

***With warrant by police officer :***

**Section 41(2) :** The police officer is not entitled to arrest a person who commits a non-cognizable offence or against whom a complaint has been made except with the warrant of the Magistrate.

On perusing the above amendments it appears that the recognition of need of arrest in certain cases. The Code of Criminal Procedure (Amendment) Act, 2008 which came into force on 1st November 2010 *vide* Notification: S.O.2687 (E) of Ministry of Home Affairs dated 30th Oct. 2010. This amendment brought as a result of recommendations made in the 177th Law Commission Report headed by J. B.R. Jeevan Reddy.

The theme of the report is to maintain a balance between the liberty of citizens (the most precious of all fundamental rights) and the societal interest a difficult balance but it has to be attempted and achieved to the extent possible. The report taken into the consideration of the judgments in the cases

mainly *D.K. Basu* (1997) and *Joginder Kumar* (1994) and concentrates on the specific theme “the police officer must be able to justify the arrest apart from his power to do so”

In *Amarabati v. State of U.P.*, 2005 Cr. LJ 755, it was held that arrest and detention in the police custody can cause ill-calculable harm to the reputation and self –esteemed of a person and, that, is why no arrest can be made in routine manner on minor allegation of commission of a crime”

In *M.C. Abraham v. State of M.H.*, 2003 SCC 628 Cri., The Lordships held that Section 41 gives a discretion to the police officer from a Magistrate that even without a warrant may arrest any person in the situation enumerated in that section’

**CONCLUSION:** It is therefore the concept of arrest has an important role in the criminal justice system and it is inevitable the new changes in the concept of arrest in view of contemporaneous societal changes which recognizes the fundamental rights of citizens.

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## IRRETRIEVABLE BREAK DOWN OF MARRIAGE – OLD WINE IN NEW BOTTLE

*By*

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Our Indian society is rich with its traditions and culture. The laws in India recognize the operation of personal law of Hindus which provide the rights and obligations of a Hindu. The Hindu Law has its roots in the Dharmasastras, Vedas, itihahas, puranas, commentaries and customs. The Hindu Law is an ancient law made applicable to the Hindus at large.

The origin of marriage amongst Aryans is very sacred. As early as since the times of

commencement of Rigveda age, the values of marriage were rewarded its esteem. The sacrament of marriage is highly respected and regarded with moral values among Hindus. The sacredness of the marriage and the values of a woman were respected and honoured as shown by the long and striking hymn in Rigveda thus” Be thou, mother of heroic children, devoted to the Gods. Be thou, queen in thy father-in-law’s household. May all the Gods unite the hearts of us into one.”

It is a well established procedure and practice that marriage is one of the essential religious rites or *samskaras* among the Hindus. It is believed among the Hindus that marriages are made in heaven. The essence of marriage is sharing in common by spouses their life, happiness, sorrow, love and affection at all times.

The object of Hindu Marriage Act was to bring uniformity in the code of personal laws relating to marriages among Hindus for there existed several inconsistencies about the validity and to their forms of marriages as regards the physical and mental capacity of the parties to the marriage, prohibited degrees of marriage, infant marriages, ceremonies of a valid marriage *etc.*

The initial attempt of a codified act governing guidelines to marriages among the Hindus took its birth in the form of Hindu Marriage Act 1855 as Act 25 of 1955 dated 18.5.1955. The Hindu Marriage Act of 1955 underwent for amendments by Act 73 of 1956, Act 58 of 1960, Act 32 of 1963, Act 44 of 1964, Act 33 of 1969, and Act 68 of 1976 (*vide* Gazette Extra Part-II on 27.5.1976 respectively). These amendments led to insertions, substitutions and omissions of various provisos in the Act. The Marriage Laws (Amendment) Act 1976 in keeping with the Amendment Act 68 of 1976 brought major changes in the Hindu Marriage Act.

The concept of “Irretrievable breakdown of marriage” is the latest intended design to provide for grant of divorce. The history of theory of “Irretrievable breakdown of marriage” dates back to the year 1920 when for the first time the aspect of separate agreement as a ground for divorce akin to the concept of Irretrievable breakdown took a legislative design in New Zealand in their statute of Divorce and Matrimonial Causes Amendment Act 1920. The amendment as introduced in the year 1920 by the country of New Zealand had its influence in England too. The British Parliament by its enactment

of Matrimonial Causes Act 1973 replacing the Divorce Reform Act 1969 introduced the principle that petition seeking for divorce can be presented on the ground that the marriage has broken down irretrievably.

The Western influence and the enactments of other countries of World appears to have attracted our Indian country too. Insofar as our country of India is concerned, the brief history to the concept of “Irretrievable Breakdown” dates back to 1971 when the Full Bench of Delhi High Court in the case of *Ram Kali v. Gopal Das*, 1971 ILR (1) Delhi 10, in the course of dealing with the maintenance issue brought out the principle that there should not be insistence on the maintenance of a union which has been broken down for the same being unreasonable and inhumane to compel the parties to keep up the façade of marriage since the rift between the parties is complete and there is no prospects of the spouses living together as husband and wife. This judicial pronouncement found its place in April 1978 when the Law Commission in its 71st Report dated 7.4.1978 dealing with amendment of Hindu Marriage Act headed by His Lordship *H.R. Khanna, J.*, for the first time in its Report submitted a Report titled “The Hindu Marriage Act 1956- Irretrievable breakdown of Marriage as a ground of Divorce” recommended the need for introducing the concept of “Irretrievable breakdown of marriage” as ground for grant of divorce. In keeping with the Report, though the Marriage Laws Amendment Bill 1981 was introduced in Lok Sabha in February 1981, but the same could not be passed and the Bill got lapsed.

The subsequent judicial precedents by the Hon’ble Courts of India gave its respective versions as regards the concept of “Irretrievable breakdown of marriage” as ground for seeking divorce, taking the nature and scope of the situation of irretrievable breakdown notwithstanding its legislative amendment in the Hindu Marriage Act.

In *Ms. Jorden Diengdeh v. S.S. Chopra*, AIR 1985 SC 935, the Supreme Court in the course of its verdict expressed the necessity to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce. It was further suggested that Legislature has to come forward with a uniform code of marriage and divorce and to provide law to meet the situations of unhappiness as existing among couples.

In *Chanderkala Trivedi v. Dr. S.P. Trivedi*, 1993 (4) SCC 232, the Supreme Court applied for the first time the principle or doctrine of irretrievable breakdown in specific terms. It was held that where there is no possibility for the parties to live together and the wife's assertion that she still wants to live with her husband is nothing but a revengeful resolve to live in agony and an exercise to continuation of a dead tie. This view was reiterated in the case of *Romesh Chander v. Savitri*, AIR 1995 SC 851.

In *V. Bhagat v. D. Bhagat*, AIR 1994 SC 710, the Supreme Court held that existence of irretrievable breakdown plays a vital role in determining to the grant of the relief of divorce.

In *Kanchan Devi v. Pramod Kumar Mittal*, AIR 1996 SC 3192, the Supreme Court, notwithstanding the existence of a specific provision in the Hindu Marriage Act governing the aspect of irretrievable breakdown of marriage, by invoking the Article 142 of the Constitution of India in keeping with the facts of the case granted divorce.

In *Ashok v. Rupa*, 1996 (2) HLR 512 (Guj) the Hon'ble High Court by due considering the facts of the case, held that as there was no possibility of reunion of spouses and that refusal of divorce would prolong the agonies of the spouses has granted divorce.

In *Tapan Kumar Chakraborty v. Jyotsna Chakraborty*, AIR 1997 Cal. 134, the Hon'ble

High Court held that in a petition seeking for divorce on a ground as stated therein, Court cannot grant divorce on mere ground of irretrievable breakdown of marriage.

In *Anil Kumar v. Sunitha*, 1998 (2) Civil LJ 243, the Hon'ble Court held that as there is no provision in the Act for granting a decree for divorce on the ground of irretrievable breakdown of marriage, the said order of divorce cannot be exercised under Article 142 of the Constitution of India by the High Court as no power or jurisdiction akin to Article 142 lies with the High Court.

In *Gouri Shankar Chakraborty v. Smt Basana Roy*, AIR 1999 Gau. 48, the Hon'ble High Court held that where the wife is willing to join her husband but the husband is not inclined to allow her join, the said marriage cannot be said as a dead marriage and more so as irretrievable breakdown of marriage.

In *Abha Agarwal v. Sunil Agarwal*, AIR 2000 All. 377, the Hon'ble High Court held that where there is irreparable breakdown of marital relationship, the marriage between the couple has to be dissolved by a decree of divorce on the ground of cruelty in the facts of the present case.

In *Cbetan Dass v. Kamala Devi*, AIR 2001 SC 1709, the Supreme Court held that it would not be proper to apply the concept irretrievable breakdown of marriage as a routine formula or means for grant of relief of divorce. The Court felt that the other facts and circumstances are to be considered so as to apply the aspect of breakdown of marriage.

In *Savitri Pandey v. Prem Chandra Pandey*, AIR 2002 SC 591, the Supreme Court held that the marriages cannot be dissolved only on averments made in the petition and as the marriage between them has broken down, no useful purpose will be served to put the said relationship alive.

In *Geeta Mallick v. Brojo Gopal Mullick*, AIR 2003 Cal. 321, the Hon'ble High Court held that marriage between the spouses cannot be dissolved on the ground of irretrievable breakdown of marriage in the absence of one or more grounds as envisaged in Section 13(1) of Hindu Marriage Act.

In *Harish Kumar Ledwani v. Anita Ledwani*, AIR 2003 MP 197, the Hon'ble High Court held that the divorce cannot be granted on the ground of irretrievable breakdown of marriage alone in a situation where none of the grounds for divorce under the Act are made out.

In *Popuri Sunita Laxmi v. Poppuri Srinivas*, AIR 2004 AP 187, the Hon'ble High Court held that mere living separately for long and that there has been irretrievable breakdown of marriage in itself cannot be recokened as ground for grant of divorce.

In *Dilip Kumar Karmakar v. Biju Rani Kamarkar*, 2004 (4) Civil. LJ 339 Cal., the Hon'ble High Court held that the concept of irretrievable breakdown is not a new or separate ground outside the purview of Section 13 of the Hindu Marriage Act. It is really a facet or an extension of the term mental cruelty. It was further held if none of the spouses really want to live together, the Court can grant divorce. In this case, it was made clear that breakdown of marriage is not a ground of divorce, and that Court cannot grant on any ground other than what has been laid under Section 13(1) of the Hindu Marriage Act.

In *A. Jayachandra v. Aneel Kumar*, 2005 AIR SCW 163, the Supreme Court held that to grant complete justice, Court can grant divorce notwithstanding the fact that irretrievable breakdown of marriage is not one of the statutory grounds on which Court can direct dissolution of marriage.

In *Shankar v. Puspita*, AIR 2005 Jhar. 92, the Hon'ble High Court in keeping with the

fact that husband and wife were living separately from each other for 19 years and with there being no settlement among them granted divorce notwithstanding the absence of any specific provision governing the concept of irretrievable breakdown of marriage.

In *Naveen Kohli v. Neelu Kohli*, AIR 2006 SC 1675, the Supreme Court in categorical terms expressed the need for amendment of Hindu Marriage Act to incorporate "irretrievable breakdown of marriage" as a ground for grant of divorce. This case was mainly filed on the ground of cruelty. The trial Court granted the relief but the High Court refused to grant divorce on the ground that the averments as against the wife as stated therein do not fall within the parameters of cruelty. The Supreme Court however granted the relief of divorce setting aside the judgment of High Court. This judgment is a historic one and was taken as an important reference in the 217th Report of the Law Commission of India.

In *Vinita Saxena v. Pankaj Pandit*, JT 2006 (3) 567, the Supreme Court in keeping with the factum of long separated lives of the spouses for 13 years, and with marriage between the parties not consummated in keeping with the act of one party and for such various reasons granted divorce. This judgment of the Supreme Court overruled the verdicts of both the High Court and that of the Trial Court.

In *Durga Devi v. Narsing Dass*, AIR 2006 (NOC) 840 Raj., the Hon'ble Court after considering the fact that petition for dissolution of marriage were filed on grounds of cruelty and desertion and in keeping with the fact that husband and wife were living separately for almost 30 years granted divorce.

In *Rita v. Trilokesh*, AIR 2007 Gau. 122, the Hon'ble High Court taking due note of the various facts and among them finding

that no consummation of marriage took place and the parties were living separately for a period of 16 years with no chance for reconciliation granted divorce.

As a matter of record, the Supreme Court in the case of *Sanghamitra Ghosh v. Kajal Kumar Ghosh*, 2007 (2) SCC 220, did referred the extracts of the 71st Report of the Law Commission of India as well as referred to the judgment pronounced in the case of *Ashok Hurra v. Rupa Bipin Zavan*, 1997 (4) SCC 226. This judgment emphasized the need for legislation of the concept of irretrievable breakdown of marriage.

In *Asha Gupta v. Rajiv Kumar Gupta* AIR 2005 P&H, the Hon'ble Court held that mere living apart by parties separately for eleven years cannot be said that marriage relationship has irretrievably broken down. Divorce granted on the ground of irretrievable breakdown of marriage was set aside, however the divorce was granted on the ground of cruelty.

In *Samar Ghosh v. Jaya Ghosh*, 2007 (4) SCC 511, the Supreme Court has referred to the 71st Report of the Law Commission of India and did extract certain relevant paras thereto of the said Report also. The Supreme Court held that when the circumstances of long separation exist, and if found that breakdown is irreparable, then divorce should not be withheld.

In *Rajesh Gupta v. Prabha Gupta*, AIR 2007 (NOC) 834 (MP), the Hon'ble High Court in keeping with the facts that the petition filed for divorce as filed on grounds of cruelty and desertion having found that wife left the house on account of cruel treatment and that the husband did not make any efforts to bring his wife back exhibiting that husband deserted his wife, taking the criteria of lapse of time and separation for long period of time granted divorce irrespective of the fact that such a ground was not prohibited in the statute.

In *Sitaram Chauhan v. Smt Ramesh Chauhan*, AIR 2007 (NOC) 1259 (P&H), the Hon'ble High Court held that mere separate residence irrespective of its period cannot give rise to an inference that one spouse intends to put an end the marital ties. The cogent circumstances and facts of each case differ. In the instant case, as no material was placed to infer that wife intended to sever matrimonial tie permanently, it was held that husband was not entitled to decree for divorce.

In *Muni Devi v. Kameshwar Roy*, AIR 2007 (NOC) 2480 Gauhati, the Hon'ble High Court held that irretrievable breakdown by itself cannot be ground for grant of divorce. The children could not simply be orphanised on the basis of scanty material as adduced before the Court.

In *Pradeep Kumar Nanda v. Sanghamitra Binakar*, AIR 2007 Orissa 60, the Hon'ble Court held in proper and suitable cases, though irretrievable breakdown has not been prescribed as a ground for divorce in Section 13 of the Hindu Marriage Act, the same can be considered to be ground for grant of divorce by application of Articles 141 and 142 of the Constitution of India.

In *Harjeet Kaur v. Bhupinder Singh*, AIR 2007 HP 96, the Hon'ble Court considering the fact that the wife was living with her parents against the wishes of husband ignoring the efforts of the husband's attempts to bring her back several times, with no reasonable cause shown by the wife for living separately, the Court held that husband is entitled for divorce on ground of desertion.

In *Arpita Chakraborty v. Dr. Amit Chakraborty*, AIR 2008 (NOC) 2379 Cal., the Hon'ble High Court held that mere proof of indication of breakdown of marriage relations does not suffice for grant of divorce unless the ingredients of Section 13 of the Act are satisfied and more so when a petition



under Section 9 of the Act for restitution of conjugal rights was filed by the other spouse.

In *Varalaxmi Charka v. Sathyanarayana Charka*, AIR 2008 AP 134, the Hon'ble High Court held that in keeping with the fact that the husband was a citizen of USA and the wife being a patient of Asthama not able to live with her husband she requiring frequent medical attention and were living separately at places which are apart, the marriage was held to be irretrievably broken down and divorce was granted.

Finally after a series of judicial pronouncements since the year 1971, the Law Commission of India by act of another arrow from its bow under the Chairmanship of His Lordship *A.R. Lakshmanan, J.*, presented to the Government in March 2009 its report and recommended the need to provide "Irretrievable breakdown" as another ground for divorce. In keeping continuity and recommendations of the said report is the present Marriage Laws Amendment Bill 2010, having its original source from the English Matrimonial Causes Act 1973.

The now proposed amendment through Marriage Laws Amendment Bill 2010 by inserting Section 13C and its incidental provisos in the Hindu Marriage Act is an act of providing a judicial approach to legalize the already decreasing values of the sacred marital tie. The proposed Section 13C provides for seeking divorce on ground of irretrievable breakdown of marriage.

The concept of IRRETIEVABLE BREAKDOWN is the result of English Legal Law's influence on our statutes and British culture to our Indian society at large. It is clear that the proposed Section 13C seeking divorce under the ground of irretrievable breakdown and its incidental proposed provisos will be more often used particularly by youth as a mode of easy channel or route for putting an end to the marital relations,

degrading the moral and ethical values of the concept of sacred marriage. Marriage is a relationship bond for life. The freedom of choice to depart with the marital ties as is likely to be provided with the advent of this new concept will disturb the traditional and orthodox values among the Hindu community. There will be no sanctity to the ceremonies of marriage. The proposed amendment introducing of irretrievable breakdown of marriage will eliminate any room for amicable settlement among the spouses, and in all probability is likely to be misused by younger generation at large. A thought that a misunderstanding between couple could grant them a divorce is alarming and disturbing. In my considered opinion, if the proposed Section 13C and its incidental provisos as spelled in the Marriage Laws Amendment Bill 2010 takes the final shape in legislation, there is every likelihood of increase in number of matrimonial litigations in the near future. It can be said that the new proposed Section 13C is a gateway for increase in litigations towards legalized divorces.

The now proposed Section 3C of the Act has opened a Pandora box for new litigation with a free hand leverage to the Advocates, jurists and the Hon'ble Judges to interpret the proposed provision of Section 13C and the incidental provisos to their choice expanding the nature and origin of the scope of concept "Irretrievable breakdown."

The now proposed Section 13C to grant divorce on ground of irretrievable breakdown of marriage is nothing but an act of OLD WINE IN NEW BOTTLE. The already existing provision of Section 13(1) of the Hindu Marriage Act is comprehensive and exhaustive. A careful and proper study would indicate that the Doctrine of Irretrievable Breakdown of Marriage is not a new or independent ground outside the scope of the already existing provisos of Section 13(1) of the Hindu Marriage Act. The concept of

irretrievable breakdown of marriage is a facet or an extension of concepts DESERTION and CRUELTY (in particular Mental Cruelty). The several judicial pronouncements as illustrated hereinabove indicate that though the principle "Irretrievable breakdown of marriage" has not been part of the statute so far, yet its ingredients have already been interpreted and compared with the existing concepts of "Desertion" and "Cruelty" and the new principle of irretrievable breakdown of marriage comes within the ambit of existing provisos of Hindu Marriage Act.

The wordings of the proposed insertion of Section 13C to the Hindu Marriage Act appears to be an act in isolation and in clash to the already existing provisions of Section 13(1)(ia), 13(ii) and 13(iii) of the Hindu Marriage Act. The proposed Section 13C on a bare reading gives an impression that mere living apart by the spouses though under a same roof for a period of three years even without presence or requirement of the ingredients of Section 13(1)(ia), 13(ii) and 13(iii) qualifies them for seeking divorce under irretrievable breakdown. It would have been apt and prudent for the legislative wizards to have provided the explanation indicating the

nature and its scope of the words constituting 'IRRETRIEVABLE BREAKDOWN' and "LIVING APART" with relevant explanatory notes narrating the circumstances under which the period of living apart for three years constitute or qualify to consider marriage as irretrievably broken down. The normal practical prudence indicate that divorce under the proposed Section 13C cannot be granted without the satisfaction of the ingredients as provided in the existing provisions of Section 13(1)(ia), 13(ii) and 13(iii) of the Hindu Marriage Act.

Generally legal legislations with proposed amendments are to take birth to provide better and new clarifications to avoid ambiguity and curb pending litigations to serve the interests of humanity and justice at large. In my considered view with due respects and regards to all the legal luminaries, the proposed Marriage Laws Amendment Bill 2010 with its proposal to insert under Section 13C the concept of "Irretrievable Breakdown" as ground to grant divorce with its incidental proposed provisos requires reconsideration for its introduction or insertion to the Hindu Marriage Act will serve no new purpose to resolve the marital litigations relating to divorces in India.

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## ROLE OF JUDICIARY IN PROTECTION OF CHILD LABOUR IN INDIA

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### ***Introduction :***

Children are blooming flowers of the garden of the society and valuable assets of the nation. It is therefore our duty to protect these tender flowers from damaging effects of excess exposure. Unless tender plants are properly nourished, it has little chance to go

into a strong and useful tree. The society must be given first priority to the welfare of the children.

In the words of Mr. Justice *Subba Rao* "Social Justice must begin with children. Unless tender plant is properly tended and nourished, it has little chance to grow in to a strong and