

Irretrievable Breakdown of Marriage: Need To Change the Law

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I. INTRODUCTION

Though 'irretrievable breakdown of marriage' is not a ground for divorce under the Hindu Marriage Act and Special Marriages Act, the Supreme Court on dt. 4th oct. 2019 in Civil Appeal No. 4696/2013 R.Srinivaskumar v. R. Shametha has, in a significant ruling, said divorce can be granted if a marriage is totally unworkable, emotionally dead and beyond salvage.

Coming to the rescue of a man fighting a legal battle for divorce for the last two decades as his plea was rejected by a lower court and Andhra Pradesh high court after his wife refused to consent for separation, a bench of Justices S K Kaul and M R Shah invoked the SC's inherent powers under Article 142 to do "complete justice" and allowed the petition saying the marriage had broken irretrievably.

In the case before the SC, the couple had been living separately for the last 22 years after their relationship ran into rough weather just a few years after marriage in 1993.

The apex court in a series of verdicts has asked the Centre to amend the law to introduce irretrievable breakdown as a ground of divorce but the law remains unamended and divorce is denied even if a couple are not living together for years and their relationship bruised beyond repair. This effectively denies them an opportunity to explore life afresh as their marriage survives in law even if not in substance. Even the Law Commission, in its reports in 1978 and 2009, recommended the Centre to take "immediate action" to amend the laws with regard to "irretrievable breakdown" where a "wedlock became a deadlock". As the Centre failed to act on the suggestions, the apex court has from time to time invoked Article 142 to grant divorce even though existing laws do not recognise the ground for divorce. "This court, in a series of judgments, has exercised its inherent powers under Article 142 of the Constitution for dissolution of a marriage where the court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted," the court said.

The SC said, "In the present case, admittedly, the husband and wife have been living separately for more than 22 years and it will not be possible for the parties to live together. Therefore, we are of the opinion that while protecting the interest of the respondent wife to compensate her by way of lump sum permanent alimony, this is a fit case to exercise the powers under Article 142 to dissolve the marriage between the parties." The bench rejected the wife's plea that the marriage cannot be dissolved without her consent and granted relief to husband after noting that all efforts to continue the marriage had failed and there was no possibility of a reunion because of the strained relations between the parties. "If both the parties to the marriage agree for separation permanently and/or consent for divorce, in that case, certainly both the parties can move the competent court for a decree of divorce by mutual consent. Only in a case where one of the parties does not agree... only then the powers under Article 142 of the Constitution are required to be invoked to do the substantial justice between the parties, considering the facts and circumstances of the case," the bench said.

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Introduction to Irretrievable Breakdown of Marriage

Marriages as is often said are made in heaven and solemnized on Earth. Marriage is the very basis of a social organisation. It is the foundation of a family and in turn society without which no civilization can exist.

Marriage is regarded as a sacrament under Hindu Law which is eternal and indissoluble. The law with regard to marriages has been codified by the Parliament as the Hindu Marriage Act 1955. Hindu Law strictly insists on Monogamy. Prior to the enactment of the Hindu Marriage Act, divorce was not a recognized means to put an end to a marriage, the only exception being where it was recognized by custom, which meant that the rules of dissolution of marriage and monogamy were subject to a valid custom to the contrary.

Under the Sharia law, marriage is a sanctified contract which is solemnized on the payment of Mehr from the husband to the wife. In the Muslim law, polygamy is not unconditionally conferred and is based on the precedent condition about the capacity of the husband to do justice between his co-wives.

Modern society has become quite complex coupled with changes in socio-economic conditions seconded by the disintegration of the joint family structure as well as rapid industrialization and urbanisation, education and employment. Moreover, the laws have given equal status and rights to women have had a tremendous impact on the institution of marriage which is no longer treated as an indissoluble union. There has

been a considerable legislative and judicial interference in the gamut of matrimonial laws all over the world. Divorce, which was earlier regarded as an evil, has codified laws which are being substantially modified and liberalized.

In India, with regards to the Hindu Marriage Act and Special Marriage Act, the Government of India has attempted to include 'Irretrievable Breakdown of Marriage' as a ground of divorce as per the recommendations of the 71st report of the Law Commission of India.

Irretrievable Breakdown of Marriage is defined as:

“The situation that exists when either or both spouses are no longer able or willing to live with each other, thereby destroying their husband and wife relationship with no hope of resumption of spousal duties.”

In other words, Irretrievable breakdown of marriage can be defined as such failure in the matrimonial relationship or such circumstances adverse to that relationship that no reasonable probability remains of the spouses remaining together as husband and wife for mutual comfort and support.

In *Naveen Kohli v. Neelu Kohli*² the 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 in the following words: “Before we part with this case, on the consideration of the totality of facts, this Court would like to recommend 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 the grant of divorce. A copy of this judgment be sent to the Secretary, Ministry of Law & Justice, Department of Legal Affairs, Government of India for taking appropriate steps”³ Earlier, in *Ms. Jorden Diengdeh v. S. S. Chopra*⁴ the Supreme Court observed:

“It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases... We suggest that the time has come for the intervention of the legislature in those matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situation in which couples like the present have found themselves.”⁵

It is pertinent to notice that the Law Commission of India has already submitted a very comprehensive 71st Report on irretrievable breakdown of marriage as a ground of divorce. The matter had been taken up by the Commission as a result of a reference made by the Government of India. The Law Commission under the Chairmanship of Shri Justice H. R. Khanna presented its Report on April 7, 1978. The Report considered the suggestion and analyzed the same in extenso. Before embarking upon further action on the suggestion that irretrievable breakdown of marriage should be made as a ground for divorce, the Law Commission considered it appropriate to invite views on the matter by issuing a brief questionnaire. The Commission in its 71st Report have accepted in principle irretrievable breakdown of marriage as a ground of divorce and also examined the question as to how exactly to incorporate it into the Act and also further examined the question whether the introduction of such a ground should be coupled with any safeguards. The Commission also in Chapter II of the said Report considered present law under the Hindu Marriage Act, merits and demerits of the theory of irretrievable breakdown of marriage in Chapter IV and retention of other grounds of divorce in Chapter V. In Chapter VI the Commission also considered the requirement of living apart and also suggested many safeguards like welfare of children, hardship and recommended amendments to Sections 21A, 23(1)(a) and also recommended insertion of new sections 13C, 13D and 13E.

History of Irretrievable Breakdown of Marriage

The 71st report submitted by the Law Commission of India submitted in 1978 deals with the concept of Irretrievable Breakdown of Marriage. The Report is based on the prima facie question as to the extent and conditions on which Irretrievable Breakdown of Marriage can be included as a ground for divorce under the Hindu Marriage Act.

As per the Report in 1920, New Zealand was the first of the Commonwealth countries to introduce that a separation agreement of three or more years could become a ground to file divorce before the courts. In 1921, the first divorce on the ground of Irretrievable Breakdown of Marriage was granted by the Court in New Zealand. The Court held that “when matrimonial relations have ceased to exist, it is not in the interests of the parties nor in the interest of the public to keep the man and woman bound as husband and wife in law”. The Court also added that “in the event of such separation, the essential purpose of marriage is frustrated and its further continuance is not merely useless but mischievous”. This led to the formulation of the breakdown theory in Matrimonial law.

In England, the commencement of this theory was opened up in the case of *Masarati v. Masarati*, where both the parties to the marriage had committed adultery. The court of appeal, on wife's petition for divorce, observed breakdown of marriage. The law commission of England in its report said, “the objectives of good divorce law are two: one to buttress rather than to undermine the stability of marriage and two, when regrettably a marriage has broken down, to enable the empty shell to be destroyed with maximum fairness, and minimum

bitterness, humiliation and distress'. On the recommendation of the Law commission, Irretrievable Breakdown of Marriage was made the sole ground for divorce under section 1 of the Divorce Law reforms Act, 1973.

The Matrimonial Causes Act, 1959 of the Commonwealth of Australia provided for divorce on the grounds of breakdown of marriage.

In its report, the Law Commission observed that the provision of restricting divorce to matrimonial disability results in injustice in cases whether neither party is at fault or the fault is of such a nature that neither party wishes to divulge it and yet the marriage has ceased to exist. In other words, Irretrievable Breakdown of Marriage refers to a situation whether emotional bonds, respect, etc, which is the very foundation of a marriage have disappeared and only a façade in the name of marriage remains.

In conclusion, the Law Commission mentions the where a marriage has ceased to exist both in substance and in reality, divorce has to be taken as a solution to escape from a difficult situation. The provisions of such a divorce should be primarily concerned with bringing the parties and the children to accept the new situation and to work out a satisfactory basis for regulating relationships in the wake of the changed circumstances, rather than finding faults during the divorce proceedings.

Theories of Divorce :

1. **Fault Theory** – Under the Fault theory or the offences theory or the guilt theory, marriage can be dissolved only when either party to the marriage has committed a matrimonial offence. It is necessary to have a guilty and an innocent party, and only innocent party can seek the remedy of divorce. However the most striking feature and drawback is that if both parties have been at fault, there is no remedy available.
2. **Consent Theory** – The consent theory accepts that parties to a marriage could together decide to end the relationship. This is the concept of “divorce by mutual consent.” The procedure for divorce under this theory is that the parties live apart for a specified period of time, and also require that such application be made in two stages, before the divorce is confirmed. Importantly, related but critical issues such as maintenance, distribution of common properties and custody of children are expected to be decided by the parties.
3. **No Fault Theory** – The Institution of marriage being distinct as regards its socio-economic and legal footings, it will be unjust if the law ignores the importance attached to it.

However, one must also take consideration of the fact that it is the choice of the parties to a valid marriage to understand the importance of the institution and to preserve its sanctity. With the changing requirements, attitude and aptitude, the society has drastically changed and it is very difficult for the married couples to cope with change. While adjusting in a new atmosphere in the matrimonial home, spouses may commit, knowingly or unknowingly, with or without intention, whether economical dependent or independent, some kind of mistakes which may lead to a communication gap between them and create havoc in the matrimonial home. Where both the parties of a valid marriage are at fault of any kind of matrimonial offence, it is difficult to prove which one is an aggrieved party.

According to the Doctrine of Recrimination, no remedy can be granted to the party who is at fault. It is imperative in law to have one party as innocent and another at fault to provide a matrimonial relief. In case of no fault theory of divorce, it is not necessary to prove which party is at fault. There may be many reasons based on which sweetness of matrimonial relationship is at risk. If the parties prove with reliable evidence on record that their marriage is beyond all possible repairs then law should understand the reality of the facts and should help the parties to the marriage which has broken down irretrievably.

The breakdown theory of divorce which is inherently attached with no fault theory of divorce represents the modern view of divorce. Under this theory, the law realises a situation and says to the unhappy couple: if you can satisfy the Court that your marriage has broken down, and that you desire to terminate a situation that has become intolerable, then your marriage shall be dissolved, whatever may be the cause. The marriage can be said to be broken when the objects of the marriage cannot be fulfilled. When there is not an iota of hope that parties can be reconciled, it can be considered as irretrievable breakdown of marriage.

Supreme Court's Inherent Jurisdiction under Article 142 of Constitution of India :

Our constitution confers wide power on the Supreme Court such as power to grant Special Leave against the orders or decrees from any court, or Tribunal in the country or to have exclusive jurisdiction to decide the disputes of the President or Vice President.

The law laid down by the Hon'ble Supreme Court is no doubt the laws of the land binding on all the courts in the country. The Constitution of India confers powers upon the Supreme Court to ensure that courts do not suffer from any jurisdictional difficulties to do justice between the parties before it.

Article 142 of the Constitution of India is one such provisions which empowers the Supreme Court to pass such “Decree or Order” as may be necessary for doing complete justice between the parties.

In other words Article 142 supplement the powers already conferred upon the Supreme Court under the constitution to ensure that justice is done and in doing so, the court is not prohibited by lack of jurisdiction or authority of law.

The Supreme Court has exercised its power under Article 142 of the Constitution even in the case of matrimonial matters that has been pending for long time in the Tribunal/High Court. The reason is that the matter is adjourned from time to time on account of reconciliation between the parties, but ultimately that has not happened. Hence it is indeed an observation of the court that marriage status should, as far as possible, as long as possible and whenever possible, be maintained.

Relying on the judgement of the Hon'ble Apex Court in Sangamitra Ghose Vs. Kajal Kumar Ghosh, reported in 2007 2 SCC page 200, wherein it has been held as follows:

We are fully convinced that the marriage between the parties has irretrievably broken down because of incompatibility of temperament. In fact there has been total disappearance of emotional substratum in the marriage. The matrimonial bond between the parties beyond repair and that the marriage has been wrecked beyond the hope of salvage and therefore public interest and interest of all concerned lies in the of the recognition of the fact and to declare defunct de jure what is already defunct de facto.

In the case of Navin Kohli vs Neelu Kohli, the Supreme Court made a strong plea to the Union of India for incorporating irretrievable breakdown of the marriage as a separate ground for divorce under Section 13 of the Hindu Marriage Act 1955 and amending the Hindu Marriage Act.

It should be noted that no court in the country except the Supreme Court can grant divorce on the ground of irretrievable breakdown of matrimonial relationship.

JUDICIAL VIEW/SUGGESTIONS:

A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; divorce Courts are presented with concrete instances of human behaviour as bring the institution of marriage into disrepute.⁶ Once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interest of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie, by refusing to sever that tie, the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. Public interest demands not only that the married status should, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist. Human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.⁷ The Supreme Court in Naveen Kohli vs. Neelu Kohli⁸ 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.

The irretrievable breakdown of marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the grounds on which divorce is sought are made out, the circumstances can be taken into consideration. No divorce can be granted on the ground of irretrievable breakdown of marriage if the party seeking divorce on this ground is himself or herself at fault. The decree of divorce on the ground that the marriage has irretrievably broken down can be granted in those cases where both the parties have levelled such allegations against each other that the marriage appears to be practically dead and the parties cannot live together. The power of the Court to grant divorce on the ground of irretrievable breakdown of marriage should be exercised with much care and caution in exceptional circumstances only in the interest of both the parties.⁹

In Geeta Mullick v. Brojo Gopal Mullick¹⁰ the Calcutta High Court held: "In our considered opinion, the marriage between the parties cannot be dissolved by the trial Court or even by the High Court only on the ground of marriage having been irretrievably broken down, in the absence of one or more grounds as contemplated under section 13(1) of the Hindu Marriage Act, 1955."¹¹

The concept of irretrievable breakdown of marriage cannot be used as magic formula to obtain a decree for divorce where grounds for divorce are not proved.

In V. Bhagat v. D. Bhagat¹² the Supreme Court held : "Irretrievable breakdown of the marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the ground(s) alleged is made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind."¹³

The Calcutta High Court in *Tapan Kumar Chakraborty v. Jyotsna Chakraborty*¹⁴ held that in a petition for divorce on a ground as mentioned in the Hindu Marriage Act or the Special Marriage Act, court cannot grant divorce on the mere ground of irretrievable breakdown of marriage.

In *Kanchan Devi v. Pramod Kumar Mittal*¹⁵, however, the Supreme Court held: "...the marriage between the appellant and the respondent has irretrievably broken down and that there was no possibility of reconciliation, we in exercise of our powers under Art. 142 of the Constitution of India hereby direct that the marriage between the appellant and the respondent shall stand dissolved by a decree of divorce."¹⁶

There is no use of keeping two persons tied by the matrimonial relationship when they cannot live peacefully. Where wedlock has become a deadlock, since parties are living separately, and after marriage the wife has lived only for a few months in the matrimonial home, wife having made allegations of cruelty and desertion against the husband and husband having made counter-allegations against her, the court in *Krishna vs. Som Nath*¹⁷ held that marriage is irretrievably broken and it is in the interest of justice that decree of divorce be granted so that both the parties can live in peace. When the court finds in facts as well as from talks of resettlement or reconciliation between parties that there was no possibility of reunion between husband and wife and refusal of decree of divorce would only prolong the agonies of the spouses, it can dissolve the marriage on this ground.¹⁸ Where the husband and the wife are living separately from each other for the last 19 years and there is no chance of settlement between the parties a decree for divorce can be granted.¹⁹ Where there was no consummation of marriage, wife being adverse to cohabitation, wife disobeyed instructions of the court to undergo medical examination to prove that marriage had not consummated, there was indecent behaviour of wife to her in-laws reflecting her mental imbalance, and the parties have been living separately for a period of 16 years without any serious attempt for reconciliation, a decree dissolving the marriage would be proper.²⁰

The Supreme Court in *Savitri Pandey v. Prem Chandra Pandey*²¹ held that marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of the Supreme Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses.

In *Vinita Saxena v. Pankaj Pandit*²², the marriage between Vinita Saxena and her husband Pankaj Pandit was dissolved by an order of the Supreme Court. The marriage between the parties lasted only for five months. Both of them were living separately for over 13 years and marriage also was not consummated. Wife filed a petition for the dissolution of marriage on the ground of physical and mental cruelty and insanity on the part of the husband. Trial court however dismissed the petition. High Court also dismissed the appeal despite the failure of the husband to appear before the court. Allowing the appeal of the wife, a division bench of the Supreme Court speaking through Dr. Justice AR. Lakshmanan (as he then was) held that the orders of the courts below had resulted in grave miscarriage of justice to the wife who had been constrained into living with a dead relationship for over 13 years and that the fact situation clearly showed that the husband and wife can never ever stay as husband and wife and the wife's stay with the respondent husband would be injurious to her health. Accordingly, a decree of divorce was granted in favour of the wife against the husband. The Court held as follows:

"Spouses owe rights and duties each to the other and in their relationship they must act reasonably. In every case where cruelty exists it is possible to say that the spouse at fault has been unreasonable. The list of cruelty, therefore, should be reach of the duty to act reasonably, whether in omission or commission, causing injury to health. Such a list avoids imputing an intention where in fact none may exist. Further all such matters are foresight, desires, wishes, intention, motives, perception, obtuseness, persistence and indifference would remain relevant but merely as matter of evidence bearing upon the requirement to act reasonably or as aggravation of the matters charged.

Humane aspects which this Court should consider: - The appellant was 24 years of age when she got married. - The marriage lasted for four to five months only when she was compelled to leave the matrimonial home.

The marriage between the parties was not consummated as the respondent was not in a position to fulfil the matrimonial obligation. - The parties have been living separately since 1993. 13 years have passed they have never seen each other. - Both the parties have crossed the point of no return. - A workable solution is certainly not possible. - Parties at this stage cannot reconcile themselves and live together forgetting their past as a bad dream. - Parties have been fighting the legal battle from the year 1994. - The situation between the parties would lead to a irrefutable conclusion that the appellant and the respondent can never ever stay as husband and wife and the wife's stay with the respondent is injurious to her health. - The appellant has done her Ph.D. The respondent, according to the appellant, is not gainfully employed anywhere. - As a matter of fact, after leaving

his deposition incomplete during the trial, the respondent till date has neither appeared before the trial court nor before the High Court.

The facts and circumstances of the case as well as all aspects pertain to humanity and life would give sufficient cogent reasons for us to allow the appeal and relieve the appellant from shackles and chain of the respondent and let her live her own life, if nothing less but like a human being.”

In *Samar Ghosh vs Jaya Ghosh*²³ the Supreme Court referred to the 71st Report of the Law Commission of India on "Irretrievable Breakdown of Marriage" with approval as follows:

“90. We have examined and referred to the cases from the various countries. We find strong basic similarity in adjudication of cases relating to mental cruelty in matrimonial matters. Now, we deem it appropriate to deal with the 71st Report of the Law Commission of India on "Irretrievable Breakdown of Marriage".

91. The 71st Report of the Law Commission of India briefly dealt with the concept of irretrievable breakdown of marriage. This Report was submitted to the Government on 7th April, 1978. In this Report, it is mentioned that during last 20 years or so, and now it would be around 50 years, a very important question has engaged the attention of lawyers, social scientists and men of affairs, should the grant of divorce be based on the fault of the party, or should it be based on the breakdown of the marriage? The former is known as the matrimonial offence theory or fault theory. The latter has come to be known as the breakdown theory. It would be relevant to recapitulate recommendation of the said Report.

92. In the Report, it is mentioned that the germ of the breakdown theory, so far as Commonwealth countries are concerned, may be found in the legislative and judicial developments during a much earlier period. The (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920, included for the first time the provision that a separation agreement for three years or more was a ground for making a petition to the court for divorce and the court was given a discretion (without guidelines) whether to grant the divorce or not. The discretion conferred by this statute was exercised in a case *Lodder v. Lodder* (1921 New Zealand Law Reports 786). Salmond J., in a passage which has now become classic, enunciated the breakdown principle in these words:

‘The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this Court, as prima facie a good ground for divorce. When the matrimonial relation has for that period ceased to exist de facto, it should, unless there are special reasons to the contrary, cease to exist de jure also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous.’

93. In the said Report, it is mentioned that restricting the ground of divorce to a particular offence or matrimonial disability, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet such a situation has arisen in which the marriage cannot survive. The marriage has all the external appearances of marriage, but none in reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a facade, when the emotional and other bonds which are of the essence of marriage have disappeared.

94. It is also mentioned in the Report that in case the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce, then the parties alone can decide whether their mutual relationship provides the fulfilment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.

95. Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties.”

Similarly, in *Sanghamitra Ghosh vs Kajal Kumar Ghosh*²⁴ the Supreme Court while referring to its earlier decision in *Ashok Hurra v Rupa Bipin Zaveri*²⁵, also reproduced some excerpts from the aforesaid 71st Report of the Law Commission.

As stated earlier, the recent decision of the Apex Court in the case of *Naveen Kohli vs. Neelu Kohli*²⁶ fully establishes the need for immediate amendment of the Hindu Marriage Act to incorporate ‘irretrievable breakdown of marriage’ as a ground for grant of divorce. The Court in that case was dealing with a case where the parties were living separately for ten years. There were, during this period, many proceedings between the

parties, mostly by the wife. Allegations of misconduct were made on both sides, maintenance was demanded and paid and the proceedings lingered on causing deep anxiety and frustration to both sides. The husband filed for divorce on the ground available – cruelty. The Trial Court granted him relief but the High Court turned down the divorce petition on the ground that the conduct of the wife did not fall within the parameters of ‘cruelty’ as defined in various judgments. The husband was back to square one. On appeal, the Supreme Court granted him relief. This was a classic case of consent being withheld by a spouse just for harassing the other spouse. The 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 grant of divorce. It would also be in the fitness of things that the Special Marriage Act, 1954, which deals with the civil marriages, is also considered for an amendment on similar lines.

Criticisms of the concept of Irretrievable Breakdown of Marriage:

The concept of irretrievable breakdown of marriage to be made a ground for divorce under the Hindu Marriage Act, 1955 has been although a lot more debated but it has equally been criticised at various points by the state High courts and The Government of India.

Criticism by the High Court:

High Court has in many cases, expressed disagreement with the suggestion that the Hindu Marriage Act, 1955 should be amended with a view to making irretrievable breakdown of marriage as a good ground for grant of a decree of divorce. The judges of the High Courts have expressed themselves against the introduction of irretrievable breakdown as a ground of divorce. One of the points made in the reply of the High Court is that it is extremely difficult to say that the husband and wife would never live together merely because there has been a rift between them and for the time being it appears that there may not be any prospect of their living together.

The mere fact that there has been a rift between the parties or that they are for the time living apart does not mean that the marriage has come to an end. It is possible that what may appear to one person to be irretrievable may appear to another as not yet beyond repair. But such a state of things cannot be allowed to continue indefinitely, and there must arrive a point of time when one of the parties should be permitted to seek the judgment of the court as to whether there is or there is not a possibility of the marriage being retrieved.

Criticism by the Govt:

The Government of India, Ministry of Education, Department of Social Welfare, has expressed the view that making irretrievable breakdown of marriage a ground for grant of a decree of divorce is redundant in the light of the fact that sufficient grounds covering ‘irretrievable breakdown of marriage’ exist in the Hindu Marriage Act and the Marriage Laws Amendment Act, 1976, for the purpose of seeking divorced.

Political Status of amending the Hindu Marriage Act to include Irretrievable Breakdown of Marriage:

As per the news report dated February 19, 2015 and July 12, 2015, the present NDA government might reverse the Marriage Law Amendment Bill 2013 which was introduced by the former UPA Government. Irretrievable Breakdown of Marriage had been incorporated as Section 13C in the Bill. The bill was passed by the Rajya Sabha on 26th August 2013, however could not be taken up for discussion in the Lok Sabha due to the change in the Government at the Centre.

Though the present Government had contemplated tabling the bill again, however the then Law Minister Mr. Sadanand Gowda admitted that the Government was still considering the implications of the Bill as more than 70 representations had been received against the Bill.

Even though the Bill was drafted to remove the lacuna as far as Divorce law is concerned, groups opposing the Marriage Laws Amendment Bill contend that the Bill if passed will cause an increase in illegitimate and live-in relationships thereby destroying the institution of marriage and family values. Another fear, the groups have is an increase in the crime rate and undue litigation.

Given the present scenario, it appears that the Marriage Laws Amendment Bill will not see light of the day at least in the near future, in spite of the Hon’ble Supreme Court time and again pressing for its inclusion.

Whenever the question of inclusion of irretrievable breakdown of marriage as a ground for divorce is mooted, the opponents argue that “divorce by mutual consent” introduced in the Hindu Marriage Act in 1976 more than covers the situation. It is important to note that “mutual consent” requires the consent of both the parties and if one or the other does not cooperate, the said ground is not available. ‘Irretrievable breakdown of marriage’, on the other hand, is a ground which the Court can examine and if the Court, on the facts of the case, comes to the conclusion that the marriage cannot be repaired/saved, divorce can be granted. The grant of divorce is not dependent on the volition of the parties but on the Court coming to the conclusion, on the facts pleaded, that the marriage has irretrievably broken down.

II. CONCLUSION & SUGGESTION:

A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the faulty theory, guilt has to be proved; divorce courts are presented concrete instances of human behaviour as bring the institution of marriage into disrepute. Because of the divorce of matrimonial offence, judges, and lawyers are sometimes reduced to the role of scavengers. The lawyers have to look for and expose and the judges are confronted with, the worst obscenities within a married life. It is therefore, not surprising that with the present adversary system all types of allegations are freely hurled across the courtroom. We need not stand on an old divorce law which demands that men and women must be found innocent or guilty.

One cannot say that it is an enhancement of the respondent for marriage if there are tens of thousands of men and women desperately anxious to regularize their position in the community and they are unable to do so. People should be able to marry again where they can obtain a death certificate in respect of a marriage already long since dead. The objection that irretrievable breakdown as a ground of divorce is vague has been already dealt with.

Irretrievable breakdown allows the spouses, or even one spouse, to terminate the marriage at will, thus transforming marriage from a union for life into one which can be ended at pleasure.

It is necessary to the basic principle that no man should be allowed to take advantage of his own wrong; a spouse who was responsible for the breakdown of marriage should not be able to rely on such breakdown in order to obtain a divorce against his or her partner's will. By authorizing one spouse to divorce the other against the latter's will after separation for a specific period, the law will have given statutory recognition for the first time to the principle that a person may take advantage of his or her own wrong.

The theory that one cannot take advantage of one's own wrong has not been adhered to in the Hindu Marriage Act in the past. According to clause (ii) of sub section (1A) of section 13 of the Act, either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition for the dissolution of the marriage by a decree of divorce on the ground that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or afterwards after the passing of a decree for the restitution of conjugal rights in proceedings to which they were parties. This provision clearly contemplates that even the party which has been in the wrong in so far as it has failed to comply with a decree for restitution of conjugal rights can also apply for a decree of divorce on the ground that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of the decree for restitution of conjugal rights in a proceeding to which they were parties. Such a party, though at fault, would thus be taken advantage of its own fault. It cannot therefore be said that under the provision of the Hindu Marriage Act, as they stand at present, no person can be allowed to take advantage of his own wrong.

Thus, once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties if the legal bond is sought to be maintained notwithstanding the disappearance of the emotional substratum. Such a course would encourage continuous bickering perpetual bitterness, and may often lead to immorality. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist. Marriage is lifelong cohabitation in the home. When the prospect of continuing cohabitation has ceased, the legal tie should be dissolved. Therefore it is suggested that :

1. Immediate action be taken to introduce an amendment in the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 for inclusion of 'irretrievable breakdown of marriage' as another ground for grant of divorce.
2. The amendment may also provide that the court before granting a decree for divorce on the ground that the marriage has irretrievably broken down should also examine whether adequate financial arrangements have been made for the parties and children.

FOOT NOTES:

- [1]. Mayne's Treatise on Hindu Law & Usage (16th Ed.) Revised by Justice Ranganath Misra (New Delhi: Bharat Law House, 2008), page 292.
- [2]. AIR 2006 SC 1675.
- [3]. Ibid., para 96.
- [4]. AIR 1985 SC 935.
- [5]. Ibid., para 7.

- [6]. 71st Report of the Law Commission of India.
- [7]. Supra note 1, pages 292 – 293.
- [8]. Supra note 2.
- [9]. Supra note 1, page 293.
- [10]. AIR 2003 Cal. 321.
- [11]. Ibid., para 7.
- [12]. AIR 1994 SC 710.
- [13]. Ibid., para 23.
- [14]. AIR 1997 Cal. 134.
- [15]. AIR 1996 SC 3192.
- [16]. Ibid., para 6.
- [17]. (1996) DMC 667 (P&H).
- [18]. Ashok v. Rupa, 1996 (2) HLR 512 (Guj).
- [19]. Shankar v. Puspita, AIR 2005 Jhar. 92.
- [20]. Rita v. Trilokesh, AIR 2007 Gau.122.
- [21]. AIR 2002 SC 591.
- [22]. JT 2006 (3) SC 587.
- [23]. (2007) 4 SCC 511.
- [24]. (2007) 2 SCC 220.
- [25]. (1997) 4 SCC 226.
- [26]. Supra note 2.