

# BARS TO MATRIMONIAL RELIEF — A PLEA TO MAKE THE DIVORCE UNDER HINDU LAW JUST AND FAIR

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## I. ROLE OF THE THEORY OF RELIEF BARS

The purpose of law of divorce is not only to dissolve a marriage union which has become undesirable, but also to protect the institution of marriage which is the very foundation of society. This aspect of law of divorce can be taken care of by the theory of bars to relief.

The theory of relief bars under section 23(1) of the Hindu Marriage Act 1955<sup>1</sup> provides that relief of divorce shall not be granted to the petitioner, even if ground for relief exists, if he does not come to the court with clean hands and the case is covered under one or the other bars laid down in the Act. If the court feels that it would be unfair or unjust to dissolve the marriage, even though a ground for divorce exist, it may refuse to dissolve it by applying the proper bar to relief. This is based on the principle of guilt theory of divorce that only innocent spouse can obtain divorce against the guilty spouse.

The properly constituted theory of bars in the statute become a powerful weapon in the hands of the court to avoid unjust divorce. It should also provide for safeguard or compensation to the innocent spouse for the injury done to him or her by the misconduct of the guilty spouse. The bars need not compel unwilling spouses to live together as husband and wife. Rather it should try to reasonably compensate the innocent spouse for the injury done by the other spouse by breaking the marriage.

## II. BARS TO DIVORCE UNDER HINDU LAW

Section 23(1) of the Hindu Marriage Act, 1955 provides the following bars to a petition for divorce:<sup>2</sup>

1. the bar of 'taking advantage of one's own wrong or disability'  
[S.23 (1)(a)];

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1. Act No. 25 of 1955 as amended by Act No. 68 of 1976.

2. Some of these bars apply to other reliefs also.

2. the bars of 'connivance' and 'being accessary' [S. 23(1)(b)];
3. condonation [S. 23 (1)(b)];
4. delay [S. 23 (1)(d)];
5. collusion [S. 23 (1)(c)];
6. want of free consent [S. 23 (1)(bb)].

(i) *Taking Advantage of one's own wrong or disability*

This bar is a direct manifestation of equity maxim, "he who comes to equity must come with clean hands." The petitioner must show that respondent's guilt or fault is not related, directly, or indirectly to some wrong or disability of the petitioner. If it is, the petitioner would not be entitled to the matrimonial relief sought by him even if he has been able to establish the fault of the respondent. On the other hand, if the wrong or disability has no bearing on the fault or guilt of the respondent or has no connection with the relief sought by him or her, relief cannot be denied.

In *J.S. Sodhi v. Amarjit Kaur*,<sup>3</sup> Avadh Behari J., of the Delhi High Court observed that the question of judging whether the petitioner is taking advantage of his own wrong arises, on the language of section 23 (1)(a), only after the court finds that any of the grounds for granting relief exists. If the ground on which relief is claimed does not exist, the relief cannot be granted to the petitioner, even if his conduct is free from blame.

In *S v. R*,<sup>4</sup> a Division Bench of the Delhi High Court (K.S. Hedge, C.J., and Jagjit Singh J.) distinguished the doctrines of 'want of sincerity' and 'approbate and reprobate' from the provision made under section 23(1)(a) that the petitioner cannot be allowed to take advantage of his own wrong for getting relief under the Act. It was pointed out that the two doctrines propounded by the House of Lords in *G v. M*,<sup>5</sup> were rules of English law, and while they could be applied in proceedings under the Indian Divorce Act, by virtue of section 7 thereof, they had no place under the Hindu Marriage Act.

In *Swarana v. Dharampal*,<sup>6</sup> the Delhi High Court dismissed the petition as the husband had in his petition attempted to foist a case of cruelty in an unjustifiable and clumsy manner. In *Gurcharan Singh v. Waryam Kaur*,<sup>7</sup> I.D. Dua, J., held that in a petition for restitution of

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3. 1981 HLR 331.

4. AIR 1986 Del 79.

5. (1885) 10 AC 171.

6. 1983 (2) DMC 414.

7. AIR 1960 Punj 422.

conjugal rights, the Court can take into consideration all the circumstances mentioned in section 23, such as false charge of adultery against the respondent wife and inordinate delay in presenting the petition, although these were not pleaded in the respondent's written statement. It may be noted that foisting a charge of cruelty or making false charge of adultery were surely wrongful acts but the kind of wrong contemplated by section 23 (1)(a) is such a wrong committed by the petitioner against the respondent as can be shown to be helpful in building up or creating a ground for relief in petitioner's favour. In *Chanda v. Nandu*<sup>8</sup>, the respondent husband pleaded that the wife had herself insisted upon his taking a second wife as she could not give birth to a son. Krishnan, J. found the story so put forward to be fantastic, and that it was not a case where the petitioner wife could be said to be taking advantage of her own wrong.

Until their replacement as sub-section (1-A) of section 13, by the Hindu Marriage (Amendment) Act 1964, (Act 44 of 1964), clauses (viii) and (ix) of sub-section (1) of section 13 of the Act provided that a party to a marriage could sue the other party thereto for divorce, if the other party had not resumed cohabitation for a period of two years or upwards after the passing of a decree for judicial separation against the other party, or if the other party had failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree. The party against whom the decree was passed could not apply for divorce on the basis of that decree even by proving that the marriage had irretrievably broken down. Thus the party in the wrong could not get relief by way of divorce. And where the basis of the petition for divorce was a decree for restitution of conjugal rights in the petitioner's favour, he/she had to further establish that the other party had failed to comply with the decree. It postulated the making of an effort by the decree-holder petitioner to have the decree complied with, which could be established in most of the cases only by putting the decree into execution and proving that the result was negative. But Flashaw, C.J., of the Punjab High Court observed in *Ishwar Chander v. Promilla*<sup>9</sup>, that the person who fails to comply with a decree for restitution of conjugal rights "does so at his or her own risk, and it would not even be necessary for the aggrieved party to prove that he or she had made positive efforts to make the other party comply, and the mere admission of the opposite party that he or she had made no efforts to comply would be quite sufficient." The 1964 Amendment replaced clauses (viii) and (ix) of section 13(1) by sub-section (1-A)

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8. AIR 1965 MP 268.

9. AIR 1962 Punj 432.

and thereafter, either party could apply for divorce on the ground that there has been no resumption of cohabitation after the passing of a decree for judicial separation, or restitution of conjugal rights between the parties, for a period of two years (reduced to one year by Act 68 of 1976) or upwards. This enabled the Courts to decree divorce if the marriage had irretrievably broken down, notwithstanding that the petitioner's wrong was the cause of the earlier decree of judicial separation or restitution of conjugal rights, or even that the petitioner had failed to execute the decree for restitution of conjugal rights in his/her favour or to obey such decree against him/her. Section 23(1)(a) was, however, allowed to stand as it was by the Amendment Act of 1964, and even while amending it by the Amendment Act of 1976, so as to exclude the cases of voidable marriages under clause (ii) of section 5 read with section 12 (1) (b) of the Act, cases covered by sub-section (1-A) of section 13 were not excluded from the operation of that clause.

One view was that section 13 (1-A) did not confer an absolute or unrestricted right to divorce. It was subject to section 23 (1) (a) and the Court should refuse to grant divorce to a party who did not enforce, or obstruct compliance, or had refused to comply with a decree for restitution of conjugal rights, or continued to be guilty of the wrong which occasioned the passing of a decree of judicial separation against him/her<sup>10</sup>. The other view, which is now the accepted view, has been that in a petition for divorce under section 13 (1-A), the wrong committed by the petitioner, so as to disentitle him/her in view of section 23 (1)(a), must be a sufficiently serious wrong committed after the passing of the decree for restitution of conjugal rights or for judicial separation, and not the wrong which occasioned the passing of such decree against him/her nor is the fact of non-compliance with or disobedience of, or non-enforcement of a decree for restitution of conjugal rights, or refusal to cohabit or live with the other party after a decree for judicial separation.<sup>11</sup>

In *Ram Kali's*<sup>12</sup> case a Full Bench of the Delhi High Court held that mere non-compliance with the decree for restitution does not constitute a wrong within the meaning of section 23 (1)(a). Relying on and explaining this decision in the later case of *Gajna Devi v. Purshotam Giri*,<sup>13</sup> a learned Judge of the same High Court observed:

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10. *Laxmibai v. Laxmichand*, AIR 1968 Bom 332; *Chaman Lal v. Mohinder*, AIR 1968 P&H 287; *B.R. Syal v. Syal*, AIR 1968 P&H 489; *Someswara v. Leelavathi*, AIR 1968 Mys 274.

11. *Ram Kali v. Gopal Das*, ILR (1971) 1 Del 6; *Gajna Devi v. Purushotam*, AIR 1977 Del 178; *Madhukar v. Sarala*, AIR 1973 Bom 55; *Jethabai v. Manabai*, AIR 1975 Bom 88; *Bimla Devi v. Singh Raj*, AIR 1977 P & H 167.

12. ILR (1971) 1 Del 6.

13. AIR 1977 Del 178.

Section 23 existed in the statute book prior to the insertion of Section 13 (1A)... Had Parliament intended that a party which is guilty of a matrimonial offence and against which a decree for judicial separation or restitution of conjugal rights had been passed, was in view of S. 23 of the Act, not entitled to obtain divorce then it would have inserted an exception to Section 13 (1A) and with such exception, the provision of Section 13 (1A) would practically become redundant as the guilty party could never reap benefit of obtaining divorce, while the innocent party was entitled to obtain it even under the statute as it was before the amendment. Section 23 of the Act, therefore cannot be construed so as to make the effect of amendment of the law by insertion of Section 13 (1A) nugatory.

...The expression 'petitioner is not in any way taking advantage of his or her own wrong' occurring in Clause (a) of S.23 (1) of the Act does not apply to taking advantage of the statutory right to obtain dissolution of marriage which has been conferred on him by S. 13 (1A)... In such a case a party is not taking advantage of his own wrong, but of the legal right following upon of the passing of the decree and the failure of the parties to comply with the decree....

The controversy as to the scope of section 23(1) (a) with reference to divorce under section 13 (1A) (ii) came up before the Supreme Court in *Dharmender Kumar v. Usha Kumar*.<sup>14</sup>

The appellant contended that the allegation made in his written statement that the conduct of the petitioner in not responding to his invitations to live with him mean that she was trying to take advantage of her own wrong for the purpose of relief under section 13 (1-A) (ii).

The Supreme Court Observed:

In our opinion the law has been stated correctly in *Ram Kali v. Gopal Das* and *Gajna Devi v. Purshotam Giri*. Therefore, 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

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14. AIR 1977 SC 2218.

misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled.

Counsel for the appellant sought to urge that the expression 'taking advantage of his or her own wrong' in clause (a) of Sub-section (1) of Section 23 must be construed in such a manner as would not make the Indian wives suffer at the hands of cunning and dishonest husbands. Firstly even if there is any scope for accepting to this case and secondly if that is so then it requires legislation to that effect. We are therefore unable to accept the contention of counsel for the appellant that the conduct of the husband sought to be urged against him, could possibly come within the expression his 'wrong' in Section 23 (1) (a) of the Act so as to disentitle him to a decree for divorce to which he is otherwise entitled to as held by the Court below. Furthermore we reach this conclusion without any mental compunction because it is evident that for whatever be the reasons this marriage has broken down and the parties can no longer live together as husband and wife, if such is the situation it is better to close the chapter.<sup>15</sup>

In *Vatsula v. N.R. Gulwade*,<sup>16</sup> husband obtained a decree for restitution of conjugal rights *ex parte*. Wife did not comply with that decree but filed a petition for divorce. Husband pleaded that she could not be allowed to take advantage of her own wrong. V. Mohta J., met the husband's plea by saying.

...this approach and view of the matter is contrary to letter and spirit of the amended provisions.... No doubt S. 23 (1) (a) has remained unaltered even after Act No. 44 of 1964, but it cannot be so read as to render the amendment futile and to defeat the very purpose behind it. If legislation intended that benefit of S. 13 (1-A) is not to be given to the defeated party, it would have clearly mentioned this either by incorporating an exception or by any other mode. If this was done, there was no necessity of amendment at all. It is not possible to assume that Legislation intended to indulge in an exercise in futility.

It seems to me that the purpose of both these provisions is entirely different. S. 13 (1-A) gives statutory recognition to the

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15. 1984 (2) DMC 325 (SC).

16. 1982 HLR 148. See also *Bimla Devi v. Singh Raj*, AIR 1977 P&H 167; *Ranjit Kaur v. Gurbax Singh*, AIR 1977 HLR 87; *Santosh Kumari v. Mohan Lal*, 1980 MLC 309; *Ama Ram v. Kala Wati*, AIR 1982 P&H 83; *Kamla Devi v. Ram Dev*, 1980 HLR 469.

principle that it is in the interest of society as well as the spouses that if there is irretrievable breakdown of the marriage and all chances of reunion disappear, there is hardly any utility in maintaining a marriage as a facade in absence of emotional and other bonds which are the very essence of marriage relationship. This was intended to be achieved irrespective of the question as to who is responsible for the unfortunate situation. If two or more years have passed without resumption of marital life inspite of decree by a competent Court, it was considered unrealistic to expect that some day spouses will unite and marriage will work. The old concept of default of the spouse as furnishing a ground for refusing divorce when claimed by that party was, therefore, given up. Permitting only a decree holder to move the Court for divorce led to a stalemate. If he chose not to do so, a curious situation could arise. Opposite party was left with no remedy and the marriage was, as it were, a limbo. The 'fault' theory is, therefore, pushed back and 'breakdown' theory had been pushed a step further. This is thus codification of the principle that if marriage cannot be worked, there is no point in thrusting one spouse on the other much against his or her desire irrespective of the reasons behind.

It may be noticed that the Act came to be amended further by Act No. 68 of 1976. It not only reduced the waiting period of two years to one year but also incorporated a fresh provision, in the form of Section 13-B for grant of decree of divorce by mutual consent... New legislative intention is that all efforts to restore sick marriage to health have to be made, but once they fail, there is no point in withholding the award of a decree for divorce. It is considered better to dissolve it than meaninglessly to try to let it limp along. Not that these last amendments are relevant in the present case, but they do point out that more realistic approach is being made towards this human problem by the society. While more practical view of the marriage relationship is taken, old tradition is not given up completely. Divorce is not available merely for asking and consideration of conduct of parties has still been retained, in the form of Section 23 (1) (a). There is thus no unqualified right to divorce as soon as condition of Section 13 (1-A) are fulfilled. Decree can be refused if any spouse is taking advantage of his or her own wrong for the purposes of relief claimed...it seems that wrong prior to passing of decree is not the wrong contemplated.... It means, and act of causing some

injury to the other side in the sense that action has some direct or indirect relation to the marital offence committed by the other spouse and on which the cause of action for the petition is based.

In *Santosh Kumari v. Kewal Krishna Sabharwal*<sup>17</sup>. Khanna, J., gave a new twist to the controversy. The parties lived together as husband and wife for a period of two years. On account of expulsive conduct of husband, wife was forced to leave the matrimonial home. The Husband moved a petition for divorce on grounds of adultery, cruelty and desertion. Wife moved a petition for restitution of conjugal rights on the ground that she was turned out of the matrimonial home and the husband did not care to have her back. Both the petitions were consolidated. Wife was allowed interim maintenance under Sec. 24. As the husband did not comply with this order his defence was struck off. Wife's petition was allowed and a decree for restitution was passed. Wife also filed a petition for maintenance under Sec. 125, Criminal Procedure Code, and a consent order was passed where in the husband undertook to pay Rs 300/- per month as maintenance. The Husband moved the petition for divorce under section 13 (1-A) (ii). She joined the matrimonial home and stayed there for about 20 days when again she was ill-treated and turned out. There was no sexual act during that period.

The Court observed :

In cases where the couples are educated, financially and socially independent or are further well aware of the consequences of break-up of marriages and are determined to proceed in that direction, it can be said that to still hold them tied by matrimonial bonds would be wholly unjustified. It cannot be ignored that overwhelmingly our females are still illiterate & semi-literate, and have no independent source of livelihood. They are still, from dependency point of view, as appurtenances to their menfolk. While a divorcee man has little difficulty in entering into a fresh wedlock, the divorcee woman finds herself as a desolate lone voyager. There are bleak chances of her finding a new suitable partner in life. Mere providing of maintenance is no substitute for happiness and fulfilment which a person otherwise gets from marriage. Till the times when the female finds her feet, both socially and economically, divorce means leaving them in a veritable widowhood for the rest of life with all the stigma attached in society.

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17. AIR 1983 Del 383.

Finally setting aside the decree of divorce, the court stated:

After giving my utmost consideration to the entirety of the circumstances in the present case, and the case law referred to above, I am of the view that this was an extreme case where Kewal Krishan in order to first keep face with the society, and as counter to her claim for maintenance and execution proceedings admitted her back for a short duration to the matrimonial home and still did not consummate the conjugal rights. His conduct as the person responsible for breaking of the matrimonial home has been accepted in the decree for restitution of conjugal rights as well as the award of maintenance under S.125. He has treated his wife with a sort of conjugal rejection in spite of her coming to live with him. This is a strong circumstance in which recourse to S.23 can be taken.

In some cases it has been emphasised that the petitioner must not be guilty of any matrimonial wrong after the decree for restitution or separation, so that it may not be said against him/her that he/she is responsible for breaking the marriage. In *Soundarammal v. Sundara Mahalinga Nadar*<sup>18</sup> the husband had applied for divorce on the basis that there had been no resumption of cohabitation for more than two years after the decree for judicial separation that had been obtained by the wife against him on the ground that he had been living in adultery with another woman. The wife opposed the petition on the ground among others that the husband continued to live with that other woman and could not be allowed to take advantage of his own wrong for wrecking the marriage. Sathiadev J., observed that the view expressed in AIR 1977 Delhi 178, to the effect that “the petitioner for divorce, whether innocent or guilty cannot be deprived of his/her rights on the grounds which existed prior to the passing of the previous decree” was “unacceptable because the wrong that is now pleaded is a continuing wrong and a persisting cruelty.”

In *Geeta Lakshmi v. G.V.R.K.S. Rao*<sup>19</sup> the wife had obtained a decree for restitution of conjugal rights on 27-10-1971, on a petition presented in 1967. After the decree she lived at the husband's place for 15 days, but was ill-treated by the husband and the mother-in-law and finally driven out of the house. She took shelter with her parents. After sometime in 1972 she filed a suit for maintenance against the husband, which was decreed on

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18. AIR 1980 Mad 296.

19. AIR 1983 AP 111. See also, *O.P. Mehta v. Saroj Mehta*, 1984 (2) DMC 4 Del; *Anil v. Sudhaben*, AIR 1978 Guj 74; *Meera Bai v. Rajinder*, AIR 1986 Del 136; *Ashok v. Shabnam*, AIR 1989 Del 121.

5.4.1974. In 1976 the husband filed a petition for divorce under section 13 (1-A), which was decreed by the District Court. The Division Bench of the High Court reversed the finding of the District Court and held that the husband was in the wrong in ill-treating the wife subsequent to the passing of the decree.

The Court observed:

...The amendment to S.13 must be limited to the extent to which the amendments have been made. They cannot be given an extended operation. S.13 cannot be taken out of the limits of S. 23 (1)(a). If it were otherwise, the Parliament would have added the words "notwithstanding anything to the contrary" ...or would have... suitably amended Section 23 (1) (a) itself.... If the interpretation put by learned counsel for the appellant is accepted, S. 23 (1) (a) would be rendered otiose and nugatory... the provisions of S. 13 are subject to ... S. 23 (1) (a) of the Act.

It seems that in most of the cases courts have taken the view that the post-decree conduct of the petitioner is material and in case it would be found that in seeking divorce on the ground of non-resumption of cohabitation after a decree of judicial separation or non-compliance with the decree of restitution of conjugal rights, the petitioner is taking advantage of his own wrong, he would not be allowed relief.

The provision made under section 23 (1) (a) that the petitioner cannot be allowed to take advantage of his or her own wrong for getting relief is pushed back, when a petition is filed for divorce under section 13 (1-A) of the Act. It causes lots of difficulties, as in most of these cases the innocent spouse does not want divorce. It particularly creates hardships for the innocent wives if they do not want divorce. Because of the rule that when a petition is filed by the husband under section 13 (1-A), he is not taking advantage of his own wrong, but of the statutory provision, section 23 (1)(a) does not come for the rescue of the innocent wife. In some cases she is subjected to punishment of divorce without any fault of her own. For instance, if an innocent wife obtains a decree of restitution of conjugal rights against her husband on the ground that she has been turned out of the matrimonial home because the husband wants to marry another woman. This decree may prove a death warrant for her marriage; and boon for the erring husband.

In order to redeem the society from the unjust divorce, help can be taken from the theory of relief bars by changing its complexion, scope, and nature. It is suggested that the artificial and illogical difference between grounds for divorce that some grounds are based on fault theory, others on

break down of marriage or divorce by mutual consent, should be ignored in this context, as this sort of attitude, towards the grounds for divorce has done a lot of harm. It has resulted in making the law of divorce unnecessarily complicated as well as unjust.

All grounds of divorce are pointer towards the fact that the marriage has broken down in one respect or the other. Whether the marriage has broken down irretrievably or it is a case of simple broken marriage, law can not define, as it depends upon the subjective attitude of the parties, and not on the definition provided by law. A spouse can reasonably presume that his or her marriage has finally ended as a result of adultery, cruelty, desertion change of religion etc, by the other spouse, as he or she finds it intolerable. In such a case law should not impose its own concept of broken marriage on the spouse.

In almost all cases, when a petition for divorce is filed by a party on the grounds which in legal terminology are known as guilt grounds or fault grounds, it is in fact a case of broken marriage. It is better for legal reasoning to presume it a case of broken marriage, as soon as the reconciliation proceedings fail, in the court.

Petition for divorce under section 13(1-A) should not be treated different from any other divorce petition and should not be given the VIP treatment, licence to the erring spouse that he be allowed to take advantage of his own wrong, which is denied to other petitioners. There is neither any logic nor any sound reason, which entitles the petitioner under section 13 (1-A) that his or her misconduct should not attract section 23 (1) as it does in case of other petitions.

The bar of 'taking advantage of one's own wrong or disability' be applicable to all divorce petitions including the petitions under section 13 (1-A), with slight modification that it would not affect the right of a party to file a divorce petition under section 13(1-A), simply because the decree of judicial separation or restitution was passed against him or her. Instead the over all conduct of the party would be taken into consideration to decide whether it attracts section 23(1)(a) or not.

The prevailing atmosphere of the Hindu society is in favour of breakdown principle, that if the marriage has broken down without any possibility of repairs (or irretrievably) then it should be dissolved, without looking into the fault of either party<sup>20</sup>.

The breakdown principle of marriage has two aspects:

- (1) the marriage be dissolved;
- (2) the fault of the parties should not be looked into.

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20. See, Paras Diwan, LAW OF MARRIAGE AND DIVORCE: (2nd ed.) at XIV.

Both these issues should not be confused. It is submitted that the first proposition is agreeable that a broken marriage be dissolved whatever be the reason. The fact, whether the conduct of the petitioner attracts section 23 or not ceases to be important in this context because there is no use to keep the union alive. Thus conduct or misconduct of the parties should not come in the way of dissolution of the broken marriage.

But the second proposition that the conduct of the parties should not be considered by the court at all is not sound as it leads to injustice. If both, wrongdoer as well as innocent are put at par injustice is bound to be done to the innocent spouse. It would lead to unjust divorce. So to avoid injustice, the enquiry must be made into the conduct of the petitioner and respondent to find their guilt in bringing an end to the marriage. In case the petitioner is found responsible for bringing the holy union to an end, he must compensate the innocent spouse for the loss suffered by him or her due to wrongful act of the petitioner. So long as the petitioner does not compensate the innocent spouse for the loss suffered, decree of divorce should not be made absolute.

The principles of payment of damages in law of contract and tort can be taken into consideration, to assess the quantum of damages payable by the guilty spouse to the innocent party. Depending upon the gravity of the case, the penal damages may be justified. This approach would not compel the unwilling spouse or spouses to live together as husband and wife; it would remedy the harm done to the innocent spouse. The new approach is remedial, and not penal.

The new approach will help in protection of the institution of marriage, since a spouse after the marriage will misbehave with the other spouse at his own cost, (i.e. he or she would be required to pay damages to the other spouse for his matrimonial mis-conduct).

*(ii) The Bars of 'Connivance' and 'Being Accessory'*

The bars of "connivance" and "being accessory to" are provided by section 23(1)(b). These bars apply to the petition of divorce on ground of adultery. In 'accessory' there is an active participation by the petitioner in the guilt of the respondent. In connivance there is corrupt intention but not active participation. To constitute connivance consent, express or implied, is necessary.

It is suggested that this bar be made a discretionary bar so that it may be applied to do justice to the parties in appropriate cases and may not lead to unjust decisions.

(iii) *Condonation*

Section 23(1) (b) of the Hindu Marriage Act, 1955 provide the bar of 'condonation'. The bar applies to a petition for divorce on the ground of adultery or cruelty. The condonation implies forgiveness on the part of the petitioner of the guilt of the respondent. But condonation is some thing more than forgiving, there must be resumption or continuation of the marital status. Condonation as a bar to matrimonial relief is an absolute bar. The doctrine of condonation is based on the guilt theory that if the guilt of the respondent has been condoned it ceases to be ground for divorce. The doctrine of condonation totally differs in tune and character from some other bars like 'connivance' and 'being accessory' to the respondent's adultery, as these themselves amount to matrimonial offences. But in case of condonation the petitioner is an innocent party. Here the petitioner has to lose his right of filing the divorce petition for his kind and noble act of condonation. Condonation as absolute bar may lead to injustice to the petitioner which may be avoided by making it a discretionary bar.

The real purpose of the doctrine was to strengthen the guilt theory of divorce. The basis of law of divorce under Hindu Law has ceased to be strict guilt theory, and now it is possible to take divorce on breakdown principle as well as by mutual consent. So there is no justification of condonation as an absolute bar to relief in the Act. Application of condonation as an absolute bar creates hardships in cases where the marriage is broken, and there is no possibility of the spouses living together as husband and wife.<sup>21</sup>

It is submitted that in case of a broken marriage the court must exercise its discretion in favour of the petitioner to avoid unnecessary hardships and injustice to the innocent petitioner, on the basis of out moded concept of guilt theory that in case the offence of the respondent is condoned it ceases to be a ground for divorce.

It is well known fact that many Hindu wives allow themselves to be subjected to the humiliation against their will, and some time in the hope of improvement prefer silence to avoid likely distress to their parents etc. The Hindu wives condonation of cruelty should not be presumed by continuance of cohabitation.<sup>22</sup>

The condonation as a discretionary bar would make the law of divorce more just and would also provide more stability to the institution of marriage. As a discretionary bar it would not come in the way of dissolution of broken and undesirable union.

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21. See, *Dastane v. Dastane*, AIR 1975 SC 1537.

22. *Satinder Gupta v. Sevaram Gupta*, 1981 HLR 580 (Del).

*(iv) Delay*

Section 23(1)(d) of the Hindu Marriage Act, 1955 provides delay as a bar to a petition for divorce. Mere delay or long lapse of time is not a bar to relief, it must not be unnecessary and improper.

The notion of the doctrine of delay is not much different from condonation as very often delay implies condonation of the guilt. It should also be made a discretionary bar.

In case of a Hindu wife in most cases the delay is of optimism, namely, the aggrieved wife still hopes very often on slender basis that things can be patched up therefore she avoids pushing matters to an issue. The wife who after prolonged optimism is disillusioned and goes to seek the assistance of the court, should not be refused discretion in her favour.

In case there are indications that she is guilty of insincerity or has taken undue advantage from the marriage, the discretion should not be exercised in her favour, such discretion in her favour would amount to unjust divorce.

Similarly, when husband is able to prove that he has been waiting for a long period to give an opportunity to the erring wife to mend her ways, discretion should be exercised by the court in his favour, so that he may not suffer for his efforts to save the marriage.

*(v) Collusion*

Collusion is an absolute bar to relief. In view of the provision for divorce by mutual consent under the Hindu Marriage Act there is no logic in retaining the bar of collusion. The continuation of section 23(1)(c) is anachronism after the statutory acceptance of the concept of divorce by consent and it has become a dead letter in the statute as section 13 B provides that two souls can mutually agree to part from each other amicably without bitterness.

It is therefore submitted that collusion should be abolished as bar to relief as it has out-lived its utility in the present structure of the Hindu Marriage Act.

*(vi) Want of Free Consent*

In case of divorce by mutual consent Supreme Court held in *Sureshta Devi v. Omprakash*<sup>23</sup> that mutual consent should continue till the divorce decree is passed and it is open to one of the spouse to withdraw the consent at any time before the court passes a decree of divorce.

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23. (1991) 1 DMC 313 (SC).

The view of the Supreme Court is not correct as it has diminished the utility of the provision of divorce by mutual consent and has given a powerful weapon in the hands of the unscrupulous party to make a joke of the law and also to harass the other spouse by withdrawing the consent without any justification.<sup>24</sup>

Section 13-B (2) should be read along with section 23(1)(bb) and the consent is withdrawable only if the elements of force, fraud or undue influence are applied at the time of obtaining the consent.

### III. CONCLUSION

Analysis of concept of law of divorce shows that it has three components — theory of divorce, grounds for divorce, and theory of bars to relief. These three components are like family members in the field of law of divorce. There should be co-ordination in this family. Bars to relief should take into consideration what is in the interest of Hindu society and work in that direction to create just and social order.

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24. See, *Ashok Hurra v. Rupa Bipin Zaveri*, AIR 1998 SC 1266, where the ratio of *Sureshta Devi* has been doubted.