

Full Length Research Paper**Marriage Laws (Amendment) Bill, 2013: A Step to Transform Matrimonial Jurisprudence****Abhilasha Kataria***Assistant Professor, School of Law, Wollega University, Ethiopia***Abstract**

Apropos to the approval of the Cabinet, the “Marriage Laws (Amendment) Bill, 2013” is now about to become an “Act of Parliament” very shortly. In this context the present work of author becomes very germane and relevant. This paper is an attempt to critically analyse the “Marriage Laws (Amendment) Bill, 2013”. The paper seeks to find out the relevance and impact of “Marriage Laws (Amendment) Bill, 2013” on the familial relations of Indian spouses and their families. The author tries to analyse the questions central to the issue of liberalized “break-up laws”. The whole array of arguments is based upon primary and secondary sources of law and plethora of divorce petitions disposed by the judiciary. The recently proposed changes by government regarding property rights to divorced woman out of husband’s property has again rooted a new problem in the path of enactment of the said law and the same has been covered by the paper as well. As a whole the paper presents a fair critical analysis along with required suggestions.

Keywords: *Marriage, divorce, irretrievable breakdown, mutual consent, amendment.*

Introduction

It is universally accepted fact that marriage is a union of two lives and souls binding them forever. According to Manu marriage is a sacred bond (MANUSMRITI, IX, 48). Marriage is the foundation of a “family”. At one point of time marital knot used to be an ecstatic dream but with the socio-economic transformations in society and advent of e-age it has turned towards more of agony. However the cleavage of religion and law through codification of various legislations had also played a pivotal role in transcending individual psychologies. Due to this change in psychology law is said to be the instrument of social change. This social change further becomes the cause of various amendments in the legislations and so is the case of family law. Since the codification, personal laws have witnessed a number of amendments in India. The very latest addition to the garland is “the Marriage Laws (Amendment) Bill, 2013”. The object of this law is to introduce “irretrievable breakdown of marriage” as a ground for divorce and do away with the waiting period in case of divorce by mutual consent under Hindu Marriage Act, 1955 as well as under Special Marriage Act, 1954. In order to analyse the said amendment Act the author has discussed the background of excogitating divorce clauses and change in concept of marriage from status to contract in the next point. Consequent to the conceptual background the divorce laws have been introduced in India.

Conceptual Background

The existence of the institution of marriage, irrespective of the form it may take has been a universal constant of human society after the primitive stage (AGNES, 2011). Historically, within most feudal societies in Europe and England marriage was viewed as an essential social institution and its stability as desirable social objective, which could be ensured by prohibiting its dissolution in pre-industrial era (AGNES, 2011). In India too, marriage was one of the necessary *sanskaras* or religious rites for all Hindus (MAYNE, 2012). There is no mention of dissolution of marriage under any of the ancient sources of Hindu law except customary divorce (Yamanaji H. v. Nirmala 2002 (1) HLR 612 (P & H)). It is pertinent to note here that at least in case of customary allowance, dissolution of marriage could be granted to Hindus (Yamanaji H. v. Nirmala). The term ‘divorce’ as such owes its origin to the French term, ‘*diverter*’ and the Latin term ‘*divortium*’, which mean ‘to divert’. The French Civil Code of 1800 (also called the Napoleonic Code) was the first to recognize marriage as a civil contract (AGNES, 2011). Before this husband and wife used to have a single legal identity and status and legal existence of woman was suspended during marriage (William Blackstone, 1769). After French Code, England also provided similar remedies to husband and wife (Matrimonial Causes Act, 1857). Afterwards the same was introduced by Parsi Marriage and Divorce Act, 1865 and Indian Divorce Act, 1869. The Hindu woman got the right to divorce in India only in 1955 through Hindu Marriage Act. Under Muslim law marriage is recognized as a contract since the beginning as mentioned in Quran and can be dissolved as a matter of right (MAHMOOD, 2008). So, now the context can be canvassed as regards the advent of divorce law in India and it will be helpful to move further with understanding “no fault theory” and its relevance to the present amendment Bill.

No Fault Theory and the Amendment at hand

Out of the three theories (Fault or Guilt theory, Mutual Consent Theory and Irretrievable Breakdown Theory) of divorce “no-fault” or irretrievable breakdown theory is very unique as according to this theory the guilty or fault need not to be proved before a court of Justice for getting divorce. The only requirement is to establish the fact that the marriage is no more in “workable condition” and cannot be reconciled or retrieved at all. The beauty of the theory is that the parties to divorce need not to feel criminalized or hostile with one another. Also they can be treated as “Just Divorced” respectfully by other spouse and their children if any rather being treated as guilty. In England ‘no-fault’ or ‘irretrievable breakdown’ is the sole ground for divorce (Section 1, Matrimonial Causes Act, 1973). This was the effect of the leading judgment of *Masarati v. Masarati* (1969) 1 WLR 392 (C.A.) and Divorce Law Reforms Act, 1969 (as recommended by Law Commission of England and added in Section 1 of the Divorce Law Reforms Act, 1969). As Indian law is broadly based on Common Law the impact can be seen even on the 2013 Amendment Bill. The 2013 Amendment Bill is introduced to ground the existing divorce regime with liberalized interpretations and further it tends to reduce the agony of aggrieved parties due to the unnecessary hardship. In this connection the recommendations by Law Commission of India have played an important role.

1. Projections by Law Commission of India

In view of the demand from various quarters for making irretrievable breakdown of marriage as a 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 subsequently and hence the Bill lapsed. Further, the 18th Law Commission of India *suo motu* took up the matter and in its 217th Report titled ‘Irretrievable Breakdown of Marriage: Another Ground for Divorce’ presented to the Government in March, 2009 recommended that ‘Irretrievable breakdown of marriage’ should be incorporated as another ground for grant of a decree of divorce under the Hindu Marriage Act, 1955 and Special Marriage Act, 1954.

2. Judicial Benchmarks

Apart from the Law Commission’s recommendations the judicial pronouncements also largely responsible to bring an amendment in the marriage laws in India. The Hon’ble Supreme Court in *Ms. Jordan Diengdeh v. S.S. Chopra* AIR 1985 SC 935 had pointed out the necessity to introduce irretrievable breakdown of marriage and mutual consent as grounds for grant of divorce in all cases. In the instant case the Coram of O. Chinnappa Reddy and R. B. Mishra, JJ. have pointed out as under:

“It is seen that the law relating to judicial separation, divorce and nullity of marriage is far, far from uniform. Surely the times has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable break down of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by a marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down.”

The law relating to the time period of revocation of consent under divorce by mutual consent remained unsettled for long. The Bombay High Court in *Jayashree Ramesh Londhe v. Ramesh Bhikaji Londhe* AIR 1984 Bom 302 has expressed the view that the crucial time for the consent for divorce under Section 13B is the time when the petition was filed. If the consent was voluntarily given it would not be possible for any party to nullify the petition by withdrawing the consent. The court has drawn support to this conclusion from the principle underlying Order XXII Rule 1 of the Code of Civil Procedure which provides that if a suit is filed jointly by one or more Plaintiffs, such a suit or a part of a claim cannot be abandoned or withdrawn by one of Plaintiffs or one of the parties to the suit. The High Court of Delhi adopted similar line of reasoning in *Smt. Chander Kanta v. Hans Kumar and Anr.* AIR 1989 Delhi 73 and the Madhya Pradesh High Court in *Meena Dutta v. Anirudh Dutta* 1984 11 DMC 388 also took a similar view but the Kerala High Court in *K.I. Mohanan v. Jeejabai* AIR 1988 Ker 28 and the Punjab and Haryana High Court in *Harcharan Kaur v. Nachhattar Singh* AIR 1988 P and H 27 have taken a contrary view. It has been *inter alia*, held that it is open to one of the spouses to withdraw the consent given to the petition at any time before the Court passes a decree for divorce. 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 (*Smt. Sureshta Devi v. Om Prakash* (1991) 2 SCC 25). Mutual consent to the divorce is a sine qua non for passing a decree for divorce under Section 13B. Mutual consent should continue till the divorce decree is passed (*Smt. Sureshta Devi v. Om Prakash*). It is a positive requirement for the court to pass a decree of divorce. “The consent must continue to decree nisi and must be valid subsisting consent when the case is heard”. (See (i) Halsbury Laws of England, Fourth Edition Vol. 13 para 645; (ii) Rayden on Divorce, 12th Ed. Vol. 1 p. 291 and (iii) Beales v. Beales (1972) (2) All E.R. 667, 674).

But later the apex court reconsidered the divorce by mutual consent clubbed with irretrievable breakdown of marriage in *Ashok Hurra v. Rupa Bipin Zaveri* 1997 (4) SCC 226 and observed as under:

“Undoubtedly, a very strong feeling and impression is created in the mind of this Court that not only no re-union of reconciliation between the spouses was possible at any stage after the institution of petition for divorce by mutual consent under Section 13B on 21.8.1984, the parties were convinced that the marriage was irretrievably broken. This Court also finds that no useful purpose would be served by prolonging and/or procrastinating the miseries of two spouses when the very purpose of happy married life was lost.”

Further in the same case the Court granted a decree of mutual divorce by exercising its extra-ordinary powers under Article 142 of the Constitution of India. The decision in *Ashok Hurra’s* case to invoke the power under Article 142 of the Constitution was, thereafter, followed in several Cases based upon the doctrine of irretrievable break-down of marriage (*Anita Sabharwal v. Anil Sabharwal* (1997) 1 SCC 490).

Similarly in *Naveen Kohli v. Neelu Kohli* AIR 2006 SC 1675, the Hon’ble Supreme Court recommended to the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for divorce. Further in *Anil Kumar Jain v. Maya Jain* AIR 2013 SC 229 the respondent wife has made it very clear that she will not live with the petitioner, but, on the other hand, she is also not agreeable to a mutual divorce. In ordinary circumstances, the petitioner’s remedy would lie in filing a separate petition before the Family Court under Section 13 of the Hindu Marriage Act, 1955, on the grounds available, but in the present case there are certain admitted facts which attract the provisions of Section 13B thereof. One of the grounds available under Section 13B is that the couple have been living separately for one year or more and that they have not been able to live together, which is, in fact, the case as far as the parties to these proceedings are concerned. In this case, the parties are living separately for more than seven years. As part of the agreement between the parties the appellant had transferred valuable property rights in favour of the respondent and it was after registration of such transfer of property that she withdrew her consent for divorce. She still continues to enjoy the property and insists on living separately from the husband. Therefore, following the decision in *Smt. Sureshta Devi’s* case the Supreme Court was of the view that this is a fit case where it may exercise the powers vested in under Article 142 of the Constitution. However most recently in *Darshan Gupta v. Radhika Gupta* 2013(7)SCALE583 the Supreme Court has taken a different stand and denied to grant divorce on the ground of irretrievable breakdown of marriage and relied heavily on *Vishnu Dutt Sharma v. Manju Sharma* (2009) 6 SCC 379; also see *Gurbax Singh v. Harminder Kaur* (2013) 14 SCC 301, wherein this Court has held as under:

“On a bare reading of Section 13 of the Act, reproduced above, it is crystal clear that no such ground of irretrievable breakdown of the marriage is provided by the legislature for granting a decree of divorce. This Court cannot add such a ground to Section 13 of the Act as that would be amending the Act, which is a function of the legislature.”

After considering the above as per Jagdish Singh Khehar, J.:

“Since we were not agreeable with the contention advanced by the learned counsel for the appellant, on the plea of irretrievable breakdown of marriage, learned counsel sought the same relief, for the same reasons, by imploring us to invoke our jurisdiction under Article 142 of the Constitution of India, and to annul the marriage between the parties, as a matter of doing complete justice between the parties. Doing justice between the parties is clearly a constitutional obligation. This Court has been bestowed with the discretion “... to make such order as is necessary for doing complete justice in any cause or matter pending before it...” The concept of justice, however, varies depending on the interest of the party. On most occasions, it is advisable to adjudicate matters in consonance with law. Whenever it is possible to do so, on the touchstone of the courts conscience, the determination rendered would simultaneously result in doing justice between the parties” (2013(7) SCALE 583)

So the latest stand of judiciary in *Darshan Gupta* makes it clear that use of Article 142 of Indian Constitution is an exceptional case and the court cannot legislate but only review and interpret the existing law. Hence after examining the judicial march through various case laws till date it can be said that the enactment of Marriage Laws (Amendment) Bill, 2013 is the only way out to clear the faint position on “no fault divorce” and “divorce by mutual consent”. The author hopes that the Bill would lighten the lamp of justice.

Salient Features of the Proposed Law

After thorough reading of “the Marriage Laws (Amendment) Bill, 2013” (hereinafter the Bill) following salient features may be derived according to the author:

Regarding Divorce by Mutual Consent

The Amendment Bill has substituted the provisions of divorce by mutual consent (S. 13B of Hindu Marriage Act, 1955(HMA) and s. 28 of the Special Marriage Act, 1954, hereinafter SMA) under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 as under:

Upon receipt of a petition under Section 2 sub-section (1) of the Bill

In section 13B Divorce by mutual consent of HMA, in sub-section (2), for the words, brackets and figure “On the motion of both the parties made no 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 words, brackets and figure “Upon receipt of a petition under sub-section (1)” shall be substituted. Likewise under the Special Marriage Act, 1954 in section 28, in sub-section (2), for the words, brackets and figure “On the motion of both the parties made no 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 words, brackets and figure “Upon receipt of a petition under sub-section (1)” shall be substituted (S. 6 of the Bill). The effect of substitution in both the provisions (S. 13B and S. 28) would be that now the procedure of dissolution of marriage will become simple and no need for first and second motion by both the parties to divorce. Another important aspect is that the waiting period of six to eighteen months has been removed and just by filing a joint petition the divorce proceedings may be started. So, as a whole this amendment is to be welcomed by all concerned.

Regarding Irretrievable Breakdown of Marriage as separate ground for Divorce

The main objective behind drafting the Bill was to introduce Irretrievable Breakdown of Marriage as a ground (by insertion of S. 13C in HMA and S. 28A in SMA) for matrimonial relief due to the changing dynamics of family relations. It can be shown that the legislature has added this ground by adding wide range of provisions (Ss. 13C,13D,13E under HMA and Ss. 28A, 28B, 28C under SMA) in Chapter II (Amendments to the Hindu Marriage Act, 1955: Ss. 3,4, 5) and Chapter III (Amendments to the Special Marriage Act, 1954: Ss. 7, 8) of the Bill. In both the Chapters identical provisions have been drafted to keep the couples married as per Hindu rituals or registered their marriage as per Special Marriage Act. The main insertions in this regard are dealt with hereunder:

Petition before the District Court

After Section 13B of the Hindu Marriage Act and 28 a new Sections 13C and 28A will be added with the heading “Divorce on Ground of Irretrievable Breakdown of Marriage”. Under cl. (1) of the new section only District Court has been awarded the jurisdiction to dispose of the petition for divorce on the ground of irretrievable breakdown of marriage and not the Family Court. (S. 3 and S. 7 of the Bill)

Separation for Continuous Three Years & Satisfaction of Court

As per cl. (2) separation for continuous three years immediately preceding the presentation of the petition on the satisfaction of court regarding evidences of irretrievable broken marriage is a mandate to invoke relief under this ground.

Wife’s Right to Oppose Petition

Any wife who is a respondent to a petition under 13C or 28A may oppose the grant of decree on account of *grave financial hardship* to her or their children or other persons concerned. The court after considering all the circumstances may dismiss the petition in this regard (Proposed S. 13D & 28B under HMA & SMA).

Restriction on decree for divorce affecting children

The court shall not pass a decree of divorce under section 13C or 28A unless the court is satisfied that adequate provision for the maintenance of children born out of the marriage has been made consistently with the financial capacity of the parties to the marriage. The term “children” here includes any minor, unmarried or widowed daughter and children with special condition of their physical or mental health (*Explanation* to the Proposed S. 13E & 28C of HMA & SMA).

Special mention under other provisions

To give complete effect the proposed Sections “13C” & “28A” shall be added along with S. 13 (Grounds of divorce under HMA) and 27 (Grounds of divorce under SMA) in transfer of petition cases (S. 21A of HMA & 40A of SMA). Apart from this in section 23 (Bars to Matrimonial Relief) of the Hindu Marriage Act, in sub-section (1), in clause (a), after the word and figure “section 5”, the words, figures and letter “or in cases where the petition is presented under section 13C” shall be inserted.

Regarding Property Rights to Wife after Divorce

The Law Ministry had suggested that a woman be given a share in the residential property of the husband, including inherited and inheritable premises, in case of divorce, but the Ministry of Women and Child Development had objected to this clause (The HINDU, May 2, 2013). So this provision is still under consideration before the Cabinet. This inclusion in the Bill has given rise to many controversies including the one by an NGO supporting rights of men (*Press Release: FIGHT FOR JUSTICE, May 27, 2013*).

The Flip Side and Alternatives

The amendment Bill seeks to achieve the basic objective of “no-fault revolution” yet some gray spots may be seen on its canvas which can dilute its essence. The gaps identified in this reference may be summarised as under:

- i. The very first point to be raised here is the nomenclature of the Bill. The Bill is namely, “The Marriage Laws (Amendment) Bill, 2013” and it proposes to amend only Hindu Marriage and Special Marriage Act. The other personal laws like Indian Divorce Act, 1869, Parsi Marriage & Divorce Act, 1936 and Dissolution of Muslim Marriage Act, 1939 have been sidelined completely. Therefore the minority groups are still lagging behind and cannot enjoy the liberty of using “no fault grounds” in its true spirit.
- ii. The period of eighteen months has been removed (under Ss. 2 and 6 of the Bill) from the divorce by mutual consent and now it may be treated procedurally as good as any other ground of divorce. Due to this any couple would like to dissolve their marriage under this ground and chances of frivolous and vexatious petitions will grow high. In the light of this relaxation some other compulsory psychological counseling sessions or mediation sessions should be introduced to provide some room for reconciliation and save the institution of marriage.
- iii. No clear ground or criteria is nailed down under proposed S. 13C and 28A when the provision should be applied other than “continuous separation of three years”. It looks very premature to introduce a delicate provision like “irretrievable breakdown of marriage” at early stage of a matrimonial relationship. The spouses may become less receptive and spoil their consortium by exaggerating trivial issues and petty quibbles at this stage of marriage. So the time period of separation should be increased. Moreover an explanation or proviso should be added envisaging the rare use of the said ground and that too in exceptional circumstances.
- iv. Lastly the proposed provision about special rights to wife seems very gender biased and needs to be gender neutral. As per proposed Sections 13D and 28B a respondent wife may oppose the petition on the ground of “grave financial hardship” and that it would “in all circumstances” be wrong to dissolve the marriage. What would be included in “all circumstances” and why only to “a wife” is not clear. The provision shows that the legislators still do not treat the spouses on same footing.

Concluding Remarks

To sum up, it would be appropriate to say that the Marriage Laws (Amendment) Bill, 2013 projects an altruistic image of the marriage legislations by removing waiting period in divorce by mutual consent and adding “no fault” or “irretrievable breakdown” as a sole ground for divorce. It would prove as great relief for many litigants who are struggling for getting divorce due to procedural and statutory limitations till date. It is suggested that if the alternatives and solutions proposed above may be taken into consideration the Bill will prove as a revolution in the legal history of family law in India.

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 Ibid wherein S. 13C (2) and 28A (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.
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