In the Court of the Vacation Sessions Judge, Theni.
Present: Thiru. S. Gopinathan, B.Sc.,B.L.,
Vacation Sessions Judge, Theni
Dated this the 24th day of May 2023
Crl.M.P.No.265/2023
CNR.No.TNTH01-000288-2023

Murugesan S/o. Sannasi … Petitioner/Accused

-Versus-

State through the S. I. of Police,
P. C. Patti P.S. in Cr.No.184/2023
U/s.147, 294(b), 341, 336 and
506(i) of IPC … Respondent/Complainant

This petition is coming up on this day before me for hearing in the presence of Thiru. D. Selvakumar, Learned Counsel for the petitioner and the Learned Public Prosecutor for the State and this Court passed the following:

ORDER

This petition has been filed by the petitioner/accused U/s.438 Cr.P.C. for seeking anticipatory bail.

2. Heard the Learned Counsel for the petitioner and the Learned Public Prosecutor for state.

3. The Learned Counsel for the petitioner submitted that the petitioner has falsely been implicated in this case and he is not involved in any offences as alleged in the complaint and the petitioner is afraid that he may be harassed by the police in the event of his arrest. He is innocent and hence he will neither tamper the prosecution witnesses nor hamper the investigation and he is ready to obey any conditions that may be imposed by this court if he is enlarged on anticipatory bail. Further he represented that there is a civil dispute between the both parties and counter case is also pending. Hence, the petitioner may be enlarged on anticipatory bail.

4. On the other hand, the Learned Public Prosecutor would submit that the petitioner has committed punishable offences U/s.147, 294(b), 341, 336 and 506(i) of IPC of which U/s.506(i) of IPC alone is non bailable. Further he submitted that totally one named and 20 unnamed accused are involved in this case, due to civil dispute between the both parties and they had disturbed the de-facto complainant's enjoyment and used filthy language against the de-facto complainant and threatened him and the investigation is still pending. Hence he strongly opposed to enlarge the petitioner on anticipatory bail.

5. Heard the submissions. The FIR was registered on 25.04.2023, the investigation is pending and if the petitioner is enlarged on anticipatory bail at this stage the investigation may be get affected. Hence, this court is not inclined to grant anticipatory bail to the petitioner.

In result, this anticipatory bail petition is dismissed.

Pronounced by me in open Court on this the 24th day of May 2023.

S GOPINATHAN

Digitally signed by S GOPINATHAN
Date: 2023.05.25 11:34:29 +0530

Vacation Sessions Judge,
Theni.

Copy to
The Judicial Magistrate, Theni.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION (CRL.) NO.65 OF 2020

VINAY SHARMA ...Petitioner

VERSUS

UNION OF INDIA AND OTHERS ...Respondents

O R D E R

R. BANUMATHI, J.

This writ petition has been filed under Article 32 of the Constitution of India by the petitioner-Vinay Sharma – a death-row convict. The petitioner has filed the writ petition challenging the rejection of his mercy petition by the President of India and seeking commutation of his death sentence *inter alia* on the grounds:- (i) Non-furnishing of relevant materials under RTI Act; (ii) non-consideration of relevant material; (iii) torture; (iv) mental illness; (v) consideration of irrelevant material by the respondent authorities; and (vi) illegal solitary confinement.

2. The petitioner is a death-row convict in Nirbhaya's case which relates to the gang rape of the victim in the moving bus in Delhi on

the night of 16/17.12.2012. The trial court by its judgment dated 10.09.2013 convicted the petitioner and other co-accused in SC No.114 of 2013 under Sections 120-B, 365, 366 read with Section 120-B IPC, 307 read with Section 120-B IPC, 376(2)(g), 377 read with Section 120-B IPC, 302 read with Section 120-B IPC, 395, 397 read with Section 120-B IPC, 201 read with Section 120-B IPC and 412 IPC. The trial court imposed the death sentence on the petitioner and other co-accused by the order dated 13.09.2013. The High Court by its judgment dated 13.03.2014 confirmed the conviction of the petitioner and co-accused and also the death sentence imposed upon them. For awarding death sentence, the trial court and the High Court have recorded detailed reasonings that the incident was gruesome and falling within the category of "rarest of rare cases". The Supreme Court by its judgment dated 05.05.2017 in *Mukesh and Another v. State (NCT of Delhi) and Others* **(2017) 6 SCC 1** confirmed the conviction and also the death sentence and dismissed the appeal preferred by the petitioner and other co-accused. After referring to various judgments and by elaborate reasonings, the Supreme Court held that there were no extenuating or mitigating circumstances. The review petition was heard at length by the Supreme Court in the open court and the

same was considered and dismissed by the order dated 09.07.2018.

3. On 07.01.2020, learned Sessions Court, Patiala House issued an execution warrant to execute the petitioner on 22.01.2020. On 08.01.2020, petitioner filed a curative petition before the Supreme Court and the same was dismissed on 14.01.2020. After rejection of co-accused Mukesh's mercy petition, Sessions Court issued a fresh warrant for execution directing that the petitioner and the co-accused to be executed on 01.02.2020. On 10.01.2020, petitioner's counsel sought for the documents from the Superintendent and after obtaining the documents, the petitioner preferred the mercy petition to the President of India on 29.01.2020. The President of India rejected the mercy petition on 01.02.2020 and the same was communicated to the petitioner in Tihar Central Jail on 01.02.2020.

4. On 31.01.2020, learned Sessions Judge passed an order postponing the execution of the death warrant. The criminal revision petition filed by the Union of India has been disposed of by the High Court by its order dated 05.02.2020. Challenge in this writ petition is the rejection of mercy petition by the President of India under Article 72 of the Constitution on 01.02.2020.

Contentions:-

5. Dr. A.P. Singh, learned counsel appearing on behalf of petitioner Vinay Sharma challenged the rejection of his mercy petition by the President of India contending that the Lieutenant Governor and Home Minister, NCT of Delhi have not signed the recommendation for rejection of the petitioner's mercy plea. It was submitted that the relevant materials like the case records, correct medical status report of the petitioner, Social Investigation Report and the nominal roll of the petitioner were not placed before the President of India and the concerned authorities and these documents were kept out of consideration and only irrelevant materials were placed before the President of India which according to the learned counsel, vitiates the order of rejection of mercy petition. As per Dr. A.P. Singh, he approached the respondents authorities that is office of the President of India, Lieutenant Governor, Ministry of Home Affairs and the Department of Home, Govt. of NCT of Delhi under the Right to Information Act, 2005 and filed RTI application requesting for records pertaining to the rejection of the mercy petition of the petitioner; however, the same have not been furnished to nor was there any reply to his application. However, the learned counsel submitted that he was permitted to peruse the relevant file. According to the learned counsel, without access to the records, the petitioner cannot

exercise his right under Article 21 of the Constitution and he cannot challenge the order rejecting his mercy petition.

6. It is the further argument of the learned counsel for the petitioner that petitioner Vinay Sharma was only 19 years old and is not a habitual offender and hails from lower class of society and these aspects could have been considered only by a thorough Social Investigation Report which was not placed before the President of India.

7. The learned counsel submitted that the petitioner was kept in solitary confinement even while his mercy petition was still pending before the President of India and such illegal confinement was unfair and in violation of *Sunil Batra v. Delhi Administration and Others* **(1978) 4 SCC 494** and this becomes a ground for commutation of death sentence. It was further urged that the petitioner was tortured in the jail not only physically and there were also mental tortures and on number of days, petitioner Vinay Sharma was sent to medical treatment and also for psychological treatment. It is the claim of the learned counsel that the petitioner has been on psychological medication and diagnosed with the adjustment disorder and that as per Delhi Prisons Rules, the petitioner should have been provided with proper care and

treatment for mental illness and on the basis of the medical records. It is the claim of the learned counsel that the prisoners with medical illness and mental illness cannot be executed in terms of the UN General Assembly Resolutions as referred to in *Shatrughan Chauhan and Another v. Union of India and Others* **(2014) 3 SCC 1** and other Union Treaties.

8. Countering the above arguments, Mr. Tushar Mehta, the learned Solicitor General has submitted that all the relevant materials were placed before the concerned authorities and the mercy petition was forwarded to the President of India along with all those documents including the details of the court cases, records of the case, medical record, Social Investigation Report. It was submitted that the mercy petition along with the relevant documents was received by the Ministry of Home Affairs who have perused and with the appropriate note file, thereafter documents were placed before the President of India with a detailed Note File. Insofar as the alleged medical illness/mental illness of the petitioner, learned Solicitor General submitted that the petitioner was regularly checked and the Medical Officer In-Charge, Central Jail Hospital has issued the medical report stating that the petitioner was psychologically well adjusted and his general condition is stable and the medical

report of the petitioner has been placed before the President of India. Drawing our attention to the affidavit filed by the Director General (Prisons), Tihar Jail, it was submitted that the petitioner was never placed in solitary confinement and was placed in a single room with iron bars and the petitioner intermittently mingled with other prisoners. The learned Solicitor General submitted that the scope of judicial review of the order passed by the President of India is very limited and the contentions urged on behalf of the petitioner would not fall within the grounds of review as laid down by various judgments of this Court and prayed for dismissal of the writ petition.

9. In this writ petition filed under Article 32 of the Constitution, the petitioner challenges the order of rejection of his mercy petition by the President of India *inter alia* on various grounds that the settled principles of consideration of mercy petition have not been followed and that the relevant materials were not placed before the President of India.

10. As per Article 72 of the Constitution, the President of India shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence. As per Article

72(1)(c) of the Constitution, the power is inclusive of commutation in cases where the sentence is a sentence of death. Under Article 161 of the Constitution, similar is the power of the Governor to give relief to any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. The disposal of the petitions filed under Articles 72 and 161 of the Constitution requires consideration of various factors i.e. the nature of crime, the manner in which the crime is committed and its impact on the society and that the time consumed in this process cannot be characterised as delay. As held in *Devender Pal Singh Bhullar v. State of (NCT of Delhi)* **(2013) 6 SCC 195** that the disposal of the mercy petitions filed under Articles 72 and 161 of the Constitution of India requires consideration of various factors.

11. The grounds for judicial review of rejection of mercy petition under Article 72 of the Constitution has been considered in *Satpal v. State of Haryana* **(2000) 5 SCC 170** and the Constitution Bench judgment in *Bikas Chatterjee v. Union of India and Others* **(2004) 7 SCC 634** and *Shatrughan Chauhan*. After referring to various decisions, the Supreme Court considered the power of the President of India or the Governor of the State under Articles 72 and 161 of the Constitution and observing that the power vested in the

President of India under Article 72 and the Governor under Article 161 of the Constitution is a constitutional duty, in *Shatrughan Chauhan*, it was held as under:-

> **"14.** Both Articles 72 and 161 repose the power of the People in the highest dignitaries i.e. the President or the Governor of a State, as the case may be, and there are no words of limitation indicated in either of the two Articles. The President or the Governor, as the case may be, in exercise of power under Articles 72/161 respectively, may examine the evidence afresh and this exercise of power is clearly independent of the judiciary. This Court, in numerous instances, clarified that the executive is not sitting as a court of appeal, rather the power of President/Governor to grant remission of sentence is an act of grace and humanity in appropriate cases i.e. distinct, absolute and unfettered in its nature."
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> …….
>
> **19.** In concise, the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is a constitutional duty. As a result, it is neither a matter of grace nor a matter of privilege but is an important constitutional responsibility reposed by the People in the highest authority. The power of pardon is essentially an executive action, which needs to be exercised in the aid of justice and not in defiance of it. Further, it is well settled that the power under Articles 72/161 of the Constitution of India is to be exercised on the aid and advice of the Council of Ministers."

12. In a number of decisions, the Supreme Court has taken the consistent view that the executive orders under Articles 72 and 161 of the Constitution should be subject to limited judicial review. In WP(Crl.) D No.3334 of 2020 - similar petition filed by co-accused Mukesh Kumar, we have referred to number of judgments which

have elaborately considered the scope of judicial review of the decision of the President of India on a petition under Article 72 of the Constitution of India. It is not necessary to refer to all those decisions referred to in WP(Crl.) D No.3334 of 2020. Suffice to refer to the *Epuru Sudhakar and Another v. Govt. of A.P. and Others* **(2006) 8 SCC 161** and *Shatrughan Chauhan*. In *Epuru* Sudhakar, the Court has referred to the various grounds available for limited judicial review under Article 72 of the Constitution, it was held as under:-

> "**34.** The position, therefore, is undeniable that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:
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> (*a*) that the order has been passed without application of mind;
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> (*b*) that the order is mala fide;
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> (*c*) that the order has been passed on extraneous or wholly irrelevant considerations;
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> (*d*) that relevant materials have been kept out of consideration;
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> (*e*) that the order suffers from arbitrariness.
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> **35.** Two important aspects were also highlighted by learned amicus curiae; one relating to the desirability of indicating reasons in the order granting pardon/remission while the other was an equally more important question relating to power to withdraw the order of granting pardon/remission, if subsequently, materials are placed to show that certain relevant materials were not considered or certain materials of extensive value were kept out of consideration. According to learned amicus curiae, reasons are to be indicated, in the absence of which the exercise of judicial review will be affected."

13. In *Shatrughan Chauhan*, the Supreme Court considered the power of the President or the Governor of the State under Articles 72 and 161 of the Constitution and observing that it is a constitutional duty, held as under:-

> "14. Both Articles 72 and 161 repose the power of the People in the highest dignitaries i.e. the President or the Governor of a State, as the case may be, and there are no words of limitation indicated in either of the two Articles. The President or the Governor, as the case may be, in exercise of power under Articles 72/161 respectively, may examine the evidence afresh and this exercise of power is clearly independent of the judiciary. This Court, in numerous instances, clarified that the executive 8 is not sitting as a court of appeal, rather the power of President/Governor to grant remission of sentence is an act of grace and humanity in appropriate cases i.e. distinct, absolute and unfettered in its nature.
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> …….
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> 19. In concise, the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is a constitutional duty. As a result, it is neither a matter of grace nor a matter of privilege but is an important constitutional responsibility reposed by the People in the highest authority. The power of pardon is essentially an executive action, which needs to be exercised in the aid of justice and not in defiance of it. Further, it is well settled that the power under Articles 72/161 of the Constitution of India is to be exercised on the aid and advice of the Council of Ministers."

14. In the light of the above principles, let us consider the present writ petition and the grounds urged by the petitioner. The petitioner has primarily raised the following grounds to challenge the order of rejection of his mercy petition:-

(i) non-furnishing of copy of records pertaining to the rejection of the mercy petition of the petitioner under Right to Information Act, 2005;
(ii) relevant materials were kept out of consideration;
(iii) torture while in custody and consequential illness and mental illness of the petitioner and non-placing of materials pertaining to health condition of the petitioner;
(iv) illegal solitary confinement; and
(v) Bias order was passed with prejudiced mind.

15. **Re. Contention: Records not made available to the petitioner under RTI Act :** Learned counsel for the petitioner while seeking to put forth the contention would submit that he had made an application to the office of the President of India, Lieutenant Governor, Ministry of Home Affairs and the Department of Home, Govt. of NCT of Delhi under the Right to Information Act, 2005 seeking copies of certain documents from the file which were relevant in the context of consideration of the mercy petition. However, the same has not been replied to. In that regard, the learned counsel contended that he was permitted to peruse the records and since the copies were not made available, he be permitted to peruse the original file and make his submissions in the court. Insofar as the grievance raised by the learned counsel for the petitioner that he had not been furnished copies under the Right to Information Act, we do not find it appropriate to advert to that aspect

of the matter since it is beyond the scope of consideration in a petition of the present nature.

16. In the writ petition filed under Article 32 of the Constitution of India seeking judicial review of the order of the President passed under Article 72 of the Constitution, the scope is very limited and the Court is called upon to examine:- (i) where the order has been passed without application of mind; (ii) where the order has been passed on extraneous or wholly irrelevant considerations; (iii) that relevant materials have been kept out of consideration; and (iv) the order suffers from arbitrariness.

17. Insofar as the contention by the learned counsel that the file be made available to him, we are of the opinion that even such a course would not be appropriate. During the course of hearing, we have rejected the request of the learned counsel appearing for the petitioner that he should be permitted to peruse the file and then make the submission on behalf of the petitioner. In any event, we have heard learned counsel for the petitioner exhaustively and the contentions with regard to the alleged discrepancies which is said to have been observed by the learned counsel in the manner in which the file had been processed and has been taken up for consideration. Having taken note of such contention, this Court

thought it fit to look into the file to satisfy itself as to whether the procedure as contemplated has been followed. Accordingly, we have adopted that course. In that regard, from the file the learned Solicitor General has referred to the various documents/enclosures forwarded along with the mercy petition, nature of consideration made from the stage of receipt of the mercy petition and an appropriate note put at various stages was referred and the file relating to the same was made available to the Court. The consideration made by us is based on the contents of the file. In any event, as already indicated above, the issue with regard to the nature of documents required not being provided under the Right to Information Act would not arise, keeping in view the definite parameters under which the petition of the present nature is required to be considered. Further, since this Court has examined the file as indicated above, the petitioner cannot make grievance that because of the non-furnishing of the copy of the documents, prejudice is caused to them.

18. **Re. Contention that the Lieutenant Governor, Delhi and Home Minister, Govt. of NCT of Delhi did not sign the relevant file:-** Learned counsel for the petitioner submitted that he was permitted to inspect the file and on such inspection, he has noticed

that the Lieutenant Governor and Minister (Home), NCT of Delhi did not peruse the file and on the other hand, upon the message sent by an official, they have recommended the rejection of the mercy petition. It was further submitted that on inspection of file, the learned counsel learnt that the relevant file has not been signed by the Minister (Home), NCT of Delhi and the Lieutenant Governor, Delhi. Upon perusal of the file relating to the mercy petition of the petitioner, it is seen that the Minister (Home), NCT of Delhi and Lieutenant Governor, Delhi has perused the relevant file and have signed the note to reject the mercy petition. We do not find any merit in the contention that there was non-application of mind on the part of the Minister (Home), NCT of Delhi and Lieutenant Governor, Delhi.

19. **Re. Contention – Non-placing of relevant materials before the President of India and the relevant materials were kept out of consideration:-** Placing reliance upon *Shatrughan Chauhan,* it was submitted that the power to commute a death sentence is not an act of grace but a constitutional responsibility of the President of India or Governor of a State. It was submitted that all the relevant documents and materials as laid down in *Shatrughan Chauhan*

case and other judgments were not placed before the President of India.

20. To satisfy ourselves, we have asked the learned Solicitor General to produce the files containing the file relating to Govt. of NCT of Delhi and the office of Lieutenant Governor, Delhi and the file relating to forwarding of the mercy petition of the petitioner from Govt. of NCT of Delhi to Ministry of Home Affairs and file containing the note put up before the President of India. Accordingly, three files pertaining to the petitioner have been produced before us which we have perused. Petitioner Vinay Sharma had earlier filed a mercy petition which was received by the President Secretariat on 04.10.2019. That mercy petition was forwarded by Govt. of NCT of Delhi along with enclosures as stated in the covering letter dated 02.12.2019. The learned Solicitor General submitted that the said mercy petition was specifically withdrawn and the petitioner had filed another mercy petition on 29.01.2020. The said mercy petition was forwarded from the Govt. of NCT of Delhi to Ministry of Home Affairs on 30.01.2020 along with the enclosures stated in the covering letter dated 30.01.2020. It is seen from the covering letter that various documents were placed before the President of India viz. (i) Recommendation of the Govt. of NCT of Delhi

in regard to grant of clemency to the petitioner; (ii) Legible and clean copy each of the judgment of Trial Court, High Court and the Supreme Court of India; (iii) Legible and clean copy of records of the case including Police Report; (iv) Nominal roll of the prisoners; (v) Latest medical report of the prisoner; (vi) Details of the review/curative petitions pending in the Court filed by the accused and other co-accused of the case, if any, along with present status; (vii) The past criminal history of the prisoner, if any; (viii) Economical condition of the family of the prisoner; and (ix) Any other documents related to the case (Order for execution on 01.02.2020).

21. Before placing the note file before the President of India, the Ministry of Home Affairs had placed the matter before the Hon'ble Union Minister, Ministry of Home Affairs who applied his mind and by a speaking order, recommended for rejection of the mercy petition. By perusing the note put up before the President of India, we have seen that all the documents enclosed along with mercy petition of the petitioner and the submissions made by him in the mercy petition were taken into consideration. Upon perusal of the Note and the records, the President of India rejected the mercy petition of the petitioner. Taking note of the documents forwarded along with the mercy petition and the note put up by the Ministry of

Home Affairs before the President of India, the mercy petition was rejected. We find no merit in the contention that the relevant materials were kept out of consideration of the President of India.

22. **Non-placing of relevant materials – medical status report and the status report as per the mental health of the petitioner:-** The learned counsel for the petitioner had taken us through the averments in the petition and submitted that torture, cruelty and inhuman treatment of the petitioner and the physical assault inflicted on him in the prison, the petitioner was suffering from various illness and on complaints of “decreased appetite”, “decreased sleep” and number of other times for “psychiatric review”, “thought disorder” and “weakness”, number of times, he was taken to Central Jail Hospital and the petitioner was given treatment repeatedly for those complaints. It was contended that due to inhuman torture and degrading treatment suffered by the petitioner during his incarceration, the petitioner developed mental illness and caused self-harm to himself on several occasions. It was submitted that the medical record, mental illness and the status report on the mental health of the petitioner were not placed before the President of India. It was contended that in the mercy petition, the petitioner has narrated that the petitioner did not receive adequate health care

which would have caused his mental illness and such mental illness and procedural lapses infringe the rights of the petitioner and entitling him for commutation. It was submitted that the medical status report, Social Investigation Report and various other relevant documents were not placed before the President of India and thus, the relevant materials were kept out of consideration of the President of India.

23. Considering the question as to the relevant documents to be placed before the President of India and after referring to *Epuru Sudhakar*, in *Shatrughan Chauhan,* the Supreme Court held as under:-

> "**24.2.** ……. in *Epuru Sudhakar* v. State of A.P. **(2006) 8 SCC 161**, this Court held thus:
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> ……..
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> 35. Two important aspects were also highlighted by learned amicus curiae; one relating to the desirability of indicating reasons in the order granting pardon/remission while the other was an equally more important question relating to power to withdraw the order of granting pardon/remission, if subsequently, materials are placed to show that certain relevant materials were not considered or certain materials of extensive value were kept out of consideration. According to learned amicus curiae, reasons are to be indicated, in the absence of which the exercise of judicial review will be affected.
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> **103.** ……. For illustration, on receipt of mercy petition, the Department concerned has to call for all the records/materials connected with the conviction. Calling for piecemeal records instead of all the materials

connected with the conviction should be deprecated. When the matter is placed before the President, it is incumbent on the part of the Home Ministry to place all the materials such as judgment of the trial court, High Court and the final court viz. Supreme Court as well as any other relevant material connected with the conviction at once and not call for the documents in piecemeal."

24. By perusal of the file produced before us, it is seen that the medical report of the petitioner along with the treatment and his latest medical report dated 30.01.2020 was placed before the concerned authorities which in turn, was placed before the President. As seen from the enclosures in the forwarding letter of the mercy petition dated 30.01.2020, latest medical status report dated 30.01.2020 issued by Dr. Akash Narade, Senior Medical Officer and other medical reports and the treatment given to the petitioner, have been placed before the competent authority which in turn, were forwarded to the President of India. In the medical status report, Dr. Akash Narade has referred to the details of the treatment of the petitioner and certified that the petitioner is psychologically well adjusted and he was being provided with regular therapy sessions by specialized therapists and the general condition of the petitioner is stable. There is no merit in the contention that the medical report of the petitioner has not been placed before the President.

25. The alleged suffering of the petitioner in the prison cannot be a ground for judicial review of the executive order passed under Article 72 of the Constitution of India rejecting petitioner's mercy petition. As per the settled legal position in *Narayan Dutt and Others vs. State of Punjab and Another* **(2011) 4 SCC 353** and *Epuru Sudhakar*, exercise of power under Articles 72 and 161 of the Constitution of India is subject to challenge only on the grounds indicated thereon. When the highest constitutional authority, upon perusal of the Note and the various documents placed along with mercy petition, has taken a decision to reject the mercy petition, it cannot be contended that the highest constitutional authority had not applied its mind to the documents.

26. Learned counsel for the petitioner then urged that the petitioner comes from poor economic and social background and the Social Investigation Report of the mercy petition has not been forwarded along with the mercy petition. This contention again has no force. As seen from the list of enclosures sent along with the mercy petition, it is seen that the economic condition of the family of the petitioner and his Family Economic Status have been enclosed as enclosure "H". It is to be pointed out that the petitioner had earlier filed a mercy petition in October, 2019 and said mercy petition was

forwarded along with enclosures from the NCT of Delhi to Ministry of Home Affairs on 02.12.2019. While forwarding the said mercy petition, Social Investigation Report containing the economic conditions of the family of the petitioner was enclosed as enclosures. While forwarding the mercy petition dated 30.01.2020, the said Social Investigation Report dated 30.11.2019 containing family background of the petitioner and economic status of the family and other details were again forwarded. There is no merit in the contention that the Social Investigation Report was not placed before the President for consideration and the relevant materials were kept out of consideration of the President.

Solitary Confinement:-

27. Learned counsel appearing for the petitioner argued that the petitioner was illegally segregated and put in solitary confinement prior to rejection of his mercy petition in violation of law laid down in *Sunil Batra*. In the said case, it was held by the Supreme Court that "a person is under sentence of death" only after the mercy petition is rejected by the Governor and the President of India and on further application, there is no stay of execution by the authorities. It is

therefore contended that solitary confinement prior to rejection of mercy petition by the President of India is unconstitutional.

28. According to the petitioner, he has been kept in solitary confinement for a period of one year. This contention is however refuted by the respondents. In the affidavit dated 13.02.2020 filed by the Director General (Prisons), Tihar Jail, it is stated that for security reasons, the petitioner was placed in one ward having multiple single rooms and barracks. It is further stated that during that limited period, the petitioner was kept in one of the single rooms and during such duration, whenever all prisoners came out, the petitioner-convict was also coming out. It is stated that the single room where the petitioner was placed had iron bars open to air and the same cannot be equated with solitary confinement as the petitioner was permitted to come out and mingle with other inmates at regular intervals on daily basis like other prisoners. Further, it has been submitted that such placement of the petitioner in a single room was for limited duration and intermittent period either for security reasons or other reasons in the interest of convict. It is clear from the affidavit filed by the Director General (Prisons) that the petitioner was not kept in solitary confinement; rather he was kept in protective custody which was for the benefit of the petitioner

and also for ensuring the security. Considering the averments in the affidavit filed by the Director General (Prisons), the contention of the petitioner that he has been kept in solitary confinement in violation of the principles of *Sunil Batra*, does not merit acceptance and this cannot be a ground for review of the order rejecting the mercy petition of the petitioner.

29. **Bias Order was passed on irrelevant considerations:-**. Another ground argued by the learned counsel for the petitioner is the alleged bias caused to the case of the petitioner because of the statements made by the Ministers in the Delhi Government as well as in the Union Government which have led to pre-judging the outcome of the petitioner's mercy petition even before it was placed before the President of India for consideration. The petitioner has referred to the various statements made by the Ministers to the effect that the death sentence be awarded to the convicts to contend that such public statements had the effect of influence "aid and advice" tendered by the Council of Ministers of Delhi to the Lieutenant Governor or by Council of Ministers in the Central Government to the President and the order of rejection is vitiated by bias. As discussed earlier, note put up before the President is a detailed one and all the relevant materials were placed before the

President and upon consideration of the same, the mercy petition was rejected. The public statements said to have been made by the Ministers, cannot be said to have any bearing on the “aid and advice” tendered by the Council of Ministers of Delhi to the Lieutenant Governor or by Council of Ministers in the Central Government to the President.

30. The petitioner filed curative petition before the Supreme Court and the same was dismissed on 14.01.2020. The petitioner filed mercy petition on 29.01.2020 and the same was forwarded by NCT of Delhi to the Ministry of Home Affairs on 30.01.2020. The President of India rejected the mercy petition on 01.02.2020 and the same was communicated to the petitioner in Tihar Central Jail on 01.02.2020. As pointed out earlier, the case records, judgments of the trial court, High Court and the Supreme Court, clean copy of records of the case, Nominal Roll of the petitioner, medical report of the petitioner, Social Investigation Report and other relevant documents were forwarded to the Ministry of Home Affairs. The note put up before the President of India is a detailed one and all the relevant materials were placed before the President and upon consideration of same, the mercy petition was rejected.

31. As held by the Constitution Bench in *Maru Ram v. Union of India and Others* **(1981) 1 SCC 107** and referred to *Bikas Chatterjee* **(2004) 7 SCC 634**, the Court shall keep in mind that where the power is vested in a very high authority, it must be presumed that the said authority would act carefully after an objective consideration of all the aspects of the matter.

32. In the result, we do not find any ground for exercise of judicial review of the order of the President of India rejecting the petitioner's mercy petition and this writ petition is liable to be dismissed. The writ petition is dismissed accordingly.

……..J.
[R. BANUMATHI]

……..J.
[ASHOK BHUSHAN]

……..J.
[A.S. BOPANNA]

New Delhi;
February 14, 2020.

FAMILY RELATED ISSUES

DIVORCE UNDER FAULT AND NO-FAULT THEORY

Family is one of oldest institution that has played an important Role in stability and prosperity of civilization. The amazing persistence of Indian Culture is a consequence of the permanent position accorded to the family, for civilization is directly dependent on the effective functioning of the family; and in India the Family attained a social importance, even a religious significance.

Almost everything of lasting value in civilization has its roots in the family. The family was the first successful peace group, the man and woman learning how to adjust their antagonisms while at the same time teaching the pursuits of peace to their children. Family harmony provides a sense of belonging and a feeling of security unlike many other types of relationships. When conflict arises, it threatens that security. Whether the disharmony initiates from within the family unit or from external sources, individual family members and the family as a whole can experience a range of negative emotions and consequences. Unresolved conflict may irreparably damage a marriage and the entire family if family members do not seek help.

Further, the urbanization, Industrialization and less dependence on agriculture has given rise to nuclear family and many unforeseen problems. Ego and disproportionate emotional outburst has opened floodgates of litigation between spouses. Family matters are to be viewed from different perspective.

According to Hindu Religion, marriage is a sacred tie between a man and woman with the sole object of attaining "**chaturvidha purushartha**" i.e., **Dharma, Artha, karma and Moksha** is what was mentioned in ancient shastras. Hindu law is also applicable to Sikhs, Jains and Budhists. In some religions it is only a contract**.**

Parties to a marriage tying nuptial knot are supposed to bring about the union of souls. It creates a new relationship of love, affection, care and concern between the husband and wife. According to Hindu Vedic philosophy it is sanskar a sacrament; one of the sixteen important sacraments essential to be taken during one's lifetime. There may be physical union as a result of marriage for procreation to perpetuate the lineal progeny for ensuring spiritual salvation and performance of religious rites, but what is essentially contemplated is union of two souls. Marriage is considered to be a junction of three important duties ie., social, religious and spiritual.**(A.Jayachandra vs. Aneel Kaur, reported in (2005) 2 SCC 22)**.

Marriage as a social institution is an affirmance of civilized social order where two individuals, capable of entering into wedlock, have pledged themselves to the institutional norms and values and promised to each other a cemented bond to sustain and maintain the marital obligation. It stands as an embodiment for continuance of the human race. Despite the pledge and promises, on certain occasions, individual incompatibilities, attitudinal differences based upon egocentric perception of situations, maladjustment phenomenon or propensity for non-adjustment or refusal for adjustment gets eminently projected that compels both the spouses to take intolerable positions abandoning individual

responsibility, proclivity of asserting superiority complex, betrayal of trust which is the cornerstone of life, and sometimes a pervert sense of revenge, a dreadful diet, or sheer sense of envy bring the cracks in the relationship when either both the spouses or one of the spouses crave for dissolution of marriage-freedom from the institutional and individual bond**.(Dr.(Mrs.) Malathi Ravi, M.D vs. Dr.B.V.Ravi, M.D, reported in Civil Appeal No.5862 by Supreme Court of India).**

What is a divorce?

A divorce is a court judgment ending a marriage. The court requires a "legal reason" for the divorce. In addition to legally ending of the marriage, the court looks at other issues which need to be decided before the divorce becomes final.

Divorce was unknown to general Hindu law as marriage was regarded as an indissoluble union of the husband and wife. Manu has declared that a wife cannot be released from her husband either by sale or by abandonment, implying that the marital tie cannot be served in any way. It, therefore, follows that the textual Hindu law does not recognize a divorce. Although Hindu law not contemplates divorce yet it has been held that where it is recognized as an established custom it would have the force of law.

Under Muslim marriage: concept of divorce-we all are know that the husband and wife is necessary condition for a happy family-life. Islam therefore, insists upon the subsistence of marriage and prescribes that breach of the marriage- contract should be avoided. Initially no marriage is contract to be dissolved in future, but in unfortunate cases the take place and the matrimonial contract is broken. A marriage may dissolve:

- By act of God;
- By act of parties.

With the advance in socio-economic conditions, the concept of marriage has also changed. The spouses are more self- reliant and independent than they used to be before. The spirit of forced tolerance of yesteryears is disappearing. They are prepared to live separately rather than stay united while unhappy. It can be seen that the inclusion of section 13(1-A)[72] in the needs of the time. In the same way, ―irretrievable breakdown of marriage‖ should also be made a ground for divorce by amending the law to enable parties whose marriage is irretrievably broken down. This will be in consonance with English law. Moreover, if there is a special provision in the statute, the courts would be relived of the task of reading into the already existing provisions something new or interpreting the statutory provisions and thereby inviting strictures. Moreover, family relations always depend on the understanding and faith between the spouses and once it is broken, the very existence of the family is in question. The best course in such cases would be to set them free of the bond, which does not serve and purpose at all.

Over the years there has been a sea change in social thinking in the matter of relations between husband and wife. The desire and determination to live separately rather than to remain united in an unhappy marriage is gaining acceptance in our society. The law commission of India has also in its Seventy-first Report on the Hindu Marriage Act, 1955 has adverted to this aspect.

The Commission in its report says:

The essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one's offspring. Living together is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage – 'breakdown' – and if it continues for a fairly long period, it would indicate destruction of the essence of marriage – "irretrievable breakdown.

In several countries of the world, the breakdown of marriage as a ground for divorce has been recognized. But in India only Special Marriage Act, 1954 assigns recognition to irretrievable breakdown of marriage as a ground for divorce. It has been judicially legislated upon by the Muslim law also but no other Indian personal law recognizes it.

When the marriage is dead both emotionally and physically and there is no possibility of its revival, the normal course of action that any court would take would be to dissolve the marriage unconditionally. But the question that arises is whether the Supreme Court can grant a decree of divorce on the ground of irretrievable breakdown of marriage when there are instances of mental as well as physical cruelty alleged against each other as in the instant case under comment.

The logic behind granting divorce on breakdown of marriage is that what could not be mended should be ended. The guilt or fault theory of divorce should be replaced, though gradually, in exceptional cases by breakdown of marriage theory. This will enable the embattled couple, who failed to secure conjugal happiness, a fresh start in life.

DIFFERENT THEORIES OF DIVORCE:

In early Roman law marriage and divorce were essentially private acts of parties. Whenever two persons wanted to marry they could do so, and whenever they wanted to put their marriage asunder they were equally free to do so. No formalities or intervention of an agency was necessary for either.

In England before 1857, a marriage could be dissolved only by an Act of Parliament. After a considerable pressure, divorce was recognised under the Matrimonial Causes Act, 1857, but only on one ground i.e. adultery.[1] This continues to be position in India in respect of the Christian marriage. Later on insanity was added as a ground of divorce.However, marriage is also regarded as a social institution and not merely a transaction between two individuals, and therefore, it was argued that there was a social interest in prevention and protection of the institution of marriage was hedged with legal protection. The inevitable consequence of this philosophy was that marriage came to be regarded as a special contract which cannot be put to an end like an ordinary contract.

A marriage can be dissolved only if one of the spouses is found guilty of such an act and conducts which undermined the very foundation of marriage. This led to the emergence of the offence or guilt theory of divorce. Marriage as an eternal union was not altogether immune to rejection. Divorce or tyaga was not

alien to Indian society; it was devoid of any formal recognition as a tool of self-emancipation by the marriage partners. During the pre-Vedic era, despite separation of marriage partners, the marriage was not null and void. Women had never used their rights to disown men. However, two ancient smriti writers' Narada and Parasara laid down few grounds on which women could remarry. Impotency, she was allowed to take second husband if the first one was missing or dead, or had taken to asceticism, or degraded in caste. However, earlier there was no systematic code to regulate divorce in specific.

Indissolubility of Marriage Theory--

According to this theory marriage is an unbreakable tie between husband and wife. It is a union of bone with bone and flesh with flesh. It is eternal. Even if the relations between the parties are unhappy, they have to live and die with it. This is the theory of the shastric Hindu Law.

The marriage could be dissolved neither by the act of the parties nor by the death of one of them. Divorce was an anathema. However, this was the law for the regenerate castes, the so called upper three castes. The shudras and tribes recognised divorce and had their customs relating there to.

The Hindu marriage Act abandoned the shastric position. Marriage is no more unbreakable rope even for the regenerate caste. If the necessary conditions as given under section 13 and 13B exist, every Hindu is entitled to the dissolution of his or her marriage. The Hindu Marriage Act is indeed a revolutionary piece of legislation from this point of view.

Divorce at Will Theory.

According to this discreditable theory one can divorce one's spouse whenever one pleases. Marriage is more difficult than divorce here, whereas the case should be just the opposite. This theory is recognised by the Mohammedan law. A Muslim husband of sound mind may divorce his wife whenever he so desires without assigning any ground therefore. He need not seek the assistance or intermeddling of a judicial officer or of the counsel of his community. Although the Mohammedan Law favours the husband only in this matter, yet we can imagine a rule which gives the right to dissolve marriage at will to both the parties.

Under the general uncodified Hindu Law, divorce was not recognized, it was rather unknown to the old textual Hindu Law of Marriage. The reason is very simple that a marriage was undissoluble tie between the husband and wife. Divorce was thus not recognized unless it was allowed by custom. Section 13 therefore introduces a vital and dynamic change in the marriage law of Hindus.

The Hindu Marriage Act, 1955 (25 of 1955): The Act has been extended to Union Territory of Dadra and Nagar Haveli by Regulation 6 of 1963, sec. 2 and Sch. 1 (w.e.f. 1-7-1965) and Pondicherry by Regulation 7 of 1963, sec. 3 and Sch. 1 (w.e.f. 1-10-1963). The Act has been extended to Sikkim by S.O. 311 (E), dated 28th April, 1989 (w.e.f. 1-5-1989).

6 The Khula and the Mubaraa are considered by many as species of divorce by mutual consent. The word mubaraa denotes the act of freeing each other by mutual consent. In the case of khula, the wife begs to be released and the husband agrees for a certain consideration, which is usually a part or the whole of the mahr. (Hedaya Vol.1, p.322

Both the theories, that marriage is unbreakable and that marriage subsists during the pleasure of one or any of the parties thereto, touch the opposite extremes. They are alike in one respect that both are unreasonable and unjust. The first compels a spouse to bear the yoke of even torturous marriage also. The second makes marriage a play thing of the party entitled to proclaim divorce at will. In the first case the lawmaker has arbitrarily made marriage a prison.

Marriage is for making a loving home, not a rigorous imprisonment, and there should be an escape from strained relation. In the second case, a party may dissolve marriage arbitrarily disregarding the sentiments, services, helplessness and above all, the innocence of the other party. As the shastric Hindu Law had faith in the first theory[8], the question of second theory did not arise. The customary Hindu Law which recognised divorce among the so called low communities also did not recognised divorce at the pleasure of any party o the marriage. The Hindu Marriage Act gives no room to the second theory.

Fault/guilt/offence Theory

The guilt or offence theory of divorce is essentially a 19th century concept where the society abhorred divorce as an evil, as devil's mischief, and therefore that society could agree for divorce only on that basis that one of the parties has committed some sin, some very heinous offence against marriage. As a corollary to the guilt of one party, the other party was required to be totally innocent.

According to this theory, if a party commits a matrimonial offence the aggrieved party may seek divorce form the delinquent spouse. It is only the matrimonial offence which is a ground of divorce. No criminal offence, howsoever heinous, is a ground for divorce. Traditionally, adultery, desertion and cruelty are considered as matrimonial offences. But this should be treated only as an illustrative list. Rapes, sodomy, bestiality, refusal to obey the order of a court to pay maintenance to the wife, marring an underage person, are also examples of matrimonial offences. If the respondent is not guilty of any of these offences, divorce cannot be granted against him even if he has committed the offence of murder, dacoity, cheating, theft, treason, smuggling, black marketing or bribery etc. hence what matters for divorce is the person injury to the marital relations of the other spouse and not the injury dine to any other person(s) in the society.

A fault divorce is usually chosen by a spouse who wishes to be vindicated by proving the other's fault. In some states, the spouse who proves the other's fault may receive a greater share of the marital property or more alimony.

The offence theory stipulates for two things: (i) a guilty party, i.e., the party who has committed one of the specified matrimonial offences, and (ii) an innocent party, who has been outraged and who has played no role in the criminality or the matrimonial offence of the other party. If the purpose of the divorce law was the punishment of the guilty party, then it was natural to lay down that the other party should have no complicity in the guilt of the offending party. If the petitioner's hands are not clean, he cannot seek relief. It is a different matter that the English courts took this principle to its logical end. This dichotomy of matrimonial offence and innocence led not merely to the evolution of matrimonial offences but also to the matrimonial bars. Such are the notions of matrimonial offence and matrimonial innocence that the burden of proof of both is on the party who seeks relief. English law classified these bars to matrimonial relief into discretionary bars and absolute bars. The existence of the absolute bar was fatal to the matrimonial petition, while in the case of discretionary bars, the court had discretion and it might exercise in favour of the petitioner, or it might refuse to do so. Under Indian law all bars are absolute bars.

The guilt theory, on the one hand, implies, a guilty party, i.e., commission of matrimonial offence on the part of one of the parties to the marriage, and, on the other hand, it implies that the other party is innocent, i.e., in no way a party to, or responsible for, the offence of the guilty party. This principle was taken very far in English law; so much so that if both the parties, independently of each other, committed matrimonial offence the marriage could

not be dissolved. For instance, if a petition is presented on the ground of respondent's adultery and it is established that the petitioner is also guilty of adultery, then the petitioner cannot be allowed divorce. This is known as the doctrine of recrimination.

One of the Chief Justice of England caustically remarked; —Perhaps it is not vouchsafed to everybody, whether in Holy Orders or out of them, to appreciate the full beauty of the doctrine that if one of the two married persons is guilty of misconduct there may properly be divorce, while if both are guilty they must continue to abide in the holy state of matrimony.

English law has now abandoned this position. Since the guilt theory requires that the petitioner should be innocent, the English law evolved the doctrine of matrimonial bars, discretionary bars and absolute bars. This means that even if a petitioner is able to establish a ground of divorce to the satisfaction of the court, he may not get divorce if one of the matrimonial bars[13] is proved against him.

Possible Faults

This type of divorce can be based in any of the following:

- cruelty which includes the infliction of unnecessary emotional or physical pain and abusive treatment
- adultery means voluntary sexual activity between a married person with a person other than his or her spouse
- desertion or a specified length of time
- confinement in prison for a number of years
- alcohol or drug abuse
- insanity
- physical inability to engage in sexual intercourse, if it was not disclosed before marriage
- infecting the other spouse with a sexually transmitted disease[20]

Defences

There are also defences which can be raised by the other spouse in a fault divorce proceedings.

- Recrimination - It is the defence wherein the accused spouse in an action for divorce makes a similar accusation against the complainant spouse.
- Condonation - Which usually takes the form of implied or express forgiveness of a spouse's marital wrong and, therefore, weakens the accusers' case.
- Connivance - Which is the act of knowingly and wrongly overlooking or assenting without placing any opposition to a spouse's marital misconduct, especially to adultery.
- Reconciliation - Where the spouses voluntarily resume marital relation by cohabiting as spouses prior to a divorce becoming final with mutual intention of remaining together and re-establishing a harmonious relationship.
- Provocation - Inciting the other spouse to do a certain act. An example of this is when a spouse claiming for abandonment, the other spouse may raise the defense that the claiming spouse provoked the abandonment.

Proof

It is equally important to consider all the circumstances when making these charges or planning a defense. Proof of marital fault is needed. It usually requires witnesses, involves a lot of time and expenses, and there is a high probability that the divorce will turn vicious.

It is important to note that the grounds and defenses for a fault divorce are defined by the different jurisdictions and that the legal interpretation may likewise vary from one place to another. Also, be aware that actual legal definitions may be very dissimilar to a layman's concept of the term.

Expenses

Fault divorce is usually more expensive, because it may necessitate a trial. This means hiring the services of an attorney and correspondingly paying for investigations, interrogatories and requests for evidence. Oftentimes, expert witnesses are invited during the hearing. However, there are also instances when fault divorce cases are settled with good reason before trial commences.

If the scenario is of both spouses being at fault or both spouses have shown grounds for divorce exist, the court will grant a divorce to the party who is least at fault under the doctrine of "comparative rectitude." This is a recent development in the field of law, because years ago, when both spouses were at fault, neither was entitled to a divorce.

Under English law the absolute bars are: connivance, acquiescence in the misconduct of the respondent, condonation and collusion. The discretionary bars are: Petitioner‘s own adultery, cruelty, unreasonable delay, conducts conducting to the respondent‘s guilt, and the like. The existence of an absolute bar is fatal to the petition, while in the case of discretionary bars the court may exercise, or refuse to exercise, its discretion in favour of the petitioner. The modern English law has abandoned practically all the bars. It has been seen that in early English law adultery, cruelty and desertion were the only three grounds of divorce. Later on insanity was added as a ground of divorce.

Insanity did not fit in within the framework of guilt or matrimonial offence theory, as the party suffering from insanity could hardly be called a guilty party. It is a misfortune rather than misconduct. This led to renaming of the guilt theory as fault theory. If one of the parties has some fault in him or her, marriage could be dissolved whether that fault is his or her conscious act or providential. In some systems of law, there exists several grounds of divorce. Sentence of imprisonment for a specified period, whereabouts of a party not been known for a specified period to the other party, wilful refusal to consummate the marriage, leprosy, venereal diseases, rape, sodomy, bestiality, etc., have come to be recognised as grounds of divorce. Some systems also include grounds like incompatibility of temperament.

Frustration of Marriage Theory

The wedlock may be frustrated for a party to marriage even though the other party is not guilty of any marital offence. This may happen when he or she is suffering from mental unsoundness or has changed his religion or renounce the world or has disappeared for a very long period. If a person prefers a release from such a fruitless marriage he or she should be, according to this theory helped. Divorce is a relief from this point of view. The Hindu Marriage Act recognises these grounds as being good for divorce.

Consent Theory of Divorce

According to this theory, if the husband and wife agree to part for good, they should be permitted to get their marriage dissolved. It is they who have to

live with their marriage. If for any reason they cannot do so they must not be compelled. Compulsive cohabitation may give birth to matrimonial delinquencies which give rise to grounds for divorce. Why should the law refuse a person a thing which may be given to him on his degeneration when he asks for it before such degeneration? Granting divorce before the matrimonial life is spoiled by the delinquency or degeneration of one or both of the spouses is a positive goodness for both, for the parties to marriage and for society. Besides saving the parties from moral degradation, this procedure for granting divorce has an additional advantage that the parties are not forced to wash their dirty linen in public. They need not level allegations and counter-allegations against each other and try to outwit each other for proving that the other party is a —sinner'.

It is feared that the grant of divorce by mutual consent will enable a party to obtain divorce by wresting the consent of the other unwilling party by a malpractice, say; coercion or fraud etc. there is no valid reason for this fear.

Consent essentially means free consent. Where the consent of a party is obtained by a malpractice, the affected party can ever refuse so in the court and the ground for divorce will automatically vanish. It is also argued against this theory that this is in a way divorce by collusion. This objection is based on a misunderstanding of the difference between consent and collusion. Every collusion is, no doubt, by consent between the parties but every consent between them does not mean collusion.

Divorce by mutual consent mean that the case is not like usual ones in which one party petition against the other for divorce and the other party resist the same. It means that both the party makes a joint petition to the court for divorce between them. There may be a genuine desire on the part of both to get rid of each other. When a party to marriage wants divorce, it is not necessary in the nature of things that the other party must oppose it. The other party may be equally or rather more willing for it. They may be sensible enough to part for good amicably.

Collusion on the other hand means an agreement or understanding between the parties to make the court believe in the existence or truth of the circumstances which parties know to be none existent or falls and the existence or truth of which is necessary for the grant of the relief claimed in the petition. --Tirukappa v. Kamalamma, AIR 1966 Mys 1..ILR 1965 Mys 211. (1965) 1 Mys LJ 329.

In a collusive proceeding, the claim put forward is false, the contest over it is unreal and the decree prayed therein is a mere mask having the similitude of a judicial determination. It is acquired by the parties with the object of confounding third parties. Collusive proceeding is a mere sham.Thus, collusion is a strong word. It is a deceitful agreement for the purpose of defrauding others and the court.

If the husband and wife present a petition for divorce by mutual consent with the actual intent and purpose of getting their marriage dissolved, it does not amount to divorce by collusion. It will be a collusive divorce if they ask for it without meaning to divorce each other in fact. Hence divorce by a real consent of the husband and wife is not synonymous with divorce by collusion. The chances of collusion in the case of divorce by consent are neither more nor less than in that of litigious divorces.

If a married couple realizes that they are finding it difficult to pull on together; they have tried hard to make the marriage a success, but all their efforts have filed. It is not that they are wicked people or bad persons. They are average

human beings who have, somehow or the other, not been able to pull on together. In such a case, only alternative for them is to get out of the matrimony. But they cannot do so.

The fault theory requires that one of them (and only one of them) should be guilty of some matrimonial offence[46], then and then only the marriage can be dissolved. Then it was thought that a divorce by mutual consent was the answer to this problem. It was asserted that freedom of marriage implies freedom of divorce.

Thus as against the guilt theory, there has been advocated the theory of free divorce or the consent theory of divorce. The protagonists of this theory hold the view that parries to marriage are as free to dissolve a marriage as they are to enter it. If marriage is a contract based on the free volition of parties, the parties should have equal freedom to dissolve it. Just as an individual may err in entering into some other transaction, so also he or she may err in entering into a marriage. The argument may be summed up thus: it may construe that two parties who have entered into a marriage with free consent, later on, realize that they made a mistake, and for one reason or another, are finding it difficult to pull on together smoothly and to live together harmoniously. It is not because they are wicked, bad or malicious people. They are just ordinary average human beings, but it has just happened that their marriage has turned out to be a bad bargain, and they find it impossible to continue to live together. Should they have no right to correct their error, to cast off a burden which has become onerous, intolerable and which is sapping the vital fluid of life and eating into its very vitals? It is not merely their physical life, it is also their entire family life, including moral life, which is affected. If from this situation they have no way out, they are likely to go astray, may be, willy-nilly, one is forced to commit a matrimonial offence, may be one, out of sheer frustration, murders the other. Such an unhappy family is a breeding ground for delinquent children. In short, continuance of such a marriage is neither in the individual nor in the social interest. Thus, it is argued, that freedom of marriage implies freedom of divorce, then and then only can mutual fidelity continue, can real monogamy exist.

It is stated that the very basis of marriage is mutual fidelity, and if for any reason the parties feel that mutual fidelity cannot continue, they should have freedom to dissolve the marriage, as only by dissolution, fidelity can be preserved.

Divorce by mutual consent means that the law recognizes the situation that has existed for some time and in effect says to the unhappy couple.

The supporters of this theory hold that the freedom of divorce will bring about more happy marriages, and reduce the number of unhappy one. It will help both the husband and the wife to live in harmony and consolidate the unity of the family, so that they may fully engage in their career. Since there is freedom of divorce, both man and woman are forced to take a very serious and sincere attitude towards marriage.

Under Muslim law also, divorce by mutual consent is recognized in two forms (i) Khul, and (ii) Mubbaraat. The word Khula literally means —to put off. In law it means laying down by a husband of his right and authority over his wife for an exchange.

In Khula the desire for divorce emanates from the wife, while in mubbaraat aversion is mutual; both parties desire dissolution of marriage. Mubbaraat denotes the act of freeing one another mutually, and the proposal for

divorce may emanate from either spouse. But even in mubbaraat wife has to give up her dower or part of it.

The Soviet Union introduced this theory in the family law. In the People‘s Republic of China, in most of Eastern-European countries, Belgium, Norway, Sweden, Japan, Portugal and in some Latin American States divorce by mutual consent is recognized in one form or the other. At home, the Special Marriage Act, 1954, and the Hindu Marriage Act, 1955 (after the amendment of 1976), the Divorce Act, 1869, the Parsi Marriage and Divorce Act, 1936 recognize divorce by mutual consent.

The criticism of the consent theory is two-fold: (i) it makes divorce very easy, and (ii) it makes divorce very difficult. It has been said that divorce by mutual consent offers a great temptation to hasty and ill-considered divorces. More often than not, parties unnecessarily magnify their differences, discomforts and other difficulties, which are nothing but problems of mutual adjustments, and rush to divorce court leading to irrevocable consequences to the whole family. This criticism has been met by the law of many countries which recognize divorce by mutual consent by providing several safeguards.

A similar provision has been made in Parsi Marriage and Divorce Act, 1936 by the amending Act of 1988.

The second course adopted was to give a very wide interpretation to some fault grounds. Cruelty was found to be most handy ground which could be moulded into any shape. Some States of the United States of America went to the extent of saying that if husband snored during the night thus disturbing the sleep of the wife, it amounted to cruelty. Gradually, cruelty was given such a wide interpretation that it virtually amounted to recognition of breakdown theory of divorce.

In Gollins v. Gollins—1964 AC 644, the wife soon after the marriage found out that her husband was heavily indebted at the time of the marriage and his farm was also heavily mortgaged. The husband was not in a position to provide maintenance for her. It was she who had to lend money to her husband from time to time to pay off pressing debts. The wife ran a guest house for elderly people: husband did not contribute anything. In short, husband did nothing to help her; he could have obtained paid employment but did not care to get .The husband however, did nothing at any time to cause any physical harm to the wife. Under these circumstances, the wife brought an action for divorce on the averment that she could not stand the strain of his debts and that her husband had willfully neglected to provide reasonable maintenance to her and children. On these facts the husband was held guilty of persistent cruelty.

The question again came in Williams v. Williams-, where the wife filed an action for divorce on the ground that the husband persistently accused her of adultery as a consequence of which her health had been injured. The husband was a mental patient and therefore insanity was taken as a defense. Rejecting the husband‘s plea, the House of Lords allowed the wife‘s petition.Thus, the scope of the cruelty-one of the fault grounds-has been so much widened by judicial interpretation as to include virtually the breakdown principle.

The Matrimonial Causes Act, 1963 removed ‘collusion‘ from absolute bars and placed it among the discretionary bars. This resulted in the acceptance of several collusive agreements which virtually implied acceptance of divorce by mutual consent of the parties.

The provision for dissolving marriage through mutual divorce in India is included in Section 13B of the Hindu Marriage Act by the Marriage Laws (Amendment) Act, 1976.

Breakdown Theory of Divorce:

The basic human and social problem is of the maladjusted couples. Many marriages fail not because of the wickedness of one party or the other, but they just fail. Many couples try, and try their best to make their marriage a success but they fail.[58] Sometimes marriages fail because of selfishness, boorishness, callousness, indifference and thinks like these on the part of one of the parties to the marriage. All this does not amount to any matrimonial offence. Yet, the marriage is not get-going.

There are several cases in which parties live separate and apart from each other for several years and just because one of the parties wants the marital bond to continue, there is no way out for the other. In the context of a Muslim case, V.R. Krishna Iyer, J. said: —daily, trivial differences get dissolved in the course of time and may be treated as the teething troubles of early matrimonial adjustment. While the stream of life, lived in married mutuality, may wash away smaller pebbles, what is to happen if intransigent incompatibility of minds breaks up the flow of the stream? In such a situation, we have a breakdown of the marriage itself and the only course left open is far law to recognize what is a fact and accord a divorce.

Breakdown of marriage as the sole basis of divorce is now recognised in several countries of the world. The Soviet Union recognized it in 1944. In most of the communist countries it is recognized basis of divorce. In some states of the United States it is recognized. In England—so far considered the citadel of conservatism—it was recognized in 1969.

It is more and more now accepted that for divorce, why should it be necessary for one party to prove that the other party has in a culpable manner violated the marital bond. To use the language of the law of the German Democratic Republic, "If a marriage...has lost its significance for the married partners, for the children and thereby for the society, if it has become merely an empty shell, it must be dissolved, independently, whether one of the married partners, or which of the two, bears the blame for its disintegration.

In the countries of the world the breakdown principle has found recognition in three forms: (i) the determination of the question of fact whether in fact a marriage has broken down is left to the court; if the court, in a case before it, is convinced that a marriage has broken down, it passes a decree of divorce. (ii) The legislature lays down the criterion of break-down; and the criterion that has been laid down in most countries is that if parties are living separate and apart for a certain duration—ranging from one year to seven years—it is sufficient proof of breakdown of marriage, and a decree of divorce may be granted at the instance of either party. (iii) If parties are living separate for a certain duration—one year to two years—under a decree of judicial separation, or if a decree of restitution of conjugal rights is not complied with for a certain duration—one year to two years —then either party may seek divorce. It should be noticed clearly that in breakdown principle of divorce culpability or guilt or innocence of either party does not figure anywhere. A marriage is dissolved just because it has broken down.

Divorce under various acts

Due to existence of diverse religious faiths in India, the Indian Judiciary has implemented laws separately for couples belonging to different religious beliefs.

- The Hindu Marriage Act, 1955
- The Parsi Marriage and Divorce Act, 1936
- The dissolution of Muslim Marriage act, 1939
- The Parsi Marriage and Divorce Act, 1936
- The Special Marriage Act, 1956
- The Foreign Marriage Act, 1969

Grounds of divorce

The Hindu Marriage Act,1955 originally recognized the fault grounds for obtaining the decree of divorce. For this purpose nine fault grounds were mentioned in the Act. Sec. 13(1) lays down these fault grounds, on which either the husband or wife could sue for divorce. Two fault grounds have been dealt with in the sec. 13(2), on which wife alone could seek the decree of divorce. In 1976, the grounds for divorce by mutual consent have been recognized through provision of the section 13 (B) of the Hindu marriage Act,1955.

Theory regarding divorce

The provisions relating to divorce is contained in *Sec 13 of Hindu Marriage Act, 1955*.The Act recognizes two theories of Divorce:

- **Fault theory;**
- **Divorce by mutual consent**.

Under the *fault theory*, marriage can be dissolved only when either party to the marriage had committed a matrimonial offence. Under this theory 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. Another theory of *divorce is that of mutual consent.* The underlying rational is that since two persons can marry by their free will, they should also be allowed to move out of their relationship of their own free will. However critics of this theory say that this approach will promote immorality as it will lead to hasty divorces and parties would dissolve their marriage even if there were slight incompatibility of temperament. Some of the grounds available under Hindu Marriage Act can be said to be under the theory of frustration by reason of specified circumstances. These include civil death renouncement of the world etc.

No fault theory of divorce

Prior to 1976 Divorce only on the basis of fault theory it means marriage can be dissolved only when either party to the marriage had committed a matrimonial offence. But now Divorce can also be obtained on the basis of *no fault theory,* it means divorce can obtain by the mutual consent of the parties to marriage under the marriage laws (Amendment) Act, 1976. According to *section 13-B (1)*, such a petition is required to be moved jointly by the parties to marriage on the ground

that they have been living separately for a period of one year or more and they have not been to live together and also that they have agreed that marriage should be dissolved.

As per *section 13-B (II)* of the Act lays down that 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 (I) given above and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that averments in the petition are true, then pass a decree of divorce, declaring the marriage to be dissolved with effect from the date of decree.

In Hindu law the breakdown principle in the third form of divorce was introduced in 1964, and in 1970 in the Special Marriage Act. This was done by amending the last two clauses of divorce of the two statutes. The new Section 13(IA) of the Hindu Marriage Act laid down that if parties have not resumed cohabitation for a period of two years or more after a decree of judicial separation, or if a decree of restitution of conjugal rights has not been complied with for a period of two years or more, then either party may sue for divorce. The provision in Section 27(2) of the Special Marriage Act is identical except that the period therein is only one year.

When the Hindu law provision came for interpretation before our courts, our courts tested it on the touchstone of guilt theory and looked in the question very closely whether the petitioner is thereby note taking advantage of his own wrong, and if they found culpability in him, they refused the relief.[63] In most of the cases the question came in this form: a wife obtained a decree of restitution of conjugal rights but the husband did not comply with it. After a period of two years the husband sued for divorce. The courts said that since he himself has not complied with the decree, he is in the wrong, and if divorce is allowed to him, it will amount to giving him an advantage of his own wrong.[64] Looked at in this manner the argument is not merely plausible but appears convincing. But the point is, if non-compliance is a criterion of breakdown of marriage, then divorce should be granted, without bothering which of the two parties bears the blame for the disintegration of marriage.

It is very unfortunate that neither the Law Commission, the report of which constitutes the basis of the Marriage Laws (Amendment) Act, 1976, nor the framer of the Marriage Laws (Amendment) Bill, 1976 looked at this aspect of the matter. In this regard only suggestion that has been made is this that the period of two years separation under the Hindu Marriage Act, should be reduced to one year. One wished very much that Parliament should have enacted a simple provision that if parties have ceased to cohabit for a period of two years (irrespective of fact whether there is a decree of judicial separation or restitution), then either party may sue for divorce. A provision like this would help us in achieving the goal of a uniform civil code, as such a provision would be, it is submitted, acceptable to all communities. It will not work hardship on the women, as, even after divorce, under both the statutes, a wife, who has no means of livelihood, can claim maintenance from her divorced husband.

Irretrievable Breakdown of Marriage Theory-

The basic postulate of breakdown theory is that if a marriage had broken down without any possibility of repair (or irretrievably) then it should be dissolved, without looking to the fault of either party. If a marriage has broken

down irretrievably, should we not recognize this fact? Should we insist to find out the party at fault?[66] Suppose, no party is at fault or one is or both are, but marriage has nonetheless broken down, should the divorce be refused? The breakdown theory holds the view that what we are concerned with is the fact of breakdown of marriage; if a marriage has broken down irretrievably, and then divorce should be granted, as there is no use in retaining the empty shell. Thus the law recognizes an unhappy situation and says to the petitioner: If you can satisfy the court that your marriage has broken down irretrievably, and that you desire to terminate a situation that has become intolerable to you, then your marriage shall be dissolved whatever may be the cause.

In a landmark judgment, the Supreme Court held that situations causing misery should not be allowed to continue indefinitely, and that the dissolution of a marriage that could not be salvaged was in the interests of all concerned. In Naveen Kohli v. Neelu Kohli, AIR 2006 SC 1675. the parties were married in 1975 and after a few years, the marriage turned sour. There were allegations of cruelty, adultery and other types of misbehaviour from both the parties against each other. Wife initiated several civil and criminal proceedings against husband indicating her resolve to make his life miserable. Husband also initiated some legal proceedings and was living separately from the wife for more than ten years. Thus, it was evident from the facts of the case that the marriage has been wrecked beyond redemption. The trial court stated that though both the parties have leveled allegations of character assassination against each other, they failed to prove the same. According to the court, the allegations were of such serious nature that there was no cordiality left between the parties and no possibility to reconnect the chain of marital life between them. Hence, it found that there was no alternative but to dissolve the marriage between the parties. The high court took the stand that the trial court erred in granting a divorce to the husband without properly appreciating the evaluating the evidence on record. In appeal, the Supreme Court while analyzing the concept of irretrievable break down of marriage discussed other issues also like physical and mental cruelty in matrimonial matters. The court came to the conclusion that where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. When the marriage becomes a fiction, the legal tie has to be severed.

A look at the provisions of the Hindu Marriage Act, 1955 reveals that most of the grounds under sub-sections (1) and (2) of section 13 are based on fault or guilt theory of divorce. According to this theory a marriage can be dissolved only if one of the parties to marriage has committed some matrimonial offence recognized as a ground for divorce. 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 open with concrete instances of human behaviour as to bring the institution of marriage into disrepute. Once a marriage has broken down beyond repair, it would be unrealistic for the law not to take note of that fact, as it would be harmful to society and injurious to the interest of the parties. There is also a provision for obtaining divorce by natural consent under section 13-B and section 14, which is based on the consent theory of divorce.

A marriage could be broken down on account of fault of either party or both parties or on account of fault of neither party. It may happen that relations of husband and wife became so strained that they stopped living with each other. In such a situation, it is desirable that the relationship is brought to an end by a decree of divorce on the ground of irretrievable breakdown of marriage without fixing any responsibility on either party in the interest of both the parties and also

the society. It is good to give de jure recognition to what exists de facto to enable them to resettle their life.

However, in the absence of legislative recognition to this ground, the apex court has been granting relief to the parties by exercising its plenary powers under Article 142 of the Constitution of India.

IMPORTANT CASE LAWS BY APEX COURT:

1) In Darshan Gupta vs. Radhika Gupta, reported in Supreme Court of India in Civil Appeal Nos.6332-6333 of 2009 decided on 01.07.2013, wherein it is held that:

A perusal of the grounds on which divorce can be sought under Section 13(1) of the Hindu Marriage Act, 1955, would reveal, that the same are grounds based on the 'fault' of the party against whom dissolution of marriage is sought. In matrimonial jurisprudence, such provisions are founded on the 'matrimonial offence theory' or the 'fault theory'. Under this jurisprudential principle, it is only on the ground of an opponent's fault, that a party may approach a Court for seeking annulment of his/her matrimonial alliance. In other words, if either of the parties is guilty of committing a matrimonial offence, the aggrieved party alone is entitled to divorce. The party seeking divorce under the "matrimonial offence theory" / the "fault theory" must be innocent. A party suffering "guilt" or "fault" disentitles himself/herself from consideration. Illustratively, desertion for a specified continuous period, is one of the grounds for annulment of marriage. But the aforesaid ground for annulment is available only, if the desertion is on account of the fault of the opposite party, and not fault of the party which has approached the Court. Therefore, if a husband's act of cruelty, compels a wife to leave her matrimonial home, whereupon, she remains away from the husband for the stipulated duration, it would not be open to a husband to seek dissolution of marriage, on the ground of desertion. The reason being, that it is the husband himself who was at fault, and not the wife. This is exactly what the respondent has contended. Her claim is, that in actuality the appellant is making out a claim for a decree of divorce, on the basis of allegations for which he himself is singularly responsible. On the said allegations, it is Darshan Gupta, who deserves to be castigated. Therefore, he cannot be allowed to raise an accusing finger at the respondent on the basis of the said allegations, or to seek dissolution of marriage, thereon.

There is no dispute between the rival parties, that after Radhika Gupta's first conception was aborted in June, 1999, the attending gynecologist at Apollo Hospital, had cautioned the couple against any further conception for at least two years. The couple had been advised, that pregnancy of Radhika Gupta during this period could lead to serious medical complications. Radhika Gupta alleges, that her husband had proceeded with unsafe cohabitation, leading to her second pregnancy, within a short period of eight months (after the abortion in June, 1999), i.e. well within the risk period. Clearly contrary to the medical advisory. The truth of the second conception, cannot be disputed, in view of the overwhelming supporting evidence on the record of the case. The conception could have only occurred because of, unprotected sexual indulgence by Darshan Gupta. The medical condition of Radhika Gupta, was for one and only one reason, namely, the second conception of Radhika Gupta, during the unsafe period. Clearly, the blame thereof, rests squarely on the shoulders of Darshan Gupta. The instant conclusion is difficult to assimilate. Yet, there can be no doubt about the truthfulness thereof. It is in this view of the matter, that the submissions advanced at the hands of the learned counsel for Darshan Gupta, have been vehemently opposed. The unambiguous contention of the learned counsel for the respondent is, that the grounds/facts on which divorce is sought by the appellant, are not at all available to him under the "fault theory" on which Section 13(1) of the Hindu Marriage Act, 1955, is

founded.

We are persuaded to accept the submission noticed in the foregoing paragraph. There can be no doubt, that all the grounds/facts on which divorce has been sought, emerge from the medical condition of Radhika Gupta, after her cesarean operation in September, 2000. The symptoms during her first pregnancy were such, that the couple was advised not to conceive for a period of two years. The husband did not heed to the advice tendered by the attending gynecologist. We are, therefore, inclined to fully endorse the view expressed by the Family Court, that the appellant- husband Darshan Gupta himself, was responsible for the state of affairs of his wife-Radhika Gupta, inasmuch as he did not heed the advice of gynecologist after the abortion of her first pregnancy in June 1999. There is no serious dispute, that to satisfy his desires, he impregnated his wife within a period of eight months, i.e., well within the risk period. Therefore, she suffered the predicted consequences. The medical condition of Radhika Gupta, on which the appellant basis his claim for divorce, is of his own doing. Even though at that juncture, Darshan Gupta was merely 25 years of age, and it may well be difficult to blame him, yet there is no escape from the fact, that the fault rests on his shoulders. In the above view of the matter, it is not possible for us to conclude, that Darshan Gupta did not suffer from any “guilt” or “fault” in the matter. It is, accordingly, not possible for us to accept, that he can be permitted to use his own fault to his advantage. His prayer for divorce on the facts alleged, is just not acceptable. The party seeking divorce has to be innocent of blame. We are satisfied, that the grounds/facts on which a claim for divorce can be maintained under Section 13(1) of the Hindu Marriage Act, 1955, are clearly not available to the appellant Darshan Gupta in the facts and circumstances of this case. For the instant reason also, the prayers made by the appellant must fail.

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.

2. In Smt. Gopi Bai vs Govind Ram, reported in AIR 2007 Raj 90, decided by Rajashtan High Court on 5 February, 2007, wherein it is held that:

Marriage is a sacred bond entered into by the husband and the wife. Both are duty bound to ensure the solidity of the institution. They should make an endeavor to live in peace and harmony. In case either one of them breaks the bond, the erring party cannot be allowed to take advantage of his/her own wrong. To allow the erring party to take advantage of his/her own wrong is to motivate people to dilute and destroy the institution of marriage. Since the family is the basic unit of any society, it is imperative that the family be protected and promoted by the two spouses. The Courts of law are also bound to protect and promote the family as a social unit. Therefore, the Courts are duly bound to consider as to who is in fault while considering a petition for divorce. Section 23 of the Act merely imports "the fault theory" in divorce cases.

3. In Sreenivasan vs Shylaja reported in Mat.Appeal No.96 of 2004(1) decided by Kerala High Court on 10 February, 2009, wherein it is held that:

The evidence would suggest that cruelty was being meted out by the wife, but she did not agree for divorce. Can a person who is at fault take shelter on his own fault to obtain a decree for divorce? To our mind it appears that a party, who, caused mental cruelty to the wife is not entitled for dissolution of marriage taking advantage of his own fault especially when the respondent wife is not prepared to have a divorce despite the fact that she was not treated well by her husband.

4. In Samar Ghosh vs Jaya Ghosh, reported in Appeal (civil) 151 of 2004 decided by Supreme Court of India on 26 March, 2007, wherein it is held that:

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 concrete instances of human behaviour as bring the institution of marriage into disrepute.

Conclusion

The Hindus consider marriage to be a sacred bond. Prior to the Hindu Marriage Act of 1955, there was no provision for divorce. The concept of getting divorced was too radical for the Indian society then. The wives were the silent victims of such a rigid system. Now the law provides for a way to get out of an unpleasant marriage by seeking divorce in a court of law. The actual benefactors of such a provision are women who no longer have to silently endure the harassment or injustice caused to them by their husbands. However, to prevent hasty divorces, the law lays down certain restrictions and grounds for obtaining a divorce.

I further recollect ancient quote:

Manu, founder of Hindu Law, said **“ Yathra Naryanthu Pujyanthe, ramanthe ththra devathah”** i.e., where women are worshipped and respected, there, the Gods will be happy.

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This is the humble submission of the topic “Divorce under Fault and No-fault theory” designated to me.

I thank one and all.

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