

## **“An Appraisal of Adultery under the Personal Laws”**

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Marriage was considered as a sacrament and not a contract under the old Hindu Law. Divorce was an unknown to Hindu textual law. Due to the advancement in the society several statutes were passed changing the ancient law of marriage. The change brought about by the Marriage laws (Amendment) Act, 1976 is a revolutionary in character and it has made the law of divorce in India more speedy and liberal.

Adultery is a serious matrimonial lapse and even the most liberal societies view this as extremely damaging to a harmonious marital relationship. Under all the personal law statutes in India, adultery of a spouse entitles the other to seek divorce or judicial separation.<sup>1</sup>

It would be pertinent to point out here that during the past few years, law on the point has undergone an extensive change. So far as the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 are concerned, prior to 1976, there were two categories of adultery entitling the petitioner to two different reliefs—a lesser relief of judicial separation, the petitioner had to prove just a single act of adultery of the respondent, but since divorce was a more serious matter, the immorality on the part of the respondent was required to be more serious and hence only if the petitioner could prove that other spouse was "living in adultery" could he or she get a decree of divorce. It, however, came to be realized that even a single lapse could be enough to shatter mutual faith and regard between the spouses and hence court should not be restrained from giving a decree of divorce where the petitioner so desires. Accordingly, in 1976, the provision of section 13 of the Hindu Marriage Act, 1955, and section 27, of the Special Marriage Act, 1954 were amended by the Marriage Laws (Amendment) Act, and now a single act of voluntary sexual intercourse by a

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<sup>1</sup> Section 13(1)(i) and section 10(1) of the HMA, 1955; Section 27(1)(a) and section 23 of the Special Marriage Act, 1954; Section 32(d) and section 34 of the Parsi Marriage and Divorce Act, 1936; Section 10(1)(i) and section 22 of the Divorce Act, 2001; Section 2 (viii) (b) of the Dissolution of Muslim Marriage Act, 1939.

party with any person other than his/her spouse is sufficient to prove adultery<sup>2</sup>.

The new provision does not use the word adultery, though what it implies is, in fact, adultery.

The Divorce Act, 1869, which was amended in 2001, has, however, changed the entire law. On proof that the 'respondent has committed adultery', either the Christian husband or the wife may now file a suit for dissolution of the marriage or for judicial separation. Also, the alleged adulterer or adulteress has to be made a co-respondent, unless the petitioner has sought waiver from the court on grounds specified in the Act<sup>3</sup>, viz, the respondent is leading an immoral life and the petitioner does not know who the co-respondent is; the name of the co-respondent is unknown; or the alleged adulterous is dead. The amended Act has also deleted section 34, which entitled the husband to claim damages from the adulterer. The significant change to remove discrimination towards the Christian women to provide the ground of adultery as simplicitor for the decree of divorce under the amended law, which came into enforcement with effect from 24<sup>th</sup> September 2001. Under section 13 (1) (i), it is a mandatory that the act of sexual intercourse should occur after the solemnization of marriage and during the subsistence of marriage. Despite the fact, the wife had delivered a child within the six months of her marriage, this incident by itself could not be brought within the ambit of section 13 (1) (i) Of the Hindu Marriage Act<sup>4</sup>.

### **Judicial Approach towards for proving the Evidence of Adultery**

The courts need to exercise great caution while deciding cases which contain flippant allegation against the moral character of the women by their husband. In

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<sup>2</sup> Anita v. A.K. Rathore (2000) I HLR 588 (MP).

<sup>3</sup> Section 11 of the Divorce Act, 1869, Section 11 Prior to amendment there was no provision for making the adulteress a co-respondent.

<sup>4</sup> Arokia Rao Morias v. Mabai Bibai Rani Morias, II (2007) DMC 209 Mad., where it was held that incident of adultery prior to marriage is not a ground of divorce.

Meera v. Vijay Shanker Talchidia <sup>5</sup> the trial court had awarded a decree of divorce to the husband on the ground of adultery and cruelty. In appeal, the Rajasthan High court set aside the decree and commented:

The statement of the husband that he saw his wife sitting with a young boy who was indulging in undesirable and unjustified activities did not establish that the wife had any sexual relationship with that boy. It was also held that consuming three or four Crocin tablets is an attempt to commit suicide, did not amount to cruelty to the husband for granting him a decree of divorce.

In Rekhabei v. Gangaram,<sup>6</sup> the trial court had granted a decree of divorce to the husband on the ground of the wife's adultery. The M.P. High Court set aside the decree on the ground that the parties had lived happily together for about 8-10 years of marriage and had four children. The court commented there was no examination of witnesses of the locality and no clinching evidence. It is a case of oath against oath. From the statements of the wife it is clear that the charge of the adultery against her has not been proved. The trial court erred in awarding a decree of divorce to her husband.

In Madhu v. Mukesh Naiyer<sup>7</sup>, while setting aside the decree of divorce awarded by the family court at Jaipur, the Rajasthan High Court held that the evidence led by the husband was unworthy of credence. The Court commented that it is highly unlikely that a woman, who sacrificed her youthful 24 years and lived as a 'pativrata' would suddenly turn towards infidelity. The charge of adultery was levelled against a respectable woman, a mother of three children, implicating her maternal uncle and brother-in-law. The court commented that petty quibbles, trifling differences and quarrels that happen in day-to-day married life of spouses, do not amount to cruelty. Despite the quarrelsome conduct of the wife, the husband tolerated her and both led a normal sexual life as a result of which the wife gave birth to three children. The husband failed to explain circumstances in which he

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<sup>5</sup> II (1994) DMC 15 Raj.

<sup>6</sup> II (2004) DMC 503 MP.

<sup>7</sup> II (2007) DMC 726 Raj.

came to lead a normal sexual life with his wife even after acts of alleged adultery and cruelty. The court further commented; “despite all odds, the wife did not file even a single criminal complaint against the husband. On the contrary she devoted her life to serve her deaf, dumb and handicapped daughter. She still wants to live with her husband. The attention of the husband towards his disabled daughter is also required. In view of this, the marital ties cannot be snapped. The High Court also commented that the approach of the family court was too technical and hypersensitive.

If the evidence is untrust worthy, the same will be disbelieved by the court. For instance, in *GurBalwinder Singh v. Baljit Kaur*<sup>8</sup>, the husband alleged that he had witnessed his wife indulging in adultery but was not able to produce any evidence to corroborate it. Hence, his petition was dismissed. But in *Rashmi v. Vijay Singh Negi*<sup>9</sup>, the two sons deposed regarding their mother’s adultery, including the son who living with the mother. Therefore, it was held that the husband was successful in proving adultery.

If the husband is able to prove that he had no access to the wife at the time when the child was conceived, it will be conclusive proof of adultery. Though there is a presumption of paternity under section 112 of the Indian Evidence Act, 1872, it is a rebuttable and if the husband is able to make out a prima facie case of non-access, the court may grant permission for DNA testing to disprove paternity<sup>10</sup>.

In *Jyothi Ammal v. K.Anjan*<sup>11</sup>, the husband’s plea for adultery was uphold on the basis of the report of DNA test excluded the husband as the father of the child and he was awarded a decree of divorce on the ground of adultery.

Since it is a difficult to prove adultery through direct evidence in matrimonial cases, the court usually rely on circumstantial evidence based on the theory of

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<sup>8</sup> I (2005) DMC 595. P. & H.

<sup>9</sup> II (2007) DMC 559. Utt.

<sup>10</sup> Flavia Agnes, *Family Law Vol. II Marriage, Divorce and Matrimonial Litigation*, 2011, p 129

<sup>11</sup> I (2007) DMC.576. Mad.

preponderance of possibilities. Evidence of cohabitation, evidence of nights spent in hotels through hotel registers, photographs of physical intimacy, evidence of visit to brothels, contracting venereal diseases, confession by concerned parties, the birth of child when the husband had no access to the wife at the time of conception, reports of DNA tests of disputed paternity, etc., have been used as evidence to prove adultery.

### **Essential for the applicability of section 497 of IPC**

Sexual intercourse with an unmarried woman, prostitute or widow is not adultery.<sup>12</sup> So constitute an offence of adultery, the following ingredients must be established.

- (1) Sexual intercourse must be committed with wife of another man;
- (2) The person must have knowledge or belief that woman is married and is the wife of another person.
- (3) Such sexual intercourse must be without the consent or connivance of the husband; and
- (4) Such sexual intercourse must not amount to rape.

### **Rape is Not Adultery**

Since 'sexual intercourse' contemplated by the matrimonial offence of adultery refers to consensual intercourse outside the wedlock, intercourse with the former or later wife of a polygamous marriage is not adultery. The mere attempt at sexual intercourse does not qualify for adultery. Further the courts are emphatic on the point that rape is not adultery. A husband cannot obtain divorce on the ground of adultery merely because the wife was victim of rape as the following case reveals:

In *Rajesh Kumar Singh v. Rekha Singh*<sup>13</sup> the petition filed by the husband for the divorce on the ground of the wife's adultery was dismissed by the trial court. In

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<sup>12</sup> *Liberty Cinema v. Commissioner, Corporation Calcutta*, AIR 1959 Cal 45. K.D. Gour, Text Book on Indian Penal Code, 2009 pp. 799-803

<sup>13</sup> AIR 2005 All 16.

appeal, while affirming the order of the trial court, the Allahabad High Court held that the allegations against the wife are frivolous. The court clarified that the wife did not have any illicit relationship and that on the contrary, she was gang raped.

"There is a fundamental difference between the two: one is with the consent and the other is without consent" the court clarified. Regarding her refusal to disclose this fact to the husband, the court further commented: "Rape leaves physical as well as emotional scars on the victim. Her physical wounds may have healed but the emotional scars, though less visible, are more difficult to treat. The wife was not disclosing the entire picture, as it was natural for any woman to be hesitant to talk about such a gruesome some crime against her.

Similarly, if the party lacks mental capacity to give consent on the account of being minor or a person of unsound mind, the presumption is that intercourse was not voluntary. Hence, the act cannot used as a ground for divorce.

In a petition for adultery, it is a mandatory to add the adulterer as a co-respondent. In *Soya v. A.K. Mohnan*,<sup>14</sup> the husband made allegation of adultery against his wife with his own brother but did not implead him as a co-respondent. In an appeal filed by the wife against the order of the trial court, the Kerala High Court set aside the decree of divorce on the ground that exemption granted to the husband against impleading his own brother as co-respondent in the proceedings was incorrect and hence the allegation of adultery was not proven.

### **Pre-marriage Pregnancy**

To be relied upon as a ground for divorce, the act of adultery essentially has to be after the marriage has been solemnized. Pre-marital pregnancy does not constitute adultery under the provisions of the matrimonial statutes except the Parsi Marriage and Divorce Act, 1936<sup>15</sup> and cannot be invoked as a ground for divorce. However,

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<sup>14</sup> 11 (2006) DMC 298 Ker.

<sup>15</sup> Section 32 (C) of the Parsi Marriage and Divorce Act 1936, that the defendant was at the time of marriage was pregnant by some person other than the plaintiff; provided the divorce shall not be granted on this ground unless ; (1) the plaintiff was at the time of marriage was ignorant of the fact alleged , (2) the suit has been filed within two

pre-marriage pregnancy is a ground for annulment of marriage. But this ground has to be strictly proved as per the stipulation under section 12(I)(d) of the HMA 1955.

In *Sontosh Devi @ Maduri Devi v. Sadanand Das Goswami*<sup>16</sup> the husband filed the petition on the ground of adultery and alleged that the wife was pregnant at the time of marriage and gave birth to a female child within six months of the marriage. But there was no averment that after the said recovery, the husband had no marital intercourse with his wife. Hence, it was held that he was not entitled to any relief under section 12(I)(d) of the HMA, 1955. He also did not specify any incident of adultery after marriage. It was held that in order to avail of the ground of adultery for the dissolution of marriage under Section 13(1) (i), it is a mandatory that the act of sexual intercourse should occur after the solemnization of marriage and during the subsistence of marriage. Despite the fact the wife had delivered the child within six months of her marriage, this incident by itself could not be brought within the ambit of section 13(1)(i) of HMA.

### **Paternalistic Approach to the offence of Adultery**

It is relevant to point out here that the mandate for enacting special legislation in favour of women has proved to be beneficial, a protectionist approach cannot always be construed as favoring women. This becomes evidence when we examine various cases, wherein the penal provisions regarding adultery under section 497 of IPC<sup>17</sup> and section 198(2) of the Code of Criminal Procedure, 1973,<sup>18</sup> the Apex

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years of the date of marriage, and (3) marital intercourse has not taken place after the plaintiff came to know of the fact.

<sup>16</sup> II (2004) DMC 301 Jha.

<sup>17</sup> Section 497 (IPC) Adultery: "whoever has sexual intercourse with a person who is and whom he knows and has reasons to believe to be the wife of another man, without the consent and connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punishable with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case wife shall not be punished as an abettor.

<sup>18</sup> Section 198 (2) (Cr PC) : Prosecution for offences against marriage ; ' for the purpose of Sub Section (1), No person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 497 or Section 498 of the said code; provided that in the absence of the husband, some persons who had

Court used a paternalist argument to defend these legal provisions which only serve to undermine women's role as equal partners in marriage. The arguments used for upholding the constitutional validity of these provisions, which are not just discriminatory against men but are sexist and anti-women in their intent and reflect archaic Victorian values, are rather absurd. The Supreme Court invoked the constitutional mandate of positive discrimination under Article 15(3) while defending these sexist provisions. The challenges to these provisions have come from the perspective punishment for the woman involved, right of the adulterer's wife to prosecute her husband etc., as the following cases illustrate.

In *Yousuf Abdul Aziz v. State of Bombay*<sup>19</sup>, the validity of the section 497 of the IPC, which punishes only the man in the offence of adultery and exempts women from punishment, was challenged as violative of Articles 14 and 15(1) of the Constitution. The petitioner contended that even the woman may be equally guilty, only the man was punished, which violates the right to equality on the ground of sex. A Constitutional Bench of the Supreme Court upheld the validity of the provisions of on the ground that the classification was not based on the ground of sex alone. The Court relied upon the mandate of Article 15(3) to uphold this provision. The position was made explicit when was ruled:

It was argued that Clause (3) should be confined to provisions which are beneficial to women and cannot be used to give them a license to commit and abet crimes. We are unable to read any such restriction into this clause; nor we able to agree that a provision which prohibits punishment is tantamount to a license to commit the offence of which punishment has been prohibited.

In *Sowmitri Vishnu V. Union of India*<sup>20</sup>, the validity of Section 497, IPC was challenged once again before three judge Bench of the Supreme Court on the ground that it recognizes only the husband of the adultress as an aggrieved party

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care of the woman on his behalf at the time when such offence was committed may , with the leave of the court, make a complaint on his behalf.

<sup>19</sup> AIR 1954 SC 321

<sup>20</sup> AIR 1985 SC 1618

but does not confer similar right upon the wife of the adulterer. It was contended that the provision is flagrant instance of gender discrimination and male chauvinism. Once again the Supreme Court decline to strike down the provision and held that it does not violate Article 14 and 15 of the Constitution and validated it on the ground that it is a protection awarded to the women under Article 15(3) of the Constitution. Subsequently, in yet another case, *Ravathi v. Union of India*,<sup>21</sup> the Supreme Court held that Section 198 (2) of the Criminal Procedure Code, 1973, which gives the husband of an adultress the right to prosecute the adulterer but does not award similar rights to the wife of the adulterer, is not discriminatory. Thus the Court was consistent in its apparent mandate to ‘protect’ women.

The Judgments by the Supreme Court are contrary to the recommendations made by the Law Commission, in its 1971 Report and recommended an amendment of the law to render it gender-neutral by extending its provisions to both men and women. The Malimath Committee Report recommended further changes and suggested:

The object of this Section (S. 497, IPC) is to preserve the sanctity of marriage. Society abhors marital infidelity. Therefore, there is no reason for not meting out similar treatment to the wife who has sexual intercourse with a man (other than her husband)<sup>22</sup>.

The provisions of IPC and CrPC are reflective of the value system then prevailing in England where marriages were deemed to be monogamous and indissoluble. Within this concept women were treated as the property of the husband. A man who violated the norms of the proprietorial ownership was equated with a man who commits theft and was punished. This notion is based on the 10 Commandments of the Biblical era, where the sixth and the ninth Commandment restrained men from indulging in sexual relationship with wife of one’s neighbour and even coveting her by prescribing, “Thou shall not covet yours neighbour’s wife”. It is interesting to note the provision does not recognize the role of the

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<sup>21</sup> AIR 1988 SC 835

<sup>22</sup> Malimath Committee Report, Committee on Reforms of Criminal Justice System, Govt. of India, Ministry of Home Affairs, at p. 190.

marriage woman as she was viewed only as a passive object or a mere chattel on the beyond the purview of this provision. Since women were mere chattels, the sanction against sex with a married woman could be applied only to the man who indulged in such an act, the wife of the adulterous man had no remedy against her own husband<sup>23</sup>.

In the modern day women have ceased to be the regarded as the property of their husbands and competent of leading an independent existence, matrimonial law in England has moved far from this archaic notion of sacramental and indissoluble marriages. A marriage can be dissolved at the behest of either of the parties by proving matrimonial faults or through mutual consent. Therefore, there is no reason to uphold this archaic provision in our Penal Code when it has been abandoned even by the English Law a long time ago.

While the Supreme Court decisions are problematic, the recommendations usher in the notion of equality as suggested by the Malimath Committee are equally problematic, granting married woman the right to file criminal complaint against her husband and the woman who had committed adultery with the husband or granting the husband the right to file a criminal complaint against his wife not serve any purpose as it would be contrary to the prevailing principles of matrimonial jurisprudence. Marriages are no longer treated as sacramental and indissoluble unions which need to be protected by providing for punishment as a deterrent to sex with married women. An act of adultery either by the wife or the husband can be addressed by filing the petition for divorce on this ground rather than resulting to penal provisions based on archaic principles. Archaic and sexist patriarchal notions cannot be validated or remedied by introducing an element of equality within them.

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<sup>23</sup> Flavia Agnes, Family Law, Vol. 1 (Family Laws and Constitutional Claims, 2011, p. 139).