Court to make such order or give such judgment on the application as it may think just. There is therefore no good reason for the view that the Court cannot act upon the admissions of the parties in proceedings under the Act. Section 23 of the Act requires the Court to be satisfied on certain matters before it is to pass a decree. The satisfaction of the Court is to be on the matter or record as it is on that matter that it has to conclude whether a certain fact has been proved or not. The satisfaction can be based on the admissions of the parties. It can be based on the evidence, oral or documentary, led in the case. The evidence may be direct or circumstantial. *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati,* AIR 1965 SC 364: 66 BomLR 681: 1965 MPLJ 509: 1964(7) SCR 267

Section 13.-Decree of divorce.-Abatement.-Death of decreeholder during appeal.-Decree affects proprietary rights of party.-Cause of action survive qua the estate of deceased spouse in the

hands of legal representatives.-Impleadment of legal representatives is permissible. *Smt. Yallawwa v. Smt. Shantavva,* AIR 1997 SC 35: 1996(7) Scale 484: 1996(9) JT 218: 1996(2) DMC 579: 1997(2) Mad. LJ 4

Section 13.-Marriage.-Dissolution of.-Conversion to other religion.-Second marriage qua existing marriage would be void.-Husband converting to other religion liable to be prosecuted for offence of bigamy.

Change of religion does not dissolve the marriage performed under the Hindu Marriage Act between two Hindus. Apostasy does not being to an end the civil obligations or the matrimonial bond, but apostasy is a ground for divorce under Section 13 as also a ground for judicial separation under Section 10 of the Hindu Marriage Act. Hindu law does not recognise bigamy. Hindu Marriage Act, 1955 provides for "Monogamy". A second marriage during the life time of the spouse, would be void under Section 11 and 17, besides being an offence. If the marital status is not affected on account of the marriage still subsisting, his second marriage qua the existing marriage would be void and in spite of conversion he would be liable to be prosecuted for the offence of bigamy under Section 494 I.P.C. *Lily Thomas etc. vs. Union of India and others,* AIR 2000 SC 1650 : 2000(2) Hindu LR 374 : 2000(2) Mah LR 409 : 2000(6) Andh LD 16 : 2000(6) SCC 224 : 2000(2) Marri LJ 1 : 2000(3) Mad LW 371 : 2000(2) Cur CC 233

Section 13(1).-Ex parte decree.-Deliberate non-appearance.-Wife present in Court precincts but not taking steps to move the Court.-No steps taken to diligently pursue to proceedings and prevent passing of ex parte decree.-Deliberate attempt to protract litigation.-No interference with ex parte decree called for. *Adhyaatmam Bhaamini v. Jagdish Ambalal Shah,* AIR 1997 SC 1180: 1997(2) Scale 46: 1997(2) JT 640: 1997(9) SCC 471: 1997 Marr. LJ 294: 1997(116) Pun. LR 670

Section 13(1)(i).-Adultery.-Proof of.-Receipt of Letters by married woman from a male relative does not necessarily prove illicit relationship. The mere fact that some male relation writes such letters to a married woman, does not necessarily prove that there was any illicit relationship between the writer of the letters and the married woman who received them. The matter may have been different if any letters of the appellant written to Chandra Prakash had been proved. Further there is intrinsic evidence in the letters themselves which shows that whatever might have been the feelings of Chandra Prakash towards the appellant, they were not necessarily reciprocated by the appellant. *Smt. Chandra Mohini Srivastava v. Shri Avinash Prasad Srivastava and another,* AIR 1967 SC 581: 1967 All WR (HC) 284: 1967 (1) SCJ 42

Section 13(1)(ia).-Cruelty.-Bad temperament.-It may not be conducive for the parties and may indirectly result in ailments but such conduct does not constitute cruelty entitling divorce from the spouse. It is no doubt an unfortunate state of affairs but it could not be held that the respondent was behaving with the appellant in a manner which could be termed as cruelty which would entitled the appellant to a decree for divorce. Sometimes the temperament of the parties may not be conducive to each other which may result in petty quarrels and troubles although it was contended by the appellant that he had to suffer various ailments on account of this kind of behaviour meted out ot him by the wife; but it could not be held on the basis of any material that ailment of the appellant was the direct result of her (respondent's) conduct. The Divison Bench therefore was right in coming to the conclusion that there is no material to come to the conclusion that the respondent treated the appellant with such cruelty as would entitle him to a decree for divorce. *J. L. Nanda v. Smt. Veena Nanda,* AIR 1988 SC 407: 1988 Supp. SCC 112: 1988(2) SCR 348: 1987 (2) Scale 1246: 1987 (4) JT 619: 1988 Pat. LJR (SC) 43**Section 13(1)(ia).-Cruelty.-Demand of dowry.-It amounts to cruelty.-The proof of such cruelty is not required beyond reasonable doubt.-It is sufficient if it is proved on preponderance of probability.** The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and

obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of interference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incopability to tolerate the conduct complained of. Such is the wonderful/ realm of cruelty. Such cruelty if not admitted requires to be proved on the preponderance of propabilities as in civil cases and not beyond a reasonable douobt as in criminal cases. *Shobha Rani v. Madhukar Reddi,* AIR 1988 SC 121: 1988(1) SCC 105: 1988(1) SCR 1010: 1987(4) JT 433: 1987(2) Scale 1008: 1988 BLJR 138

Section 13(1)(ia).-Cruelty.-Mental cruelty.-While allegation made in formal pleadings filed in Court.-Actual injury by mental cruelty need not be proved.-In the circumstances, decree of divorce granted. Mental cruelty in Section 13(1)(ia) can broadly be defined as that conduct which inflicts upon the others party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.It must be remembered that the wife was merely defending herself against what are, according to her, totally unfounded allegations and aspersions on her character. It was not necessary for her to go beyond that and allege that the petitioner is mental patient, that he is not a normal person, that he requires psychological treatment to restore his mental health, that he is suffering from paranoid disorder and mental hallucinations.-and to crown it all, to allege that he and all the members of his family are a bunch of lunatics. It is not as if these words were uttered in a fit of anger or under an emotional stress. They were made in a formal pleading filed in the Court and the question to that effect were put by her counsel, at her instructions, in the cross-examination. Even in her additional written statement she has asserted her right "to make correct statement of facts to defend herself against the wanton, imaginary and irresponsible allegations". These are not the mere protestations of an injured wife; they are positive assertions of mental imbalance and streak of insanity in the mental build-up of the husband. The husband is an advocate practicing in this Court as well as in Delhi High Court. The divorce petition is being tried in the Delhi High Court itself. Making such allegations in the pleadings and putting such questions to the husband while he is in the witness-box is bound to cause him intense mental pain and anguish besides affecting his career and professional prospects. It is not as if the respondent is seeking any relief on the basis of these assertions. The allegations against her may not be true; it may also be true that the petitioner is a highly suspicious character and that he assumes things against wife which

are not well-founded. But on that ground, to say that the petitioner has lost his normal mental health, that he is a mental patient requiring expert psychological treatment and above all to brand him and all the members of his family including his grand-father as lunatics is going far beyond the reasonable limits of her defence. It is relevant to notice that the allegations of the wife in her written statement amount in effect to "psychopathic disorder or any other disorder" within the meaning of the Explanation to Clause (iii) of sub-section (1) of Section 13, though, she has not chosen to say that on that account she cannot reasonably be expected to live with the petitioner-husband nor has she chosen to claim any relief on that ground. Even so, allegations of `paranoid disorder', `mental patient, needs psychological treatment to make him act a normal person' etc. are there coupled with the statement that the petitioner and all the members of his family are lunatics and that a streak of insanity runs through his entire family. These assertions cannot but constitute mental cruelty of such a nature that the petitioner, situated as he is and in the context of the several relevant circumstances, caannot reasonable be asked to live with the respondent thereafter. The husband in the position of the petitioner herein would be justified in saying that it is not possible for him to live with the wife in view of the said allegations. Even otherwise the peculiar facts of this case show that the respondent is deliberately feigning a posture which is wholly unnatural and beyond the comprehension of a reasonable person. She has been dubbed as an incorrigible adulteress. She is fully aware that the marriage is long dead and over. It is her case that the petitioner is genetically insane. Despite all that, she says that she wants to live with the petitioner. The obvious conclusion is that she has resolved to live in agony only to make life a miserable-hell for the petitioner as well. This type of callous attitude in the context of the facts of this case, leaves no manner of doubt in our mind that the respondent is bent upon treating the petitioner with mental-cruelty. It is abundantly clear that the marriage between the parties has broken down irretrievably and there is no chance of their coming together, or living together again. Having regard to the peculiar features of this case, we are of the opinion that the marriage between the parties should be dissolved under Section 13 (1)(ia) of Hindu Marriage Act and we do so accordingly. Having regard to the peculiar facts and circumstances of this case and its progress over the last eight years.-detailed hereinbefore.-we are of the opinion that it is a fit case for cutting across the procedural objections to give a quietus to the matter. *V. Bhagat v. Mrs. D. Bhagat,* AIR 1994 SC 710: 1994(1) SCC 337: 1993(4) Scale 488: 1993(6) JT 428: 1993(2) DMC 568: 1994(1) BLJR

Section 13(1)(ia).-Cruelty.-Protracted litigation continuing for 25 years is itself a cruelty when the marriage itself is dead.-The marriage dissolved subject to the husband transferring the house in the name of his wife. *Romesh Chander v. Smt. Savitri,* AIR 1995 SC 851: 1995(2) SCC 7: 1995(1) Scale 177: 1995(1) JT 362: 1995 Mat. LR 111

Section 13(1)(ia).-Desertion.-Burden of proof.-The burden of proving factum as well as animus desrendi is on the spouse claiming desertion who also has to prove that it was without any reasonable cause. The burden of proving desertion.-the "factum" as well as the "animus deserendi".-is on the petitioner; and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause. *Lachman Uttamchand Kirpalani v. Meena alias Mota,* AIR 1964 SC 40: 60 BomLR 297: 1964(4) SCR 331

Section 13(1)(ia).-Desertion.-Meaning and scope of.-It is intentional and permanent forsaking of one spouse by other without his consent or reasonable cause. In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to case cohabitation, it will not amount to desertion. For the offence

of desertion so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. . . . Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time.' *Lachman Uttamchand Kirpalani v. Meena alias Mota,* AIR 1964 SC 40: 60 BomLR 297: 1964(4) SCR 331

Section 13(1)(ia).-Desertion.-Necessity of re-conciliation.-Where a spouse had deserted the other, it is not obligatory on other spouse to make efforts of re-conciliation. Once desertion is established there is no obligation on the deserted husband (taking the case where he is the deserted spouse) to appeal to the deserting spouse to change her mind, and the circumstance that the deserted husband makes no effort to take steps to effect a reconciliation with the wife does not debar him from obtaining the relief of judicial separation, for once desertion is proved the deserting spouse, so long as she evinces no sincere intention to effect a reconciliation and return to the matrimonial home, is presumed to continue in desertion. Of course, the matter would wear a different complexion and different considerations would arise where before the end of the statutory period of 2 years or even therefore before the filing of the petition for judicial separation the conduct of the deserted spouse was such as to make the deserting spouse desist from making any attempt at reconciliation. If he or she so acts as to make it plain to the deserting spouse that any offer of the part of the latter to resume cohabitation would be rejected, then the deserting spouse could obviously not be blamed for not bringing the desertion to an end. Or again, if before the end of the period of two years or the filing of the petition his or her conduct is such as to provide a just cause for the deserting spouse for not resuming cohabitation, the petition cannot succeed, for the petitioner would have to establish that the desertion was without just cause during the entire period referred to in Section 10(1)(a) of the Act before he can succeed. *Lachman Uttamchand Kirpalani v. Meena alias Mota,* AIR 1964 SC 40: 60 BomLR 297: 1964(4) SCR 331

Section 13(1)(ia).-Mental cruelty.-Meaning of.

Mental cruelty broadly means, when either party causes mental pain, agony or suffering of such a magnitude that it severs the bond between the wife and husband and as a result of which it becomes impossible for the party who has suffered to live with the other party. In other words, the party who has committed wrong is not expected to live with the other party. *Hanumantha Rao vs. S. Ramani,* AIR 1999 SC 1318 : 1999(1) Hindu LR 418 : 1999(3) Guj LR 2109 : 1999(3) Mad LW 362 : 1999(122) Pun LR 528 : 1999(4) Andh LD 16 : 1999(3) SCC 620 : 1999(1) Orissa LR 513

Section 13(1)(ia).-Mental cruelty.-Removal of mangalsutra by wife at the instance of husband.-Does not amount to mental cruelty within meaning of Section 13(1)(ia).

The removal of the mangalsutra by the wife at the instance of her husband does not amount to mental cruelty within the meaning of Section 13(1)(ia) of the Act. it is no doubt true that Mangalsutra around the neck of a wife is a sacred thing for a Hindu wife and it symbolises continuance of married life. A Hindu wife removes her Mangalsutra only after the death of her husband. It is not a case where a wife after tearing her Mangalsutra threw at her husband and walked out of the husband's

house. Here is a case where a wife while in privacy, occasionally has been removing her Mangalsutra and bangles on asking of her husband with a view to please him. If the removal of Mangalsutra was something wrong amounting to mental cruelty, it was the husband who instigated his wife to commit that wrong and thus was an abettor. Under such circumstances the appellant cannot be allowed to take advantage of a wrong done by his wife of which he himself was responsible. In such a case the appellant cannot be allowed to complain that his wife was guilty of committing an act of mental cruelty upon him and further by such an act, has suffered mental pain and agony as a result of which married life has broken down and he is not expected to live with his wife. *Hanumantha Rao vs. S. Ramani,* AIR 1999 SC 1318 : 1999(1) Hindu LR 418 : 1999(3) Guj LR 2109 : 1999(3) Mad LW 362 : 1999(122) Pun LR 528 : 1999(4) Andh LD 16 : 1999(3) SCC 620 : 1999(1) Orissa LR 513

Section 13(1)(ia).-Mental cruelty.-Representation made by parents of wife to Women's protection Cell for reconciliation.-No evidence of harassment either to husband or his family members.-Complainant cannot be blamed for mental cruelty.

The respondent in her evidence stated that she had never lodged any complaint against the appellant or any members of his family with the women protection Cell. However, she stated that her parents sought help from women protection Cell for reconciliation through one of her relative who, at one time, happened to be the Superintendent of police. It is on the record that one of the functions of the Women protection Cell is to bring about reconciliation between the estranged spouses. There is no evidence on record to show that either the appellant or any member of his family were harassed by the Cell. The Cell only made efforts to bring about reconciliation between the parties, but failed. Out of panic, if the appellant and members of his family sought anticipatory bail, the respondent cannot be blamed for that. *Hanumantha Rao vs. S. Ramani,* AIR 1999 SC 1318 : 1999(1) Hindu LR 418 : 1999(3) Guj LR 2109 : 1999(3) Mad LW 362 : 1999(122) Pun LR 528 : 1999(4) Andh LD 16 : 1999(3) SCC 620 : 1999(1) Orissa LR 513

Sections 13(1)(ia) and 15.-Decree of divorce.-Challenge in appeal.-Effect of.-Remarriage of the spouse.-The appeal cannot be rendered infructuous on account of remarriage. *Tejinder Kaur v. Gurmit Singh,* AIR 1988 SC 839: 1988(2) SCC 90: 1988(2) SCR 1098: 1988(1) Scale 398: 1988(1) JT 395

Section 13(1)(ib).-Desertion.-Determination of intention.-The marriage contracted by parties under the pressure of parents as per local custom.-The parties living separately for merely a decade after spending together merely six months.-No efforts made by wife to join the husband at her matrimonial home.-Decree of divorce granted. *Sanat Kumar Agarwal v. Smt. Nandini Agarwal,* AIR 1990 SC 594: 1990(1) SCC 475: 1990(1) JT 90: 1990 MLR 142

Section 13(1)(iii).-Mental disorder.-Degree of disorder.-Schizophrenia.-Allegation of.-Mere branding of a spouse as Schizophrenic.-Is not sufficient.-Degree of mental disorder must be proved. The context in which the ideas of unsoundness of `mind' and `mental-disorder' occur in the section as grounds for dissolution of a marriage, require the assessment of the degree of the `mental-disorder'. Its degree must be such as that the spouse seeking relief cannot reasonable be expected to live with the other. All mental abnormalities are not recognised as grounds for grant of decree. If the mere existence of any degree of mental abnormality could justify dissolution of a marriage few marriages would indeed survive in law.Medical-concern against too readily reducing a human being into a functional non-entity and as a negative-unit in family or society is law's concern also and is reflected, at least partially, in the requirements of Section 13(1)(iii). In the last analysis, the mere branding of a person as schizophrenic will not suffice. For purposes of Section 13(1)(iii) `schizophrenia' is what Schizophrenia does. *Ram Narain Gupta v. Smt. Rameshwari Gupta,* AIR 1988 SC 2260: 1988(4) SCC 247: 1988 Supp. (2) SCR 913: 1988(2) Scale 670: 1988(3) JT 621

Section 13(1) (v).-Divorce.-Person suffering from venereal disease or impotency.-Valid ground for divorce by other spouse.-Person suffering from communicable disease is under moral and

legal duty to inform woman that he was not physically healthy.-Right has correlative duty.-Right to marry has to be treated as suspended till he is cured of disease.-Right to marry cannot be enforced through court of law.

Once the law provides the "venereal disease" as a ground for divorce to either husband or wife, such a person who was suffering from that disease even prior to the marriage cannot be said to have any right to marry so long as he is not fully cured of the disease. If the disease with which he was suffering would constitute a valid ground for divorce, was concealed by him and he and he entered into martial ties with a woman who did not know that the person with whom a woman who did not know that the person with whom she was being married was suffering from a virulent venereal disease, that person must be injuncted from entering into martial ties so as to prevent him from spoiling the health and, consequently, the life of an innocent woman. Such a person is under a moral, as also legal duty, to inform the woman with whom the marriage is proposed that he was not physically healthy and that he was suffering from a disease which was likely to be communicated to her. In this situation the right to marry and duty to inform about his ailment are vested in the same person. It is a right in respect of which a corresponding duty cannot be claimed as against some other person. Such a right, for these reasons also, would be an exception to the gene-rule that every "Right" has a correlative "Duty". Moreover, so long as the person is not cured of the communicable venereal disease or impotency, the right to marry cannot be enforced through a Court of law and shall be treated to be a "Suspend Right". *Mr. X vs. Hospital Z,* AIR 1999 SC 495 : 1999(1) Guj LH 1008 : 1999(8) SCC 296 : 1999(1) Rec Civ R 324 : 1999(1) All Mah LR 469 : 1999(2) Andh WR 205

Section 13(i)(4).-Virulent and incurable leprosy.-Disease found to be malignant and contagious.-Known treatment not providing complete treatment nor could correct deformity and mutilations produced by disease.-Petitioner is entitled to decree of divorce. *Swarajya Lakshmi v. Dr. G.G. Padma Rao,* AIR 1974 SC 165: 1974(2) SCR 97: 1974(2) AndhWR (SC) 1: 1974(1) SCC 58

Section 13(1A), 23.-Divorce.-Non-cohabitation for more than one year after judicial separation.-Divorce not granted.-Husband obliged to pay maintenance to wife.-Refusal to pay maintenance is 'wrong' within the meaning of Section 23.

Even after the decree for judicial separation was passed by the Court on the petition presented by the wife it was expected that both the spouses will make sincere efforts for a conciliation and cohabitation with each other, which means that the husband should behave as a dutiful husband and the wife should behave as a devoted wife. In the present case the husband has not only failed to make any such attempt but has also refused to pay the small amount of Rs. 100/- as maintenance for the wife and has been making time for expiry of the statutory period of one year after the decree of judicial separation so that he may easily get a decree of divorce. In the circumstances it can reasonably be said that he not only commits the matrimonial wrong in refusing to maintain his wife and further estrange the relation creating acrimony rendering any rapprochement impossible but also tries to take advantage of the said 'wrong' for getting the relief of divorce. Such conduct in committing a default cannot in the facts and circumstances of the case be brushed aside as not a matter f sufficient importance to disentitle him to get a decree of divorce under Section 13(1A). *Hirachand Srinivas Managaonkar vs. Sunanda,* AIR 2001 SC 1285 : 2001(4) SCC 125 : 2001 (3) JT 620 : 2001(2) Civ CR 282

Sections 13(1A)(ii) and 23(1)(a).-Divorce.-Refusal to re-union.-The husband not making serious attempt to have the decree of restitution of conjugal rights, enforced.-Husband is not entitled to decree of divorce. It would not be very reasonable to think that the relief which is available to the spouse against whom a decree for restitution has been passed, should be denied to the one who does not insist on compliance with the decree passed in his or her favour. In order to be a `wrong' within the meaning of Section 23(1)(a), the conduct alleged has to be something more than a mere

disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled. In the case before us the only allegation made in the written statement is that the petitioner refused to receive or reply to the letters written by the appellant and did not respond to his other attempts to make her agree to live with him. This allegation, even if true, does not amount to misconduct grave enough to disentitle the petitioner to the relief he has asked for. *Dharmendra Kumar v. Usha Kumar,* AIR 1977 SC 2218: 1977(4) SCC 12: 1978(1) SCR 315: 1977 MLR 160

Section 13(1A), 23, 10.-Divorce.-Non-resumption of co-habitation after passing decree for judicial separation or restitution of conjugal rights.-No obligation of either party to cohabit with other.-Section 10 does not vest a right to seek divorce on ground of non-resumption of co-habitation.-Court not bound to grant divorce on mere proof of non-cohabitation for one year.-Relief of divorce can only be granted if conditions laid down in Section 23 are satisfied.

Hirachand Srinivas Managaonkar vs. Sunanda, AIR 2001 SC 1285 : 2001(4) SCC 125 : 2001 (3) JT 620 : 2001(2) Civ CR 282

Section 13(i-a).-Divorce.-Cruelty.-Husband's allegation that wife suspected him having extra marital relations with his junior woman Advocate.-And wife used to behave in erratic fashion.-Husband expressing shock that on his wedding anniversary he came to know that his wife was pregnant despite fact that he had ceased to have marital relations with her.-Celebration of wedding anniversary showed that both were living together and husband apparently condoned cruelty alleged by him against wife.-Held, case of cruelty and desertion set up by husband not proved.

The allegation that the wife had sexual intercourse with a person other than the husband is a serious allegation against the wife and shows the cruel conduct of the husband entitling the wife to seek relief against him under the Act or otherwise. It was submitted that on July 6, 1979 parties celebrated their tenth wedding anniversary. That would show that both were living together and it is apparent that the husband has condoned the cruelty, if any, alleged by him against the wife. Husband has not gone to see his third child Kamakshi since her birth. High Court has rejected his plea that he ever made attempt to bring his wife and the daughter, who was born to her at her parents house. High Court has considered pleadings and the evidence on record threadbare and came to the conclusion that the case of cruelty and desertion set up by the husband has not been proved. We agree with the High Court and rather we find that it is husband, who is in wrong. *R. Balasubramanian vs. Vijaylakshmi Balasubramanian,* AIR 1999 SC 3070 : 1999(2) Hindu LR 411 : 1999(2) Raj LW 346 : 2000(1) All Mah LR 83 : 1999(7) SCC 311 : 1999(3) Pat LJR 8 : 1999(3) Mad LW 420

Section 13-B.-Divorce by mutual consent.-Withdrawal of consent.-Permissibility.-Any party can unilaterally withdraw consent. It will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be a party to the joint motion under sub-section (2). There is nothing in the Section which prevents such course. The Section does not provide that if there is a change of mind it should not be by one party alone, but by both. Sub-section (2) requires the Court to hear the parties which means both the parties. If one of the parties at that stage says that "I have withdrawn my consent," or "I am not a willing party to the divorce", the Court cannot pass a decree of divorce by mutual consent if the Court is held to have the power to make a decree solely based on the initial petition, it negates the whole idea of mutuality and consent for divorce. Mutual consent to the divorce is a *sine qua non* for

passing a decree for divorce under Section 13-B. Mutual consent should continue till the divorce decree is passed. It is a positive requirement for the Court to pass a decree of divorce. "The consent must continue to decree *nisi* and case is heard." *Smt. Sureshta Devi v. Om Prakash,* AIR 1992 SC 1904: 1991(2) SCC 25: 1991(1) SCR 274: 1991(1) Scale 156: 1991(1) JT 321: 1991(1) Ker LJ 553

Section 13-B.-Divorce by mutual consent.-Living separately.-Meaning of.-The provision does not require that the parties should live in different houses. The expression `living separately', connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. *Smt. Sureshta Devi v. Om Prakash,* AIR 1992 SC 1904: 1991(2) SCC 25: 1991(1) SCR 274: 1991(1) Scale 156: 1991(1) JT 321: 1991(1) Ker LJ 553

Section 13-B.-Divorce by mutual consent.-Parties not being able to live together.-Meaning of.-The expression seems to indicate the concept of broken down marriage and that it would not be possible for them to reconcile. *Smt. Sureshta Devi v. Om Prakash,* AIR 1992 SC 1904: 1991(2) SCC 25: 1991(1) SCR 274: 1991(1) Scale 156: 1991(1) JT 321: 1991(1) Ker LJ 553

Section 13-B.-Divorce by mutual consent.-Irretrievable breaking down of marriage.-Settlement between the parties.-In exercise of inherent powers of Supreme Court, all disputes pending between the parties disposed off.-Decree of divorce granted. *Smt. Kanchan Devi v. Promod Kumar Mittal and another,* AIR 1996 SC 3192: 1996(8) SCC 90: 1996(3) Scale 293: 1996(5) JT 655: 1996 All.A.C. (Cr.) 106

Section 15.-Compliance of.-Necessity of.-Marriage contracted before the expiry of period of one year from the date of decree.-The marriage is not void. Examining the matter from all possible angles and keeping in view the fact that the scheme of the Act provides for treating certain marriages void and simultaneously some marriages which are made punishable yet not void and no consequences having been provided for in respect of the marriage in contravention of the proviso to Section 15, it cannot be said that such marriage would be void. *Smt. Lila Gupta v. Laxmi Narain and others,* AIR 1978 SC 1351: 1978(3) SCC 258: 1978(3) SCR 922: 1978 MLR_256

Sections 15, 11, 12 and 28.-Second marriage.-Effect on appeal.-Challenge to decree declaring the marriage nullity.-Remarriage by the other spouse does not render the appeal infructuous. The Legislature in its wisdom has enacted Section 28 conferring a right of appeal which is unqualified, unrestrictive and not depending on the mercy or desire of a party against all decrees in any proceeding under this Act which will include a decree under Sections 11, 12 or 13 and therefore the only interpretation which could be put on the language of Section 15 should be which will be consistent with Section 28. This phrase marriage has been dissolved by `decree of divorce' will only mean where the relationship of marriage has been brought to an end by the process of Court by a decree. *Smt. Lata Kamat v. Vilas,* AIR 1989 SC 1477: 1989(2) SCC 613: 1989(2) SCR 137: 1989(1) Scale 867: 1989(3) JT 48: 1989(2) OLR 101

Section 16.-Entitlement to property.-Payment of family pension and death-cum-retirement gratuity.-Children born form second wife during subsistence of first marriage are legitimate and entitled to property of deceased employee in equal shares along with first wife and sons born from first marriage.-Family pension admissible to minor children from second wife till they attain majority.

Under Section 16 of the Hindu Marriage Act, children of void marriage are legitimate, under the Hindu Succession Act, 1956 property of a male Hindu dying intestate devolve firstly on heirs in clause (1) which include widow and son. Among the widow and son, they all get shares. The second wife taken by deceased/ government employee during subsistence cannot be described a widow of deceased employee, their marriage void. Sons of the marriage between deceased employee and second

wife being the legitimate sons of deceased would be entitled to the property of deceased employee in equal shares along with that of first wife and the sons born from the first marriage. That being the legal position when Hindu male dies intestate, the children of the deceased employee born out of the second wedlock would be entitled to share in the family pension and death-cum-retirement gratuity. The second wife was not entitled to anything and family pension would be admissible to minor children only till they attained majority. *Rameshwari Devi vs. State of Bihar and others,* AIR 2000 SC 735 : 2000(4) All Mah LR 237 : 2000(2) Andh LD 42 : 2000(2) SCC 431 : 2000(1) Raj LW 101 : 2000(1) Marri LJ 323 : 2000(2) Mad LJ 135 : 2000(1) Hindu LR 284 : 2000(1) Cal HN 93

Sections 16 and 4.-Legitimacy of children.-Effect on succession.-Legal fiction of legitimacy of children for the purpose of succession.-Scope of.-It is limited in operation for the purpose of succession to the properties of parents and not of other relatives. *Smt. Parayankandiyal Eravath Kanapravan Kalliani Amma and others v. K. Devi and others,* AIR 1996 SC 1963: 1996(4) SCC 76: 1996(4) Scale 131: 1996(4) JT 656: 1996 Mat. LR 325

Section 16 (as existed prior to 1976).-Validity of.-Children from void marriage.-Discrimination in determining legitimacy.-The children born of void marriages held prior to Act not legitimised while children born of marriages after the enactment protected under the Act.-The provision as existed prior to amendment of 1976 was unconstitutional being violative of Article 14 of the Constitution. *Smt. Parayankandiyal Eravath Kanapravan Kalliani Amma and others v. K. Devi and others,* AIR 1996 SC 1963: 1996(4) SCC 76: 1996(4) Scale 131: 1996(4) JT 656: 1996 Mat. LR 325

Section 17.-Customary marriage.-Proof of.-Living together as husband and wife not sufficient.-Custom of marriage and performance of necessary ceremonies must be proved. *Surjit Kaur v. Garja Singh and others,* AIR 1994 SC 135: 1994(1) SCC 407: 1993(4) Scale 302: 1993(2) Hindu LR 519: 1994(2) BLJR 1056

Section 17.-Marriage.-Proof of.-Condition for void marriage.-Necessity of proper celebration and ceremonies. The word `solemnize' means, in connection with a marriage, `to celebrate the marriage with proper ceremonies and in due form', according to the Shorter Oxford Dictionary. It follows, therefore, that unless the marriage is `celebrated or performed with proper ceremonies and due form' it cannot be said to be `solemnized'. It is, therefore, essential, for the purpose of Section 17 of the Act, that the marriage to which Section 494, I.P.C. applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. The marriage between two Hindus is void in view of Section 17 if two conditions are satisfied: (i) the marriage is solemnized after the commencement of the Act; (ii) at the date of such marriage, either party had a spouse living. If the marriage which took place between the appellant and Kamlabai in February 1962 cannot be said to be `solemnized', that marriage will not be void by virtue of Section 17 of the Act. *Bhaurao Shankar Lokhande and another v. The State of Maharashtra and another,* AIR 1965 SC 1564: 1965 All WR (HC) 509: 1955(2) AnLT 11: 67 BomLR 428: 1965(2) SCR_837

Section 17.-Bigamy.-Husband embracing Islam after marriage.-Mere conversion does not automatically dissolve first marriage.-Husband would be guilty of offence under Section 17 of Hindu Marriage Act read with Section 494 I.P.C.

Under the Hindu Marriage Act, a bigamous marriage is prohibited and has been constituted as an offence under Section 17 of the Act, any marriage solemnised by the husband during the subsistence of that marriage, in spite of his conversion of another religion, would be an offence triable under Section 17 of the Hindu Marriage Act read with Section 494 I.P.C. Since taking of cognizance of the offence under Section 494 is limited to the complaints made by the persons specified in Section 198 of the Code of Criminal Procedure. It is obvious that the complaint would have to be decided in terms of the personal law applicable to the complainant and the respondent (accused) on mere conversion

does not absolve the marriage automatically and they continue to be "husband and wife". Change of religion does not dissolve the marriage performed under the Hindu Marriage Act between two Hindus. Apostasy does not bring to an end the civil obligations of the matrimonial bond but apostasy is a ground for divorce under Section 13 as also a ground for judicial separation under Section 10 of the Hindu Marriage Act. *Lily Thomas etc. vs. Union of India and others,* AIR 2000 SC 1650 : 2000(2) Hindu LR 374 : 2000(2) Mah LR 409 : 2000(6) Andh LD 16 : 2000(6) SCC 224 : 2000(2) Marri LJ 1 : 2000(3) Mad LW 371 : 2000(2) Cur CC 233

Section 19(ii).-Residence.-Meaning of.-The provision refers to actual place of residence and not legal residence. In order to give jurisdiction on the ground of `residence', something more than a temporary stay is required. It must be more or less of a permanent character, and of such a nature that the court in which the respondent is sued, is his natural forum. The word `reside' is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found. It is capable of being understood in its ordinary sense of having one's own dwelling permanently, as well as in its extended sense. In its ordinary sense `residence' is more or less of a permanent character. The expression resides means to make an abode for a considerable time; to dwell permanently or for a length of time; to have a settled abode for a time. It is the place where a person has a fixed home or abode. Where there is such fixed home or such abode at one place the person cannot be said to reside at any other place where he had gone on a casual or temporary visit, e.g. for health or buisness or for a change. If a person lives with his wife and children, in an established home, his legal and actual place of residence is the same. If a person has no established home and is compelled to live in hotels, boarding houses or houses of others, his actual and physical habitation is the place where he actually or personally resides.It is plain in the context of cl. (ii) of Section 19 of the Act, that the word `resides' must mean the actual place of residence and not a legal or constructive residence: it certainly does not connote the place of origin. The word `resides' is a flexible one and has many shades of meaning, but it must take its colour and content from the context in which it appears and cannot be read in isolation. *Smt. Jeewanti Pandey v. Kishan Chandra Pandey,* AIR 1982 SC 3: 1981(4) SCC 517: 1982(1) SCR 1003: 1981(3) Scale 1641

Section 21A.-Transfer of case.-Divorce by mutual consent.-Petition filed at Bokaro.-Memorandum of settlement filed with petition taken on record.-Transfer petition allowed from Bokaro to Delhi.-Parties given liberty to file petition before transferee court at Delhi.

In this transfer petition moved on behalf of the wife for transferring the Divorce Petition of the respondent husband pending in the court of District Judge, Bokaro, Bihar State, to the District Court at Delhi, the parties have filed a copy of the Memorandum of settlement along with a copy of the petition for dissolution of the marriage under Section 13-B(1) and (2) of the Hindu Marriage Act. Both the parties have agreed that the marriage between them should be dissolved by mutual consent under Section 13-B(1) and (2) of the Hindu Marriage Act. We have taken the copies of the petition and the memorandum of settlement on record. In view of this development we direct transfer of the respondent's divorce petition from the court of District Judge, Bokaro, Bihar state who the District Court at Delhi. The parties are given liberty to file petition for divorce by mutual consent under Section 13-B of the Hindu Marriage Act before the transferee court at Delhi, wherein appropriate orders will then be passed by the District Court at Delhi. *Seema Shrinidhi (Smt.) vs. Praveen Kumar Tiwari* AIR 1999 SC 1560 : 1997(8) SCC 712 : 1998(1) All CJ 398

Section 23.-Relief.-Discretion of court.-Exercise of. Section 23 (1) of the Hindu Marriage Act, 1955 which deals with the powers of the Court in a proceeding under the Act also provides that the Court shall decree the relief claimed by the petitioner, whether the petition is defended or not, if the Court is satisfied that any of the grounds for granting relief exists and certain other conditions are satisfied.

Thus under the Indian Divorce Act, 1869 as well as under the Hindu Marriage Act, the condition for the grant of a relief is the satisfaction of the Court as to the existence of the grounds for granting the particular relief. The satisfaction must necessarily be founded upon material which is relevant for the consideration of the Court, and this would include the evidence adduced in the case. Therefore, though in the former Act the words used are "satisfied on the evidence" and the legislature has said in the latter Act "If the court is satisfied", the meaning is the same. *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati,* AIR 1965 SC 364: 66 BomLR 681: 1965 MPLJ 509: 1964(7) SCR 267

Section 23.-Divorce.-Decree in proceedings.-Relief.-Duty of Court to examine whether (i) grounds for claiming relief exist, (ii) whether there is any connivance.-Duty cast in the first instance to bring about reconciliation between parties.-Judgment of District Judge silent whether any such efforts were made.-Before passing *ex parte* order, Court required to secure presence of parties, and endeavour to find out truth by putting questions to elicit truth.-High Court should have seen if proceedings before District Judge were in accordance with procedure prescribed.-Directions to file separate suit for setting aside decree of divorce not a solution to case.-By doing so High Court failed to exercise its power of superintendence under Article 227.-Matter remanded back for fresh trial. *Balwinder Kaur vs. Hardeep Singh,* AIR 1998 SC 764 : 1998(1) Mah LR 822 : 1997(11) SCC 701 : 1998(1) Marri LJ 1 : 1998(1) BLJR 594

Section 23(1)(a), 13(1A), 10.-Divorce.-Non-cohabitation after decree of judicial separation.-Wife's petition for judicial separation granted on ground of adultery by husband.-Husband deliberately continued to lead adulterous life with no remorse and thwarting any attempt to reunite.-Offence of adultery does not get frozen or wiped out on passing decree for judicial separation.-Relief of divorce cannot be granted. *Hirachand Srinivas Managaonkar vs. Sunanda,* AIR 2001 SC 1285 : 2001(4) SCC 125 : 2001 (3) JT 620 : 2001(2) Civ CR 282

Section 24.-Income of husband.-Determination of.-Attempt to conceal the real income, assets and source of expenses incurred- Adverse inference can be drawn against husband that his income is much more than what is disclosed by him. Under the Hindu Adoption & Maintenance Act, 1956 it is the obligation of a person to maintain his unmarried daughter if she is unable to maintain herself. In this case since the wife has no income of her own, it is the obligation of the husband to maintain her and her two unmarried daughters one of whom is living with wife and one with him, Section 24 of the Act no doubt talks of maintenance of wife during the pendency of the proceedings but this section, in our view, cannot be read in isolation and cannot be given restricted meaning to hold that it is the maintenance of the wife alone and no one else. Since wife is maintaining the eldest unmarried daughter, her right to claim maintenance would include her own maintenance and that of her daughter. This fact has to be kept in view while fixing the maintenance pendente lite for the wife. *Smt. Jasbir Kaur Sehgal v. District Judge, Dehradun and others,* AIR 1997 SC 3397: 1997(7) SCC 7: 1997(7) JT 531: 1997 All LJ 2091: 1997(2) Orissa LR 379

Section 24.-Maintenance pendente lite.-Entitlement of unmarried daughter.-The daughter living with wife is not liability of the mother alone.-The wife is entitled to claim maintenance for maintaining the unmarried daughter. Under the Hindu Adoption & Maintenance Act, 1956 it is the obligation of a person to maintain his unmarried daughter if she is unable to maintain herself. In this case since the wife has no income of her own, it is the obligation of the husband to maintain her and her two unmarried daughters one of whom is living with wife and one with him, Section 24 of the Act no doubt talks of maintenance of wife during the pendency of the proceedings but this section, in our view, cannot be read in isolation and cannot be given restricted meaning to hold that it is the maintenance of the wife alone and no one else. Since wife is maintaining the eldest unmarried daughter, her right to claim maintenance would include her own maintenance and that of her

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Section 25.-Maintenance.-Both father and mother of child employed.-Law does not require that only father has obligation to maintain minor.-Both parents are obliged to pay maintenance to child in proportion of their salary.

In the present case both the parents are employed. If we refer to the first application under Section 26 of the Act by the wife she mentioned that she is getting a salary of Rs. 3,100/- per month and husband is getting a salary of Rs. 5,850/- per month. She is, therefore, also obliged to contribute in the maintenance of the children. Salaries of both the parents have since increased with the course of time. We believe that in the same proportion may be perhaps in the case of an employee of Reserve Bank of India at somewhat higher rate. If we take approximate salary of husband is twice as much as that of the wife, they are bound to contribute for maintenance of their children in that proportion. *Padmja Sharma vs. Ratan Lal Sharma,* AIR 2000 SC 1398 : 2000(2) Cur CC 79 : 2000(2) Marri LJ 167 2000(2) Orissa LR 85 : 2000(2) Raj LW 317 : 2000(4) SCC 266 : 2000(126) Pun LR 588 : 2000(3) Bom CR 10

Section 27.-Adjudication of property rights.-Jurisdiction of matrimonial court.-Scope of.-The provision is not limited in respect of property given to the spouse at the time of marriage alone. On a plain reading of the Section, it becomes obvious that the Matrimonial Court trying any proceedings under the Hindu Marriage Act, 1955, has the jurisdiction to make such provision in the decree as it deems just and proper with respect to any property presented `at or about the time of marriage' which may belong jointly to both the husband and the wife. This Section provides an alternate remedy to the wife so that she can recover the property which is covered by the Section, by including it in the decree in the matrimonial proceedings, without having to take recourse to the filing of a separate Civil suit and avoid further litigation. The provisions of Section 27 of the Hindu Marriage Act unmistakably vests the jurisdiction in the Court to pass an order at the time of passing a decree in a matrimonial cause, in respect of the property presented, at or about the time of marriage, which may belong jointly to the husband and the wife. The property, as contemplated by Section 27 is not the property which is given to the wife at the time of marriage only. It includes the property given to the parties before or after marriage also, so long as it is reliable to the marriage. The expression `at or about the time of marriage' has to be properly construed to include such property which is given at the time of marriage as also the property given before or after marriage to the parties to become their `joint property', implying thereby that the property can be traced to have connection with the marriage. All such property is covered by Section 27 of the Act. *Balkrishna Ramchandra Kadam v. Sangeeta Balkrishna Kadam,* AIR 1997 SC 3562: 1997(7) SCC 500: 1997(7) JT 742: 1997 Marr. LJ 651: 1997(3) Mah.LJ 597

Section 28.-Appeal.-Limitation.-Exclusion of time for obtaining copy of judgement and decree.-Application.-The act in question is a special law and in the absence of express exclusion, Section 12(2) of the Limitation Act is applicable in computing the limitation. Even if it is held that under Section 15 the respondent had to wait till the period of limitation for appeal expires as he entered into a marriage on 27-6-1985 it was clearly after the period of limitation has expired and therefore this marriage apparently made the appeal filed by the appellant infructuous. It is not in dispute that if the period for obtaining copy of the judgment and decree is computed as contemplated in Section 12 clause (2) of the Limitation Act, the appeal filed by the appellant before the first appellate Court was within the time and if Section 12, clause (2) is held applicable then this marriage which the respondent performed on 27-6-1985 could not be said to be a marriage which he was entitled to perform in view of language of Section 15 and therefore it could not be said that this

marriage rendered the appeal filed by the appellant infructuous. According to clause (2) of Section 29 provisions contained in Sections 4 to 24 will be applicable unless they are not expressly excluded. It is clear that the provisions of the Act do not exclude operation of provisions of Sections 4 to 24 of the Limitation Act and therefore it could not be said that these provisions will not be applicable. It is therefore clear that to an appeal under Section 28 of the Hindu Marriage Act, provisions contained in Section 12 clause (2) will be applicable, therefore the time required for obtaining copies of the judgment will have to be excluded for computing the period of limitation for appeal. *Smt. Lata Kamat v. Vilas,* AIR 1989 SC 1477: 1989(2) SCC 613: 1989(2) SCR 137: 1989(1) Scale 867: 1989(3) JT 48: 1989(2) OLR 101

Section 28, 3.-Appeal.-Decree of divorce.-Fraud perpetrated on wife by husband in filing divorce petition.-Wife did not intend to file petition.-She appeared as witness.-*Ex parte* decree for divorce.-Appeal rejected by High Court without satisfying itself the requirement of law.-Rejection of appeal improper.-Case remanded back for fresh trial.

Rules of procedures are meant to subserve the cause of justice and not to frustrate it. In the present case when fraud has been alleged by the wife in getting the petition for divorce filed through her when she never wanted a divorce and circumstances showed that what she said was *prima facie* probable and further from circumstances of the case hereinafter pointed out, the High Court in our opinion was not justified in rejecting the appeal without satisfying itself that the requirement of law had been satisfied. *Balwinder Kaur vs. Hardeep Singh,* AIR 1998 SC 764 : 1998(1) Mah LR 822 : 1997(11) SCC 701 : 1998(1) Marri LJ 1 : 1998(1) BLJR 594

Section 28(1)(b) and 10(1)(f).-Condonation of adultery.-Inference.-Cohabitation between husband and wife after discovery of adultery.-Effect of. In order that forgiveness may be confirmed or made effective, something more than stray acts of cohabitation between husband and wife have to be proved. But where as in this case, judicial separation is being claimed on the ground of Section 10(1)(f); the fact that the husband cohabited with the wife even after the knowledge that she had been guilty of cohabiting with another person would in our opinion be sufficient to constitute condonation, particularly, as in the case, the first respondent knew of the alleged adultery in May/June 1958 and still continued to cohabit with the appellant thereafter upto October 1958. Further the statement of the first respondent to the effect that he kept his wife after May/June 1958 at the instance of his friends is a clear indication of condonation even in the sense of forgiveness confirmed or made effective by reinstatement. *Smt. Chandra Mohini Srivastava v. Shri Avinash Prasad Srivastava and another,* AIR 1967 SC 581: 1967 All WR (HC) 284: 1967 (1) SCJ 42: 1967(1) SCR 864
