Changes In The Ground Of Divorce In India

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Introduction

Hindu society regards marriage as a sacrament into which, doubtless, the element of contract enters as a constituent element. But contract is not all. It is the sacramental character that is more pronounced and prominent than the contractual. The concept in western countries is different which considers marriage as a contract and like any other contract it should be terminated at the will of the contracting parties. That appears to be the characteristic tendency discernible in most of the Western societies. This fundamental difference in the notions of matrimony is responsible for the comparatively large number of divorces in Western societies and their absence from Hindu society.¹

Many Indian authors and old manuscripts are there which considers the Hindu marriage to be completely sacramental with no element of contract in it. This is not the complete truth; there are circumstances where a divorce was possible. It is only when the world moved into the medieval period, the concept of divorce disappeared. It was a completely a male dominated society in which polygamy was allowed but polyandry was discouraged. So a man never needed a divorce to marry other women, whatever may be the reason.

Now time has changed, in most countries which enjoy the benefits of civilized existence, women claim equality with men and have successfully earned it. Science and spirituality, philosophy and politics, law and literature, ethics and economics, all the branches of knowledge have been made women's own in recent times. With the modernization of the world and increased self sufficiency of women they now no longer need the support of the husband. So it is now possible for her to break the shackles of marriage if she is not happy with it.

Even the society has experienced a great amount of change in the grounds on which divorce is granted. Initially it started as the guilt theory i.e. if any of the spouses has committed an act

venereal disease, impotency insanity etc. these reasons cannot be classified as guilt since it is not a mistake but it is the fault of that person.

The latest developments are the Consent theory of divorce and the Irretrievable breakdown of marriage theory of divorce. Both are somewhat similar in nature and divorce can be granted in the absence of any guilt or fault.

**Divorce in ancient India**

Divorce in the ancient India can be understood by ancient Indian Sanskrit texts known as the Smritis; texts traditionally handed down from generation to generation, from teacher to pupil, and committed to memory.

**BRIHADA YAMA SMIRITI**

This writer takes a very charitable view of the characteristic and congenital frailty of women and counsels divorce only under the following exceptional situation: "Garbhe-jate-paritya-gonanyatha-yamabhashitam." In the opinion of Yama, a wife should be divorced if, as the result of her amour with another, she conceives. Not under any other circumstances would he counsel divorce.

This is similar to the guilt of adultery in present era. So this smriti permits divorce under the guilt theory. It does not allow for divorce under any other situation.

**BRIHADDHARITA SMIRITI**

According to Brihaddharita, divorce is permitted under the following circumstances. He writes: "Agnidam-Garadam-chandeem-Bhartrighneem-Lokaghatineem Himsaviharam-vanitam-tyaktva-papam-na-vindati." Sin will not be his, if an individual divorces a wife who is guilty of incendiarism, of at-tempted poisoning of children or husband, who is a terrible termagant, who makes an attempt on her husband's life either single-handed or aided and abetted by a paramour, and a wife who is a terror to the whole world, or who is so vicious as
to spoil the chances of a husband for otherworldly welfare on account of her association with him. This will also come under the guilt theory where the wife is dangerous to the life of the husband.

GAUTAMA SMIRITI

In the eighteenth chapter of the Dharma-Sutras, Gautama refers to a woman without husband, and it would appear by very strong and unmistakable implication that Gautama allows a wife right to divorce her husband on the grounds indicated in the familiar stanza of Brihaspati-
"Naste-Mrite-Pravrajite-kliche-cha-patitepahah-Panchasvapatsu-Naree-nam-Patiranyo
vidhiyate." If a husband suddenly disappears and all traces about his whereabouts are lost, if a husband should die early and prematurely, if he runs away from home to become an ascetic, if he should prove to be impotent, and if he should fall in social and public estimation on account of vicious conduct like drinking, stealing, consort with prostitutes, etc., the wife has a right to divorce him. Guilt theory is also present here.

VASHISTHA SMRITI

In the eighteenth chapter, Vashishta speaks of a form of divorce (stanzas 18-21): "Bharya-
putrascha-sishyascha-sams-rishta-papakarmabhih-Paribhashya-parityajyah." Wife, son, and pupil should be abandoned when they are found to be guilty of sinful, vicious, and immoral conduct. Vashishta is positive and categorical about the grounds of divorce where the erring party is the woman. He writes: "Treeni-striyah-patakani-loke- dharmavido-viduh-
Bharturadhino- Bhrunahat-ya-Svasya-garbhasya-patanah." Attempt to take away her husband's life, infanticide, and artificially inducing abortions are the three sins that make a woman fall, and the fallen woman should be abandoned. Infanticide implies adultery. Attempt to take away the husband's life implies adultery. This can be taken as onether example of guilt theory.

BODHYANA SMRITI
Bodhayana writes: "Aprajam-dasame-varshe-striprajam-dvadase - tyajet - Mritaprajam-panchadase-sadyastvapriyava-dineem." A wife who has no issue should be divorced in the tenth year after matrimony. A wife who gets only female children should be divorced in the twelfth year after marriage. One, who is unfortunate enough to lose her children soon after birth, should be abandoned in the fifteenth year after marriage. This smriti allows divorce under the fault theory.

Narada and Parasara mention five cases in which a woman may abandon her husband and take another: (a) when the husband is missing, (b) when he is dead, (c) when he has become as an ascetic, (d) when he is impotent, and (e) when he is an outcaste.

Therefore we see that in some exceptional cases divorce was permitted, but in practice it was never followed. Marriage was always considered as sacrament for the women but not for the men. This was the situation till the middle of the 19th century.

**Divorce in modern India**

OFFENSE OR GUILT THEORY OF DIVORCE

In modern India the divorce starts with the Indian divorce act, 1869. It governed only the Christians by the limit that was given to the act by section 2 of the act. Dissolution of marriage under this act is covered in the section 10. Under this act a male can file a divorce petition only on the ground that the wife has been guilty of adultery. A female could file a divorce petition if the husband had changed his religion or he was guilty of adultery, bigamy, sodomy or rape.

2. Narada, XII, 81;

In the above act only guilt is recognized as the ground of divorce. As change of religion, adultery, bigamy, rape etc attribute to ones guilt only.
THE MUTUAL CONSENT THEORY OF DIVORCE

Hindu Marriage Act, 1955

This act has undergone substantial changes since its introduction in 1955. Though initially adultery, cruelty and desertion were the ground for judicial separation, now they are grounds for divorce. Initially only the fault or the guilt theory of divorce was recognized slow and steadily other grounds of divorce were recognized.

The ground for divorce on the basis of mutual consent was recognized in the year 1976. Section 13 B was introduced in this act. As against the guilt theory there has been advocated the theory of free divorce or the consent theory of divorce. According to this the parties to marriage are free to dissolve a marriage as they are free to enter it. The argument is that the two parties that have entered into the marriage with free consent, may later on realize that they made a mistake, for one reason or the other, and are finding it difficult to live together. In this case the parties did not have any ground for divorce as they have not done any wrong (adultery, cruelty, bigamy etc) or they are faultless. So what should they do? The very basis of marriage is mutual fidelity, and if for any reason the parties feel that the mutual fidelity cannot continue, they should have the freedom to dissolve the marriage and only through dissolution the fidelity can be preserved.

3. Extent of power to grant relief generally.-[Nothing hereinafter contained shall authorise any Court to grant any relief under this Act except where the petitioner [or respondent] professes the Christian religion,

4. When husband may petition for dissolution.

-Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution.

-Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman; or has been guilty of incestuous adultery, or of bigamy with adultery.
THE IRRETRIEVABLE BREAKDOWN OF MARRIAGE THEORY OF DIVORCE

This theory is not accepted as a ground of divorce in India, though the society now needs this and it was even recommended by the law commission of India. Attempts have been made to recognize this but till now they have failed.

In view of the demand from various quarters for making irretrievable breakdown of marriage as ground for divorce under the Hindu Marriage Act, 1955, the Central Government referred the matter to the Law Commission of India for its consideration. The Law Commission in its 71st Report titled "The Hindu Marriage Act, 1955 — Irretrievable Breakdown of Marriage as a Ground of Divorce" submitted in April, 1978 had examined the issue in detail and recommended amendments to the Hindu Marriage Act, 1955 to make Irretrievable breakdown of marriage as a new ground for granting a decree of divorce among the Hindus. Accordingly, a Bill, namely, the Marriage Laws (Amendment) Bill, 1981 further to amend the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954, was introduced in Lok Sabha on the 27th February, 1981. However, before the Bill could be considered and passed by Lok Sabha, the Seventh Lok Sabha was dissolved on 31st December,

4. Divorce by mutual consent

(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.]
1984, and hence the Bill lapsed. Presently attempts have been made again to include this theory in the Hindu Marriage Act, 1955. An additional section “13 C “ is proposed to be inserted in the Hindu Marriage Act, 1955 through “The Marriage Laws Amendment bill, 2010” 6. This amendment bill has not been passed yet.

Conclusion

In ancient India marriage was permanent union, though in some exceptional cases divorce could have been granted as it appears from the smritis but, the grounds were restricted only to the guilt or fault theory. Only if any of the spouses has done a mistake that is not acceptable in marriage, a divorce could have been granted. The ideas like divorce by mutual consent or irretrievable breakdown of marriage were not there. The most important thing is that these ideas were limited only to the scriptures but they were hardly practiced, since life was impossible for lady after a divorce.

5. 13C

(1) A petition for the dissolution of marriage by a decree of divorce may be presented to the district court by either party to a marriage [whether solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 2010], on the ground that the marriage has broken down irretrievably.

(2) The court hearing a petition referred to in sub-section (1) shall not hold the marriage to have broken down irretrievably unless it is satisfied that the parties to the marriage have lived apart for a continuous period of not less than three years immediately preceding the presentation of the petition.

(3) If the court is satisfied, on the evidence, as to the fact mentioned in subsection(2), then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, subject to the provisions of this Act, grant a decree of divorce.

(4) In considering, for the purpose of sub-section (2), whether the period for which the parties to a marriage have lived apart has been continuous, no account shall be taken of any one period (not exceeding three months’ in all) during which the parties resumed living with each other, but no other period during which the parties lived with each other shall count as part of the period for which the parties to the marriage lived apart.

(5) For the purposes of sub-sections (2) and (4), a husband and wife shall be treated as living apart unless they are living with each other in the same household, and reference in this section to the parties to a marriage living with each other shall be construed as reference to their living with each other in the same household.

6 The marriage laws (amendment bill), 2010; Bill no XLI of 2010
The idea of divorce basically developed in the later part of the 20\textsuperscript{th} century where they had more freedom, more equality and due to the increased education woman had more financial independence. Earlier woman preferred to live a difficult life in a failed marriage rather than to move out, as they had no option. Neither they were socially accepted in this form nor did they have any opportunity to meet both the ends.

Earlier there was divorce only in the extreme cases of adultery or cruelty. In the present era the grounds have changed dramatically according to the need and condition of society. Now a divorce is possible even for the reason that the spouses do not like each other even though there is no fault or guilt.