
PAPER PRESENTATION

**Ch. Vivek Anand Srinivas,
Additional Senior Civil Judge,
Srikakulam.**

MAINTENANCE UNDER DIFFERENT LAWS:-

Obligation of a husband to maintain his wife arises out of the status of the marriage. Right to maintenance forms a part of the personal law. Under the Code of Criminal Procedure, 1973 (2 of 1974), right of maintenance extends not only to the wife and dependent children, but also to indigent parents and divorced wives. Claim of the wife, etc., however, depends on the husband having sufficient means. Claim of maintenance for all dependent persons is based on the income of the person liable to pay maintenance. Inclusion of the right of maintenance under the Code of Criminal Procedure has the great advantage of making the remedy both speedy and cheap. However, divorced wives who have received money payable under the customary personal law are not entitled to maintenance claims under the Code of Criminal Procedure.

Under Hindu Law, the wife has an absolute right to claim maintenance from her husband. But she loses her right if she deviates from the path of chastity. Her right to maintenance is codified in the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956). In assessing the amount of maintenance, the court takes into account various factors like position and liabilities of the husband. It also judges whether the wife is justified in living away from husband. Justifiable reasons are spelt out in the Act. Maintenance pendente lite (pending the suit) and even expenses of a matrimonial suit will be borne by either, husband or wife, if the either spouse has no independent income for his or her support. The same principle will govern payment of permanent maintenance. Under the Muslim Law, the Muslim Women (Protection of Rights on Divorce) Act, 1986 protects rights of Muslim women who have been divorced by or have obtained divorce from their husbands and provides for matters connected therewith or incidental thereto.

This Act inter alia provides that a divorced Muslim woman shall be entitled to (a) reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband; (b) where she herself maintains children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children; (c) an amount equal to the sum of mehr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to the Muslim Law and (d) all property given to her before or at the time of marriage or after her marriage by her relatives or friends or by husband or any relatives of the husband or his friends. In addition, the Act also provides that where a divorced Muslim woman is unable to maintain herself after the period of iddat the magistrate shall order directing such of her relatives as would be entitled to inherit her property on her death according to the Muslim Law, and to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of such relatives, and such maintenance shall be payable by such relatives in proportion to the size of their inheritance of her property and at such periods as he may specify in his order.

Where such divorced woman has children, the Magistrate shall order only such children to pay

maintenance to her, and in the event of any such children being unable to pay such maintenance, the magistrate shall order parents of such divorced woman to pay maintenance to her. In the absence of such relatives or where such relatives are not in a position to maintain her, the magistrate may direct State Wakf Board established under Section 13 of the Wakf Act, 1995 functioning in the area in which the woman resides, to pay such maintenance as determined by him.

The Parsi Marriage and Divorce Act, 1936 recognizes the right of wife to maintenance-both alimony pendente lite and permanent alimony. The maximum amount that can be decreed by court as alimony during the time a matrimonial suit is pending in court, is one-fifth of the husband's net income. In fixing the quantum as permanent maintenance, the court will determine what is just, bearing in mind the ability of husband to pay, wife's own assets and conduct of the parties. The order will remain in force as long as wife remains chaste and unmarried.

The Indian Divorce Act, 1869 inter alia governs maintenance rights of a Christian wife. The provisions are the same as those under the Parsi law and the same considerations are applied in granting maintenance, both alimony pendente lite and permanent maintenance.

Maintenance under Hindu law:

Maintenance is a right to get necessities which are reasonable from another. It has been held in various cases that maintenance includes not only food, clothes and residence, but also the things necessary for the comfort and status in which the person entitled is reasonably expected to live. Right to maintenance is not a transferable right.

Maintenance without divorce

The Hindu Adoptions and Maintenance Act, 1956. Maintenance, in other words, is right to livelihood when one is incapable of sustaining oneself. Hindu law, one of the most ancient systems of law, recognises right of any dependent person including wife, children, aged parents and widowed daughter or daughter in law to maintenance. The Hindu Adoptions and Maintenance Act, 1956, provides for this right.

Maintenance as main relief: for wife

The relief of maintenance is considered an ancillary relief and is available only upon filing for the main relief like divorce, restitution of conjugal rights or judicial separation etc. Further, under matrimonial laws if the husband is ready to cohabit with the wife, generally, the claim of wife is defeated. However, the right of a married woman to reside separately and claim maintenance, even if she is not seeking divorce or any other major matrimonial relief has been recognised in Hindu law alone. A Hindu wife is entitled to reside separately from her husband without forfeiting her right of maintenance under the Hindu Adoptions and Maintenance Act, 1956. The Act envisages certain situations in which it may become impossible for a wife to continue to reside and cohabit with the husband but she may not want to break the matrimonial tie for various reasons ranging from growing children to social stigma. Thus, in order to realise her claim, the Hindu wife must prove that one of the situations (in legal parlance 'grounds') as stated in the Act, exists.

Grounds for award of maintenance

Only upon proving that at least one of the grounds mentioned under the Act, exists in the favor of the wife, maintenance is granted. These grounds are as follows:

- a. The husband has deserted her or has willfully neglected her;

- b. The husband has treated her with cruelty;
- c. The husband is suffering from virulent form of leprosy/venereal diseases or any other infectious disease;
- d. The husband has any other wife living;
- e. The husband keeps the concubine in the same house as the wife resides or he habitually resides with the concubine elsewhere;
- f. The husband has ceased to a Hindu by conversion to any other religion;
- g. Any other cause justifying her separate living;

Bar to relief

Even if one of these grounds exists in favour of the wife, she will not be entitled to relief if she has indulged in adulterous relationship or has converted herself into any other religion thereby ceasing to be a Hindu. It is also important to note here that in order to be entitled for the relief, the marriage must be a valid marriage. In other words, if the marriage is illegal then the matrimonial relationship between the husband and wife is non-existent and therefore no right of maintenance accrues to wife. However, thanks to judicial activism, in particular cases the presumption of marriage is given more weightage and the bars to maintenance are removed.

Other dependents who can claim maintenance

Apart from the relationship of husband and wife other relations in which there is economic dependency are also considered to be entitled to maintenance by the Hindu Adoptions and Maintenance Act, 1956. Accordingly a widowed daughter-in-law is entitled maintenance from her father-in-law to the extent of the share of her deceased husband in the said property. The minor children of a Hindu, whether legitimate or illegitimate, are entitled to claim maintenance from their parents. Similarly, the aged and infirm parents of a Hindu are entitled to claim maintenance from their children. The term parent here also includes an issueless stepmother.

Maintenance Under Muslim Law

Under the "Women (Protection Of- Rights On Divorce) Act, 1986" spells out objective of the Act as "the protection of the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands." The Act makes provision for matters connected therewith or incidental thereto. It is apparent that the Act nowhere stipulates that any of the rights available to the Muslim women at the time of the enactment of the Act, has been abrogated, taken away or abridged. The Act lays down under various sections that distinctively lay out the criterion for women to be granted maintenance. Section (a) of the said Act says that divorced woman is entitled to have a reasonable and fair provision and maintenance from her former husband, and the husband must do so within the period of idda and his obligation is not confined to the period of idda.

it further provides that a woman , if not granted maintenance can approach the Wakf board for grant as under section (b)which states that If she fails to get maintenance from her husband, she can claim it from relatives failing which, from the Waqf Board. An application of divorced wife under Section 3(2) can be disposed of under the provisions of Sections 125 to 128, Cr. P.c. if the parties so desire. There is no provision in the Act which nullifies orders passed under section 125, Cr. P.c. The Act also does not take away any vested right of the Muslim woman.

All obligations of maintenance however end with her remarriage and no claims for maintenance can be entertained afterwards. The Act thus secures to a divorced Muslim woman sufficient means of livelihood so that she is not thrown on the street without a roof over her head and without any means of sustaining herself.

Protection to Divorced Women Sub-section (1) of Section 3 lays down that a divorced Muslim

woman **is** **entitled** **to:**
 (a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;
 (b) where she herself maintains the children born to her before or after the divorce.

Maintenance Under Christian Law

A Christian woman can claim maintenance from her spouse through criminal proceeding or/and civil proceeding. Interested parties may pursue both criminal and civil proceedings, simultaneously, as there is no legal bar to it. In criminal proceedings, the religion of the parties does not matter at all, unlike in civil proceedings.

If a divorced Christian wife cannot support her in the post divorce period she need not worry as a remedy is in store for her in law. Under S.37 of the Indian Divorce Act, 1869, she can apply for alimony/ maintenance in a civil court or High Court and, husband will be liable to pay her alimony such sum, as the court may order, till her lifetime. The Indian Divorce Act, 1869 which is only applicable to those persons who practice the Christianity religion inter alia governs maintenance rights of a Christian wife. The provisions are the same as those under the Parsi law and the same considerations are applied in granting maintenance, both alimony pendente lite and permanent maintenance. The provisions of THE INDIAN DIVORCE ACT, 1869 are produced herein covered under part IX -s.36-s.38

IX-Alimony

S.36. Alimony pendente lite. -In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection the wife may present a petition for alimony pending the suit.

Such petition shall be served on the husband; and the Court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just:

Provided that alimony pending the suit shall in no case exceed one fifth of the husband's average net income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be.

37. Power to order permanent alimony -The High Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife, and the District judge may, if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife,

Order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties.

Power to order monthly or weekly payments. -In every such case, the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable: Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as

to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part as to the Court seems fit.

38. Court may direct payment of alimony to wife or to her trustee. -In all cases in which the Court makes any decree or order for alimony, it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court, and may impose any terms or restrictions which to the Court seem expedient, and may from time to time appoint a new trustee, if it appears to the Court expedient so to do.

Alternatively, as previously mentioned S.125 of Cr.P.C., 1973 is always there in the secular realm

Under the Code of Criminal Procedure, 1973 (2 of 1974), right of maintenance extends not only to the wife and dependent children, but also to indigent parents and divorced wives. Claim of the wife, etc., however, depends on the husband having sufficient means. Claim of maintenance for all dependent persons was limited to Rs 500 per month but now it has been increased and the magistrate can exercise his discretion in adjudging a reasonable amount. Inclusion of the right of maintenance under the Code of Criminal Procedure has the great advantage of making the remedy both speedy and cheap

Order For Maintenance of Wives, Children And Parents

S.125.Order for maintenance of wives, children and parents.- (1) If any person having sufficient means neglects or refuses to maintain-
(a) his wife, unable to maintain herself, or
(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is by reason of any physical or mental abnormality or injury unable to maintain itself, or
(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Explanation- For the purposes of this Chapter, -
(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875(9 of 1875) is deemed not to have attained his majority;
(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term

which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is a just ground for so doing.

Explanation- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order. The objective of this section as expressed by Krishna Iyer, J. is to **ameliorate the economic condition of neglected wives and discarded divorcees**

Proceedings under S.125 are not civil, but criminal proceedings of a summary nature. But these criminal proceedings are of a civil nature. Thus, clause (3) of S.126 which empowers that Court to make such orders may be just.

It should be kept in view that the provision relating to maintenance under any personal law is distinct and separate. There is no conflict between the two provisions. A person may sue for maintenance under s.125 of Cr.P.C. If a person has already obtained maintenance order under his or her personal law, the magistrate while fixing the amount of maintenance may take that into consideration while fixing the quantum of maintenance under the Code. But he cannot be ousted of his jurisdiction. The basis of the relief, under the concerned section is the refusal or neglect to maintain his wife, children, father or mother by a person who has sufficient means to maintain them. The criterion is not whether a person is actually having means, but if he is capable of earning he will be considered to have sufficient means. The burden of proof is on him to show that he has no sufficient means to maintain and to provide maintenance.

Maintenance Under Parsi Law:

Parsi can claim maintenance from the spouse through criminal proceedings or/ and civil proceedings. Interested parties may pursue both criminal and civil proceedings, simultaneously as there is no legal bar to it. In the criminal proceedings the religion of the parties doesn't matter at all unlike the civil proceedings. If the Husband refuses to pay maintenance, wife can inform the court that the Husband is refusing to pay maintenance even after the order of the court. The court can then sentence the Husband to imprisonment unless he agrees to pay. The Husband can be detained in the jail so long as he does not pay. The Parsi Marriage and Divorce Act, 1936 recognizes the right of wife to maintenance-both alimony pendente lite and permanent alimony. The maximum amount that can be decreed by court as alimony during the time a matrimonial suit is pending in court, is one-fifth of the husband's net income. In fixing the quantum as permanent maintenance, the court will determine what is just,

bearing in mind the ability of husband to pay, wife's own assets and conduct of the parties. The order will remain in force as long as wife remains chaste and unmarried.

S.40. Permanent alimony and maintenance

- (1) Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on an application made to it for the purpose by either the wife or the husband, order that the defendant shall pay to the plaintiff for her or his maintenance and support, such gross sum or such monthly or periodical sum, for a term not exceeding the life of the plaintiff as having regard to the defendant's own income and other property, if any, the income and other property of the plaintiff, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the movable or immovable property of the defendant.
- (2) The Court if it is satisfied that there is change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just.
- (3) The Court if it is satisfied that the party in whose favour, an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he had sexual intercourse with any woman outside wedlock, it may, at the instance of the other party, vary, modify or rescind any such order in such manner as the Court may deem just.

Divorce under FAULT AND NO FAULT THEORY

THE CONCEPT OF DIVORCE IN HINDU LAW :-

Divorce means dissolution of marriage by a competent court. This paper discusses divorce under Hindu Law. It analyses how the concept was non-existent under ancient law due to the sacramental nature of marriage, but was introduced under the Hindu Marriage Act, 1955.

According to Kautilya's Arthashastra, marriage might be dissolved by mutual consent in the case of the unapproved form of marriage. But, Manu does not believe in discontinuance of marriage. He declares "let mutual fidelity continue till death; this in brief may be understood to be the highest dharma of the husband and wife." However, this changed when divorce was introduced in the Hindu Marriage Act, 1955.

Historical Position :-

Hindu marriage is a holy sacrament in the life of a Hindu with other various sacraments, which are known as important for the complete life. Marriage is the valid way for male and female to live together and perform their duties and husband-wife are considered to be one in law. In 1869 the Indian **Divorce Act** was passed but it had remained inapplicable to the Hindus and after the Independence on 18th May 1955 The Hindu Marriage Act has been passed which governs all the matters and situations related to Hindu marriages.

Recent trends :-

The concept of divorce is one that has become increasingly pertinent to today's society. People are bombarded by statistics about its rise and facts about the decreasing stability of the nuclear family. Rates of divorce have increased so greatly over the past few decades that people have come to fear the institution of marriage. Causes of divorce and how it has evolved over the past three decades are issues that must be addressed in order to understand this problem. While being surrounded with marital separation, our society is left to ask many questions. What are some factors that lead to divorce? What consequences or negative effects on adults and children are created by this societal breakdown? What changes is divorce causing in the family structure of society? How have divorce and marriage rates changed over past 30 years? The dissolution of marriage is without a doubt a problem for today's society. It is probably one of the biggest problems. Children of divorce are often left with scars that do not heal. Often children from divorced families have a more difficult time establishing intimate relationships. The stress has even been shown to cause difficulty in performing school work for kids.

These groups of children will form the future families of U.S. Culture, and their trust in the age-old union between a man and a woman has changed in the past years to the point where divorce has become a commonplace element of society. Recognizing the changing rates of marriage and divorce are necessary in analyzing today's family structure. One cannot deny that these divorce rates show a relevant problem that must be researched in order to understand elements of family life today.

There are basically three theories for divorce-fault theory, mutual consent theory & irremediable breakdown of marriage theory.

No Fault Theory Of Divorce :-

Introduction :-

Under the Hindu Marriage Act, 1955 both the husband and the wife have been given a right to get their marriage dissolved by a decree of divorce on more than one grounds specifically enumerated in Section 13. Some of the grounds initially inserted were substituted and some more grounds came to be added. It was in the year 1964 that sub-section (1-A) was inserted by which either party to the marriage was also given a right to apply for dissolution of marriage by a decree of divorce either where there has been no resumption of cohabitation for the period specified therein, after the passing of the decree for judicial separation; or where there has been no restitution of conjugal rights for the period specified therein, after the passing of the decree for judicial separation; or where there has been no restitution of conjugal rights for the period specified therein after the passing of a decree for restitution of conjugal rights.

Under Muslim law divorce is known as Talaq and it is an Arabic word and it means 'to set free'. It is only in unavoidable circumstances that Talaq is permitted in Islam as a lawful method to bring marriage contract to end.

- 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 rationale 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 be obtained by the mutual consent of the parties to marriage under the marriage laws (Amendment) Act, 1976. According to section 13-B (I), 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 able 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.

Essentials of divorce by mutual consent :-

According to section 13-B, there are three essentials of divorce by mutual consent :-

- That both the parties have been living separately for a period of one year or more;
- That both the parties have not been able to live together;
- That both the parties have mutually agreed that their marriage should be dissolved.

It is an important to note that the consent obtained for divorce means divorce by mutual consent not obtained by force, fraud, it means consent must be free as per section 23(1) of this Act.

The Karnataka High court in *Krishna Murti Rao v. Kamalashi*, has said that on filling a petition jointly by the wife and husband the following points are to be proved for getting a decree under this section:-

- The parties to marriage are living separately for a period of one year or more;

- They could not live together;
- They have reached a compromise that they would dissolve the marriage; and
- That they have consented to divorce not under any force or fraud or undue influence.

A Court of competent jurisdiction there upon motion (application) being made by both the parties at any time after six months , but before eighteen months from the date of presentation of petition, will make proper enquiries as it may deem fit. It is incumbent upon the Court to verify that the statements made in the Petition are true. This requires the Court to verify, by examination on oath, whether they have consented to dissolve their marriage, as stated in Petition. After making necessary enquiry into the facts that marriage was solemnized, that the parties have not withdrawn the joint petition in the meantime, and that their consent continues, as stated in the Petition, on the day of examining the parties on oath. The Court has to satisfy itself about the genuineness of the averments in the petition and also to find out whether the consent was not obtained by force, fraud or undue influence. If the court is satisfied that the consent of parties was not obtained by force, fraud or undue influence and they have mutually agreed that the marriage should be dissolved, it must pass a decree of divorce. Thereupon, the Court will declare by decree that the marriages solemnized between the parties are dissolved. After presentation of the Petition for divorce by mutual consent, either of the parties may retract his or her consent at any time or at the time of examination on oath and thereupon the Petition shall be dismissed.

It therefore follows that the parties even when having stated in the Petition that they have decided to dissolve their marriage by mutual consent, have opportunity to retract or withdraw the consent at the time of examination on oath by the Court. The period of consideration of the petition only after six months of the presentation, imply that the parties are having opportunity to re think on the decision of divorce and law gives ample opportunity to save marriage. However, it is incumbent upon the parties to move before the Court before eighteen months from the date of presentation of the Petition for divorce. The Court is not bound to pass decree of divorce by mutual consent after a period of eighteen months of the date of presentation of the Petition. In *Smt. Sureshta Devi v. Om Prakash*, the Apex Court has held that 'living separately' for a period of one year should be immediately precede the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression 'living separately', connotes not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The meaning of the words in the Act that they 'have not been able to live together' indicates the concept of broken down marriage and it would not be possible to reconcile themselves. In *Ashok Hurra v. Rupa Bipin Zaveri*, the Supreme court held that Sureshta Devi's decision that "consent can be withdrawn at any time before decree is passed" are too wide and requires reconsideration. In this case, the petition for divorce by mutual consent was pending for a considerably long period and the wife had not withdrawn her consent within 18 months from the date of presentation of petition. Neither divorce decree could be passed nor reconciliation could be brought about between the spouses. Moreover, during the pendency of the divorce

proceedings, the husband had contracted another marriage and begot a child. Civil and criminal proceedings were also filed by the spouses against each other during pendency of the suit. In view of the above facts, the Supreme Court held: The cumulative effect of the various aspects in the case indisputably point out that the marriage is dead, both emotionally and practically and there is long lapse of years since the filing of the petition; existence of such a state of affairs warrants the exercise of the jurisdiction of this court under Article 142 of the constitution and grant a decree of divorce by mutual consent and dissolve the marriage between the parties. The Hon'ble Apex Court in *Darshan Gupta Vs. Radhika Gupta* reported in 2013 (4) ALT 43 SC comes through section 13 (1) of the Act and held that the grounds contained in the said provisions are based on the fault of the party against whom, dissolution of marriage is sought : that in Matrimonial Jurisprudence, such provisions are found on the "Matrimonial Offences Theory" or "Fault Theory" and that under this Jurisprudence principle, it is constituted that only on the ground of opponent's fault that a party may approach the court seeking annulment of his/her matrimonial alliance (Para 46 is relevant)

- Divorce by mutual consent under Muslim marriage :-

Under Muslim marriage (Nikah), a divorce may take place also by mutual consent of the husband and wife. Existence of any prior agreement or delegation of authority by the husband is not necessary for a divorce by common consent. It may take place any time whenever the husband and wife feel that it is now impossible for them to live with mutual love and affection as is desired by the God. A divorce by mutual consent of the parties is a peculiar feature of Muslim law.

There are two forms of divorce by mutual consent:

- Khula

Khula :-

The term 'Khula' literal meaning is considered as 'to take off the cloths'. In this law, it means divorce by the wife with the consent of her husband on payment of something to him. Before Islam the wife was no right to take any action for the dissolution of her marriage. But, when Islam came in to existence, she is permitted to ask her husband to release her after taking some compensation. Quran lays down about Kula in the following words : "If you fear that they (husband and wife) may not be able to keep within the limits of Allah, in that case it is a sin for either of them if the woman release herself by giving something (to the husband) In the leading case *Munshie Buzle raheem v. Luteefutoon Nissa*, the privy council describes a Khula form of divorce in the following words: "A divorce by Khula is a divorce with the consent and at the instance of the wife, in which she gives or agrees to give a consideration to husband for her release from the marriage tie. In the case the terms of the bargain are matters of arrangement between the husband and wife may, as the consideration, release her *dynmahr* (due dowr) and other rights, or make any other agreement for the benefit of the husband."

Essentials of a valid Khula :-

There are four essentials of a valid khula.

Competence of the parties :-

The husband and wife must be of sound mind and have attained the age of puberty (fifteen years). A minor or insane husband or wife cannot lawfully effect Kula. The guardian of a minor husband may not validly effect on his behalf.

Free consent :-

The offer and acceptance of Khula must be made with the free consent of the parties. But, under Hanafi Law a Khula under compulsion or in the state of intoxication is also valid. But, under all other schools including Shia law, without free consent of the parties, Khula is not valid.

Formalities :-

There is an offer by the wife to release her from the matrimonial tie. The offer is made to the husband. The offer for Khula must also be accepted by the husband. Until the offer is accepted, the divorce is not complete and it may be revoked by the wife. But, once the offer is accepted, the divorce is complete and becomes irrevocable. Offer or acceptance may be in oral or writing. The offer and acceptance must be made at one sitting i.e. at one place of meeting. Under sunni law there is no any witness necessary at the time of dissolution of marriage. But, in the case of Shia law there must be two competent witness available at the time of dissolution of marriage.

Consideration :-

For the release, the wife has to pay something to the husband as compensation. Any sum of money or property may be settled as consideration for Khula. There is no maximum or minimum limits as in the case of dower. But once this consideration has been settled, it cannot be increased.

Mubarat :-

Mubarat is also a divorce by mutual consent of the husband and wife. In Khula the wife alone is desirous of separation and makes offer, whereas in Mubarat the offer by both the parties are equally willing to dissolve the marriage. Therefore, in Mubarat the offer for separation may come either from husband or from wife to be accepted by the other. The essential feature of a divorce by Mubarat is willingness of both the parties to get rid of each other, therefore, it is not very relevant as to who takes the initiative. Another significant point in the mubarat form of divorce is that both the parties are equally interested in dissolution of marriage, no party is legally required to compensate the other by giving some consideration.

Legal consequences of Khula and mubarat :-

- The wife is required to observe Iddat;
- The wife is also entitled to be maintained by the husband during the period of Iddat;
- If the consideration in Khula is not the release of wife's dower, the wife is entitled to get her dowry.

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. Before obtaining divorce, the parties may first obtain a decree for judicial separation after which divorce may be obtained.

FAULT DIVORCE

Fault divorces are not as common, and in fact, most states no longer even recognize them. In the states that do recognize them, one of the spouses requests that a divorce be granted based on some fault of the other spouse. The most common grounds for granting a fault divorce are:

- Adultery
- Abandonment for a certain length of time
- Prison confinement
- A spouse is physically unable to have sexual intercourse
- Inflicting emotional or physical pain (cruelty)

No state requires the spouses seeking a fault divorce to live apart for a specific period of time, unlike a no fault divorce. Proving fault also often provides the spouse without fault with a larger portion of the [marital property](#) or support. These two characteristics make a fault divorce more attractive to some people.

Comparative Rectitude :-

When both spouses seek a fault divorce and can both prove the other spouse is at fault, the court decides which one is least at fault. That party will be granted the divorce. This is called "[comparative rectitude](#)." This doctrine was created to address the problem of courts granting neither party a divorce if they were both at fault. Courts have a public policy interest in not forcing two people to stay married if they don't want to be.

Defenses to a Fault Divorce :-

Unlike a no fault divorce, a spouse can object to a fault divorce by disproving or presenting a defense to the fault complained of. The following is a list of common fault divorce defenses:

- Connivance is an absolute defense to adultery. Connivance alleges that the complaining spouse agreed to and even participated in the infidelity. It makes sense that a couple who voluntarily participates in group sex cannot then go and complain of adultery. Similarly, a spouse who prostitutes the other or who facilitates the other's infidelity cannot thereafter claim adultery as grounds for divorce.
- Condonation is a claim that the other spouse knew about the complained of conduct, forgave such conduct, and resumed the marital relationship. This is typically used to defend an adultery accusation.
- Recrimination is when the complaining spouse is equally at fault or engaged in similar conduct. For example, if both spouses had affairs, neither one would be able to use adultery

as grounds for a fault divorce.

- Provocation is where one spouse is enticed by the other spouse to act in a certain way. For example, where one spouse abuses the other spouse, which forces that other spouse to leave the marital home, the abusive spouse would not be able to then use abandonment as grounds for divorce, since it was his or her abuse that caused the other spouse to leave.
- Collusion refers to an agreement between both of the spouses to fabricate the grounds for divorce. If one of the spouses changes his or her mind, collusion could be raised to lessen the original grounds for the fault divorce. Proving any of these defenses can be costly, timely, and often involves the use of [witnesses](#). Furthermore, courts have an interest in not forcing people to stay married who don't want to be married, and so usually grant divorces to people who ask, despite defenses given by the other spouse. These reasons typically defer people from attempting defenses.

Residency Requirements for Filing for Divorce :-

Because state laws vary regarding fault divorce and no fault divorce, it is important to understand where you or your spouse could potentially file for divorce. Most states have a [residency requirement](#), meaning that at least one of the spouses must have been a resident of that state for a specified length of time--usually six months to one year--in order to file for divorce there. However, Washington, South Dakota, and Alaska have no required length of time. To file in one of those states, you merely need to be a resident of that state at the time you are filing. It is in your best interest to have your divorce filed in the state you are living in. Whichever court orders the divorce decree is the same court that must hear all other matters, including changes. For example, if your spouse files for and receives a divorce in Illinois, and the two of you want to revise your child custody arrangement, you must return to that Illinois court that granted the initial divorce. 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.

Grounds for Divorce Under Hindu Marriage Act :-

It is conceded in all jurisdictions that public policy, good morals & the interests of society require that marital relation should be surrounded with every safeguard and its severance be allowed only in the manner and for the cause specified by law. Divorce is not favored or encouraged, and is permitted only for grave reasons. In the modern Hindu law, all the three theories of divorce are recognized & divorce can be obtained on the basis of any one of them. The Hindu Marriage Act, 1955 originally, based divorce on the fault theory, and enshrined nine fault grounds in Section 13(1) on which either the husband or wife could sue

for divorce, and two fault grounds in section 13(2) on which wife alone could seek divorce. In 1964, by an amendment, certain clauses of Section 13(1) were amended in the form of Section 13(1A), thus recognizing two grounds of breakdown of marriage. The 1976 amendment Act inserted two additional fault grounds of divorce for wife & a new section 13B for divorce by mutual consent.

Divorce :-

1. Any marriage solemnized, whether before or after the commencement of the Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party. There are 9 grounds for divorce available to husband and wife both:

Adultery :- Whether the other party has, after the solemnization of the marriage had voluntary sexual intercourse with any person other than his or her spouse; In *Swapna Ghose v. Sadanand Ghose*, the wife found her husband and the adulteress to be lying in the same bed at night and further evidence of the neighbors that the husband was living with the adulteress as husband and wife is sufficient evidence of adultery. The fact of the matter is that direct proof of adultery is very rare.

Cruelty – where the other party has after the solemnization of marriage, treated the petitioner with cruelty as per section 13(1) (ia);

Cruelty :- The concept of cruelty is a changing concept. The modern concept of cruelty includes both mental and physical cruelty. Acts of cruelty are behavioural manifestations stimulated by different factors in the life of spouses, and their surroundings and therefore; each case has to be decided on the basis of its own set of facts. While physical cruelty is easy to determine, it is difficult to say what consists of mental cruelty. Perhaps, mental cruelty is lack of such conjugal kindness, which inflicts pain of such a degree and duration that it adversely affects the health, mental or bodily, of the spouse on whom it is inflicted. In *Pravin Mehta v. Inderjeet Mehta*, the court has defined mental cruelty as ‘the state of mind.’

Some Instances of Cruelty are as follows :-

- false accusations of adultery or unchastity
- demand of dowry
- refusal to have marital intercourse/children
- impotency
- birth of child
- drunkenness
- threat to commit suicide
- wife’s writing false complaints to employer of the husband
- incompatibility of temperament
- irretrievable breakdown of marriage

The following do not amount to cruelty :-

- ordinary wear & tear of married life
- wife’s refusal to resign her job
- desertion per se
- Outbursts of temper without rancour.

What Is Cruelty :-

Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent. To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

Impact of Physical and Mental Cruelty in Matrimonial Matters : Prior to the 1976 amendment in the Hindu Marriage Act, 1955 cruelty was not a ground for claiming divorce under the Hindu Marriage Act. It was only a ground for claiming judicial separation under Section 10 of the Act. By 1976 Amendment, the Cruelty was made ground for divorce. The words, which have been incorporated, are "as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party".

Cruelty In Eyes Of The Court :-

There are various grounds for claim on basis of cruelty and types of cruelty, which are identified by the courts in their various judgements, and the courts provide a legal backup for the sufferer in this sense. They have given following explanation within the scope of cruelty under section 13(1)(ia); It is sufficient that if the cruelty is of such type that it becomes impossible for spouses to live together. The leveling of false allegation by one spouse about the other having alleged illicit relations with different persons outside wedlock amounted to mental cruelty. A husband cannot ask his wife that he does not like her company, but she can or should stay with other members of the family in matrimonial home. Such an attitude is cruelty in itself on the part of the husband. Social torture by anyone of the spouses to the other, found to be as the mental torture and cruelty. If the intention to harm, harass or hurt could be inferred by the nature of the conduct or brutal act complained of, cruelty could be easily established. But the absence of intention should not make any difference in the case. The cruel treatment may also result from the cultural conflict between the parties. A party can cause mental cruelty when the other spouse levels an allegation that

the petitioner is a mental patient, or that he requires expert psychological treatment to restore his mental health. There are various other forms of cruelty given by courts in different cases.

Case Laws :-

Naveen Kohli Vs. Neelu Kohli [AIR 2004 All 1] In this case the Hon'ble SC held that the word "cruelty" is used in Section 13(1)(i)(a) of the Act in the context of human conduct or behavior in relation to or in respect of matrimonial duties or obligations. Physical violence is not absolutely essential to constitute cruelty. A consistent course of conduct inflicting immeasurable mental agony and torture may constitute cruelty. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party. Hence SC set aside the judgment of the **High Court** and directs that the marriage between the parties should be dissolved according to the provisions of the Hindu Marriage Act, 1955. Desertion : Where the party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition as per section 13(1)(ib) ; Conversion : Where the party has ceased to be a Hindu by conversion to another religion as per section 13(1)(ii); Unsound mind : As per section 13(1)(iii), where the party has been incurably of unsound mind, or has suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation : In this clause-(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and include schizophrenia:

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party and whether or not it requires or is susceptible to medical treatment;

Leprosy : As per section 13(1)(iv), where the party has been suffering from a virulent and incurable form of leprosy; in *swarajya Laxmi v. Padma Rao*,^[i] the Supreme court held lepomatous leprosy is virulent. This type of leprosy malignant and contiguous. It is also an incurable form of leprosy and entitles the other spouses to a decree of divorce. The petitioner brought the divorce petition against the respondent on the ground of lepomatous leprosy and it was decreed.

Venereal disease : As per section 13(1)(v) where the other party has been suffering from venereal disease in a communicable form;

Renunciation of the world : As per section 13(1)(vi) has renounced the world by entering any religious order; it means renounced the world regarded tantamount to civil death and therefore, it is given as a ground for decree of divorce. It doesn't mean that a person becomes a sanyasi merely by the declaring himself a sanyasi.

Presumed death : where the other party has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive; it means this clause provides that the either party may seek divorce on this ground if the other party has not been heard of as being alive, for a period of seven years or more by those person who would naturally have heard of it, had that party been alive. Thus

the aggrieved party may marry again and have legitimate children.

There are 4 additional grounds for divorce available to only wife :

Bigamy : As per section 13(2)(1) a wife may also present a petition for dissolution of marriage on the basis of by a decree of divorce on the ground that in the case of any marriage solemnized before the commencement of this Act, 1955, the husband has married again before such commencement or that any other wife of the husband married before such commencement of alive at the time of solemnization of marriage. Rape, sodomy or bestiality :

Under s. 13(2) (ii) of the Act a wife

is entitled to petition for divorce on the ground of rape, sodomy or bestiality committed on her by the husband. Rape is also a criminal offence and defined in s. 375 of the Indian Penal Code. A man is said to commit rape who has sexual intercourse with a woman against her will, without her consent, with her consent which is obtained by putting her in fear of death or of hurt, with her consent when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married, or with or without her consent when she is under sixteen years of age. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. There is however one exception. No rape is committed by the husband on the wife if she is over fifteen years of age. Sodomy is committed by a person who has carnal copulation with a member of the same sex or with an animal, or has non-coital carnal copulation with a member of the opposite sex. Bestiality means sexual union by a human being against the order of nature with an animal. The commission of these offences by the husband must be proved by the wife either by witnesses as to fact or by evidence of admission made by the respondent, such as a plea of guilty of his trial. Though these are criminal offences, but mere evidence of conviction for these offences is not sufficient to obtain a decree for divorce. In divorce proceedings these offences are required to be proved by the wife de novo. Where the wife is a consenting party to the commission of any of these offences, her evidence should not be accepted without corroboration. Non resumption of cohabitation after decree or order of maintenance— Where a decree for maintenance of wife under 18 of the Hindu Adoptions and Maintenance Act 1956, or an order for maintenance of wife under section 125 of Cr PC 1973, has been passed against the husband, the wife is entitled to present a petition for divorce provided two conditions are satisfied. First, she was living apart, and secondly, since the passing of such decree or order cohabitation between her and her husband has not been resumed for at least one year or upwards, decree of divorce would be granted.

Option of puberty— Wife is entitled to present a petition for divorce if her marriage was solemnized before her attainment of the age of fifteen years provided she has repudiated the marriage after attaining the age of fifteen years but before attaining the age of eighteen years. But the petition may be presented after completing eighteen years of age. In absence of a school certificate, the parents are the best witnesses of the fact of the date of birth of their children. Entries in a horoscope can be used to prove the date of birth and also by examining the person who wrote it.

Divorce Orders of One State, Valid in All States :-

Courts of all states like to honor decisions made by courts of other states, because courts want the same respect paid to their decisions. Therefore, going back to the preceding

example, if your spouse files in Illinois, this divorce and all of the court orders related to it, apply to you in your Missouri home. However, the court may not **have personal jurisdiction** over the nonresident spouse at the time of the divorce proceeding, rendering certain court decisions invalid. A lack of personal jurisdiction means that although the divorce decree is valid, other related decisions, such as child custody, support, and property division, may be invalid. If you **receive papers from a foreign country**, keep in mind there are many jurisdictional issues, such as what country is involved, where the spouses live or have lived, and where the children (if any) live. Beside these grounds, the divorce as a customary divorce can also be sought through mutual consent under Section 13-B. The question of cruelty is to be judged on the totality of the circumstances. In order to term a conduct as cruel it should be so grave and weighty that staying together becomes impossible. A conduct to be cruel must be more serious than the ordinary wear and tear of marriage. The Hon'ble Apex Court in a decision *Neela Kumar Vs. Daya Rani* reported in 2010 (5) ALT 1 SC, while referring the judgment in *Vishnu Dutt Sharma Vs. Manju Sharma* reported in (2009) 6 SCC 379 held that irretrievable breakdown of the marriage is not a ground for divorce as it is not contemplated under section 13 and granting divorce on this ground alone would amount to adding a clause therein by a judicial verdict which would amount to legislation by Court. In *Gurbux Singh Vs. Harminder Kaur* reported in 2011 (2) ALT 22 SC, the Hon'ble Supreme Court reiterated the principle that except the grounds narrated in section 13 of the Act, Hindu Marriage solemnized under the Act cannot be dissolved on any other ground.

Conclusion :-

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. However, time has changed; situations have changed; social ladder has turned. 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. But the manner in which the judiciary is dealing with the subject of irretrievable break down of marriage, it is feared that it will completely pause the system of marriages. Every theory has its negative and positive traits. Their applicability differs from situation to situation. Therefore it is very essential that the lawmakers of our country should deal with the subject in a very cautious manner after considering in detail its future implications.

Mapping Best Practices by all stake holders under Domestic Violence Act

The Protection of Women from Domestic Violence Act, 2005(PWDVA) is the response of the state to protect human rights of women within the family or the home. It has been formulated within the context of international human rights framework for guaranteeing rights under articles 14, 15 and 21 of the Indian Constitution. It is a civil law that aims at providing speedy remedies through protection and relief orders, and mobilizing a multi agency support mechanism. The judiciary plays a crucial role in driving the spirit of this gender-just law. Gender-sensitive interpretation of its provisions is therefore a pre-requisite to achieve its aims. In India, although the criminal law deals with domestic violence in the form of Section 498-A IPC, but there was no provision in the Civil Law to deal with the said problem. In order to get rid of the mischief of domestic violence, the Parliament, in its wisdom, enacted the Act, which came into force on 26 October, 2006. The Act is a social beneficial piece of legislation, which should be given as wide and as liberal an interpretation as possible.

I: Object of the enactment :

PWDVA recognizes domestic violence as a human rights issue and a serious deterrent to development. It further mentions that criminal law does not address this phenomena in its entirety, hence the need to enact a civil law aimed to provide for more effective protection of rights of women guaranteed under the constitution who are victims of violence of any kind occurring within the family.

II: Rights and Remedies under the Law :

Rights :

1. The Right to be free from violence, which is to be inferred from the definition of Domestic Violence defined under section 3 of the Act.
 2. The Right to reside in the shared household that is recognised in Section 17 of the Act.
- The Right to seek remedies under-section 12 of the Act.

Remedies :

Remedies are available in the form of Orders

1. Protection Order U/S18 of the Act
2. Residence Order U/S19 of the Act
3. Monetary relief U/S 20 of the Act
4. Temporary Child Custody Orders U/s 21 of the Act
5. Compensation Orders U/S 22 of the Act

III: Mechanisms :The following are in built mechanisms under the Act :

1. Courts
2. Protection Officers
3. Services Providers
4. Medical Facilities
5. Shelter Homes
6. Police

IV: Procedure and Enforcement :

The procedure to be applied by the courts, in dealing the complaints and applications, is drawn from the Code of Criminal Procedure Code 1973 and Civil Procedure Code, 1908 and is in detailed in Protection of Women from Domestic Violence Rules. The applicable procedure can be broadly divided into following categories :

Application : While dealing applications procedure held under section 125 CRPC shall be applied or court can lay down in its own procedure in view powers conferred under section 28 (2) of the Act.

Service of Notice : Rule 12 of the PWDVR provides a code that incorporates principles from CR.P.C. or C.P.C.

Counselling : Under Section 14 of the Act counseling shall be conducted as per manner laid down in provision

Enforcement of Orders: While enforcing the orders Section 125 CRPC is to be applied.

Besides procedure held U/Sec 31 r/w Rule 15 of the Act has to be followed

Procedure of Breach of Orders : Warrant Procedure and Breach of Order is Cognizable and Non Bailable.

High Light of the enactment is Act is supplement to existing laws governing Marriage, Custody and Property.

V: Now coming to core aspect of today's discussion best practices for all stakeholders under PWDVA, 2005. The Act incorporates a number of effective and coordinated mechanisms for assisting victims of domestic violence. In course of effective implementation of the Act and informing rights to woman Protection Officer occupies a prominent role. PO is the first person that hears the violence of woman hence certain amendments are necessary while appointing such Protection Officers.

I: Protection Officer (PO) :

Best Practices for better functioning by PO :

1.Appointments of Protection Officers :

As per the Act Protection officer is key person who projects the violence of aggrieved woman through an application. At present one Protection Officer is appointed to entire district. And these Protection officers in addition to their regular official duties attending Domestic violence cases. Wherever existing officials in the

government machinery – like ICDS CDPOs, welfare officers, probation officers, Dowry Prohibition Officers, Child Marriage Prohibition Officers, etc – have been given ‘additional charge’ as POs, they are unable to work effectively as POs since they are already overburdened, and sometimes under-skilled for the task at hand. Further, POs do not have the infrastructure or sufficient funds to carry out their duties. Hence, in many cases protection officers are not able to attend before the court whenever their presence is needed before the courts.

So, If they are exclusively appointed on full time basis they can fulfill their duties prescribed under the Act. There Should be one Protection officer for every five mandals in Rural Level and there should be one protection officer for every three police stations and there should be necessary infrastructure to them to discharge their duties smoothly and effectively.

2. Qualification of Protections Officers : It is desirable for POs to have some qualification in the social sciences, Diploma in women empowerment and rights social work or law or psychology at least for three years so that they can counsel the parties and give emotional support to the woman who approaches them in distress. And they can inform the legal rights available to them under the PWDVA and other laws as well hence, a professional qualification in said subjects improvises the role of PO's.

3. Venue of Protection Officer :

At present Protection Officers are discharging their functions in collectorate office of concern district. For easy access to distress women and to the other agencies there should be a separate location for Protection Officer which can be easily approachable by women and other agencies. If the Office of Protection Officer is located in the court premises itself it is easily accessible to public for instant assistant to women.

4. Functioning of Protection Officer :

a. Role of Protection Officer is as equal as to Investigating Officer of a Crime hence, PO's are required to maintain transparency of their duties in their way to assisting women for that, they should maintain record by entering details of women and details of persons against whom she gave report and Protection Officer shall a lot a number to DIR.

b. For better functioning of Protection Officer : Functions of Protection officer is required during pre-litigation, pending litigation and post-litigation also hence for better functioning of duties

1. One legal Officer who is graduate in law

2. Two clerical staff shall be given for assistance.

3. Apart from that two police personnel at least one shall be of Sub Inspector cadre shall be attached to Protection Officer office for better implementation of court orders.

II: Service Provider (SP). Section 10 of the Act :

There are many organizations which help women in trouble by providing legal, medical or financial assistance. Such organizations are required to register themselves under the Act. When they are registered under this Act, they are called 'service providers'.

Suggested Best Practices for best functioning by Service Providers :

Qualifications : As Experience counts in any field, before Registering Any Society or Company as Service Provider must check their experience in assisting women in need and the nature of assistance extended by them ultimately State shall call for their track record. Rule 11 shall be followed strictly

Number of Service Providers :

State shall took measures to appoint registered service providers as per need and necessity of every district and necessary infrastructure to such registered service provider shall be facilitated by the state.

Qualification of SP :

As functioning of Service provider is similar to functions of Protection Officer Qualified and Active Social Workers shall be employed by them for.

Functioning:

While counselling parties they must follow Ethical guidelines, Gender Equality Counseling must be done only after the Court has passed a protection order.

They must support women through the litigation process and ensure necessary follow up of cases. They must record DIRs. They must facilitate multi agency response system for assisting women

III: Police

Domestic violence often forces women to go to the police station for protection. In recognition of this fact, the Act lays down duties for the police to ensure that the police provide assistance to women, help the PO and SP in serving notice and enforcing orders.

Suggested Best Practices:-

Whenever any police officer receives any information about Domestic violence either from victim /women or from any relative of such women Police officer shall be proactive in informing her legal rights that can be enforceable by her and Police shall give appropriate legal assistance, pass information to Protection Officer.

They must refer the women to Protection Officers, Service providers and shall give medical assistance if required.

They must assist protection officer in service of notice and enforcement of orders.

Note : As per The Second and Third Monitoring and Evaluation Reports on the Implementation of the PWDVA, 2005 in 2008, 2009, and 2010 respectively. In the first year of the Act coming into force, Andhra Pradesh was the only state where the nodal department was supported by initiatives taken by the Police and Legal Services Authorities to ensure effective enforcement of the Act.

IV: Shelter Homes (SH) Section 6 of the Act :

Section 6 mandates to provide shelter to aggrieved women. Notification of shelter homes under the Act ensures that women are not refused shelter when referred to such facilities.

Suggested Best Practices

- Notification of shelter homes must ensure uniform geographical distribution.
- They must employ qualified social workers.
- Ethical counseling must be a part of their protocol.
- Children must be allowed to stay with their mothers.
- Accessibility of shelter homes to women with different/ special needs must be ensured.

V : Medical Facilities (MF): Section 7 of the Act :

Notification of medical facilities authorizes them to record DIRs and imposes a duty on them to provide medical care to women facing domestic violence.

Suggested Best Practices

- Record DIR's as mandated by the law.
- Identify cases of domestic violence.
- Document cases of domestic violence separately.
- Document medical history as narrated by the victim.
- Avoid all bias.
- Provide emergency care.
- Make referrals to POs, SPs, and police.
- Provide medical evidence in court.
- Health policy must recognize domestic violence as public health issue.
- Guidelines should be provided for the medical facilities.

VI: Legal Services Authority

Under Section 9(d) PWDVA imposes a duty on the PO to ensure that legal aid is provided to the women. PWDVA the aggrieved person is entitled to legal aid under the Legal Services Authorities Act, 1987 (39 of 1987)

Suggested Best Practices

Legal Services Authority at all levels must take measures to create awareness about the Act and the right to legal aid under its provisions.

A panel of lawyers must be designated specifically for providing legal aid to women seeking protection under the Act.

A list of names and details of lawyers designated by the Legal Services Authority must be maintained with Magistrates and all their functionaries.

Training and sensitization of legal aid lawyers, Para Legal Volunteers, must ensure that women get quality services.

Legal Aid Clinics established in rural areas shall explore awareness about the Act.

Legal services authority and legal aid clinics must equip itself with information on medical facilities and shelter homes to ensure appropriate referrals are made for women who are in need of such services.

In our state Directives were issued to all DLSA to organize legal awareness camps in consultation with NGOs and paralegal volunteers to create awareness about the Act. DLSA was directed to form a Legal Aid Cell consisting of Chairman, DLSA, Secretary, DLSA, Superintendent of Police, Public Prosecutor, four women Advocates, Project Director, Social Welfare Department, Protection Officer and District Rural Development Agency as members of the Cell. Cell to review the practical and procedural difficulties, encountered by POs, Courts, Domestic Violence Victims, SPs, if any, in the implementation of the Act once every two months and submit a report to the State Authority regularly with suggestions for resolution.

VII : Role of courts :

Issue No : 1 Section 5 of the Act is not implementing in practice Reason is that, Not finding time to inform the woman about her rights under various laws being over loaded with other matters.

Best Practice : Strict Implementation of Section 5 of the Act :

1. Information shall be furnished to the woman who approached the court for other family disputes as per section 5 of the Act.
 2. Affixing posters in Notice board of the court, DLSA, Bar associations in vernacular language that informs about the rights of a woman under the Act.
- There is need of having exclusive court for dealing DVS as in Hyderabad.

Issue No : 2 Implementation of Section 12 of the Act :

Whether court should accept application made on behalf of the aggrieved person in absence of her written consent ?

Best Practice: Accepting the applications filed on behalf of aggrieved person If aggrieved woman is unfit physically and mentally or in unconscious state or trauma and not in a position to give consent, in such conditions application must be accepted filed by PO's, SP's or any other person.

Issue No : 3 Whether Domestic Incident Report is mandatory in each case ?

Best Practice :

No need to insist for DIR refer Manoj Harikisanji Changani 2012 /MANU/MH/0087/2012

Issue No : 4 Interim and Exparte Orders: Issue is there is delay in granting Interim and Exparte orders.

Best Practice:

To minimize scope of violence courts needs to entertain Interim Petitions Ad-interim orders too may be passed if there is a prima facie case of severe violence and emergency situations. Affidavit -Form III filed under section 23 is enough to grant Interim or Ad-Interim Orders Emergency Situations like

1. Risk or Re-occurrence of violence
2. child custody issues
3. Restoring essentials of woman

Free copy shall be supplied to Woman, PO's SP's and Police for implementation of orders And in certain cases direct Protection Officer for conducting Home visit and report (Rule 10)

Issue No 5 : Service of Notice is a major issue that causes delay in passing orders in disposal of cases.

Implementation of Section 13 (Service of Notice) and Rule 12 (Means of Service of Notice)

Best Practice :

1. Protection officer can take assistance of Police in serving local notice
 2. Magistrate may establish her/his own procedure for serving notice, using powers under-section 28 (2) of the Act
 3. Electronic Media can become a valid method of serving notices i.e., Fax/E Mail/ Whats App can be considered as adequate proof of notice.
- Refer :TATA SONS LIMITED & ORS Vs JOHN DOE(S) & ORS (courtesy Live Law.in) In this case Hon'ble Delhi High Court ordered plaintiff to serve notice on defendant by text message as well as through

Whatsapp as well as by email and to file affidavit of service.

NRI Notices : Letter No. 25016/17/2007-Legal Cell Government of India Ministry of Home Affairs,
IS Division-II:Legal Cell New Delhi, dated the 11 th Feb, 2009 (Letter copy enclosed) NBWs: Shall be sent to Ministry of External Affairs

Issue No : 6: Court Proceedings :

Issue : Delay in disposal of case inspite of direction under Section12(5) of the Act to dispose within sixty days from its first hearing

Best Practices :

1. To conduct counseling by a trained counselor / family counsellor to reconcile the matter in accordance of section 14 (1) of the Act.
2. Using Safety Plan (Rule 8(1)(iv)) by giving direction to PO and SP to prepare safety plan as per FORM V basing on which court can pass interim orders to stop escalation of violence.
3. Adjournments should be avoided (or) Conditional adjournments shall be ordered.
4. Pro actively using powers conferred under-section 28(2) of the Act.
5. Interim orders shall be given in emergency situations only to avoid multiplicity of proceedings.

Issue No: 7 : Granting Reliefs and Effective Implementation of Reliefs :

Issues are : Not granting compensation and monetary relief orders Delay in implementation
Absence of accurate mechanism after passing Final order

Best Practice :

Every order under the Act shall be passed pro-actively by the Magistrate if it prayed for or not in her application. Magistrate with his/her Judicial Mind if circumstances in the case warrants any other relief not prayed for. That shall be passed in his/her order keeping in mind that the enactment is a beneficial legislation.

To avoid delay in implementation, consequences of Breach of Order shall be mentioned at the end of every order and the order copy shall be furnished to concern local jurisdictional police under which woman is residing for better implementation of order and specific orders shall be given to police the manner under which their assistances can be extended during violation of order and for implementation of Order.

Orders should be clear and comprehensive so as to ensured proper implementation and direction be given to concerned stake holder (PO/SP/Police) for ensuring implementation. Magistrate can seek great involvement of PO and SP in executing orders. Time limitation shall be fixed in Order itself with respect to implementation of orders. Non Bailable Warrants may be issued for recovery of Monetary reliefs – Refer Sagar Sudhalar Shendge -2013 MANU/MH/0295/2013 Magistrate Shall follow the Protection Officer about implementation of orders and to report thereof.

Issue No : 8 Mechanism for breach of orders :

Issue: Procedure to be followed in case of breach of orders

Best Practice:

Follow Rule 15 (6) and (7) summarily for trying the Offender

Magistrate Shall commence a separate proceedings for violation of orders

Recourses Open to Woman in case of breach of order are that She can approach Police, Through Protection Officer or to the court directly.

Issue No: 9 :Delay due to Appeals :

Issue : Filing Appeal against Interim (or) Final orders delays implementation

Best Practice :

Stay Order Should not be granted without hearing aggrieved woman

Disposal of appeal expeditiously

Fixing time limits for disposal of appeal as fixed for Trial Court

Issue No:10 : Lack of Coordination among Stake Holders.

Best Practice : Collective work and effort can make use-of and implementation of the Act more effective and beneficial to targeted folk. Protection Officers, Service Providers, Police and the court are effective mechanisms under the Act in which all plays a significant role. Without coordination among said mechanisms the interventions may get compartmentalized and resulting into inefficiency. In order to avoid that situation information shall be shared by discussing issues among stake holders to over difficulties in the process of realizing Justice.

VII: Role of the Government :

Coordination, Monitoring and Evaluation :

While the Act envisages a multi-agency response to violence against women, many states have not formed Coordination Committees. There is no mechanism for reporting and monitoring PWDVA within the government. This impacts every aspect of PWDVA implementation, like awareness generation, capacity building, service of notice, enforcement or breach of orders, etc. The Union Government should conduct periodic surveys to monitor VAWG and make available timely, reliable data, disaggregated by social categories and up to the district level. The Union Government should earmark financial allocations and release funds in a timely manner with a clear specification of purpose. The State governments should put in place dedicated staff backed by adequate infrastructure and quality services for effective implementation of the law. The Union and State governments should create a mechanism to ensure convergence among stakeholders supported by protocols and guidelines for them to function effectively under the Act. The State governments should monitor and document cases of domestic violence by state level Women and Child Development Department

VIII: Following Case Laws reflects the Judicial Activism in implementing the Act in its true Letter and Spirit :

I: Respondent :

Women as Respondents: Sandhya Manoj Wankhade and Ors v. Manoj Bhimrao Wankhade and ors, Supreme Court of India [MANU/SC/0081/2011] Deleting Adult Male words before word Person in Section 2(q) of the Act : The classification of Adult Male person clearly subverts the doctrine of equality, by restricting the reach of a social beneficial statute meant to protect women against all forms of domestic violence In Hiral P Harsora and ors Vs. Kusum Narottamdas Harsora & Ors :2016 (3) ARC 273 has struck down the words “adult male” before the word “person” in Section 2(q) of Domestic Violence Act holding that these words discriminate between persons similarly situated, and is contrary to the object sought to be achieved by the Act. And the court declared that the words adult male in Section 2(q) of the 2005 Act will stand deleted since these words do not square with Article 14 of the Constitution of India. Consequently, the proviso to Section 2 (q), being rendered otiose, also stands deleted

Now the section reads as Section 2(q) in The Protection of Women from Domestic Violence Act, 2005

(q) “respondent” means any person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner. So, any person irrespective of sex and age brought into whorem of the Act.

II: Relationship in the Nature of Marriage :

a. Women who are in relationship of cohabitation or live-in-relationships:

- 1) D.Velusamy vs D.Patchaiammal Supreme Court of India [MANU/SC/0872/2010]
- 2) Chanmuniya v. Chanmuniya Virendra Kumar Singh Kushwala and Anr., Supreme Court, [2011 (1) ALD (Cri) 370, MANU/SC/0807/2010]
- 3) Deoki Panjhiyara v. Shashi Bhusan Narayan Azad, I (2013) DMC 18 (SC),AIR 2013 SC 346, 2013 Cr.L.J 684 (Supreme Court)(12.12.2012)

b. PWDVA applicable to women in annulled marriage:

- 1) T.K. Surendran P. Najima Bindu & Ors, Kerala High Court, [MANU/KE/0682/2012]

c. Women in marriages which are void or voidable in law, where all other elements of marriage exists – Second wife have been held to be entitled to maintenance under section 18 of HAMA

- 1) Narinder Pal Kaur Chawla V. Manjeet Singh Chawla, Delhi High Court [AIR 2008 Delhi 7]
- 2) Suresh Khullar V. Vijay Kumar Khullar, Delhi High Court [AIR 2008 Delhi 1, MANU/DE/8505/2007]
- 3) Sau Manda R. Thaore, w/o Sh. Ramaji Ghanshyam Thaore v. Sh. Ramaji Ghanshyam Thaore, Bombay High Court [Criminal Revision Application No. 317/2006, MANU/MH/0427/2010]
- 4) in Badshah v. Urmila Badshah Godse & Anr., (2014) 1 SCC 188, Hon’ble Apex Court held that the expression wife in Section 125 of the Criminal Procedure Code, includes a woman who had been duped into marrying a man who was already married.
Second wives Pratibha v. Bapusaheb s/o Bhimrao Andhare, I (2013) DMC 530 (Bombay H.C.) (2.11.2012)

Manda R. Thaore v. Ramaji Ghanshyam Thaore, (Bombay H.C.) (20.04.2010)

Divorced women

A. Ashok Vardhan Reddy v. P. Savitha, 2012 Cr.L.J. 3462 (Andhra H.C.)(29.02.2012)

Mohit Yadav v. State of Andhra Pradesh 2010Cr. L.J. 3751 (Andhra H.C.)(13.11.2009)

Sabana @ Chand Bai v. Mohd. Talib Ali, 2014 Cr.L.J. 866 (Rajasthan H.C.)(30.10.2013)

Harbans Lal Malik v. Payal Malik, II (2010) DMC 202 (Delhi H.C.)(29.07.2010)

III: Shared Household and Right to Reside :

I:: Domestic Relationship :

A) Woman who has been in the past in the domestic relationship with the Respondent would be entitled to invoke the provisions of the PWDVA

1) Maroti s/o Dewaji Lande V. Sau Gangubai w/o Maroti Lande and Prashant s/o Maruti Lande, Bombay High Court [Criminal Writ petition No. 542/2010, MANU/MH/1763/2011]

2) Karim Khan v. State of Maharashtra through PSO and Nahid Akhtar, Bombay High Court [MANU/MH/0990/2011]

3) Vijay Verma Vs NCT Delhi (MANU/DE/1946/2010)

B) PWDVA applicable to the Divorced women:

1) Bharti Naik V. Ravi Ramnath Harlarnkar and Anr, Bombay High court [III(2011) DMC 747 2010]

II: Shared House Hold :

1) V. D. Bhanot v. Savita Bhanot, Supreme Court in Special Leave Petition (Crl) No.3916 of 2010.

2) SR Batra v. Taruna Batra, Supreme Court, [MANU/SC/007/2007]

III A) Right to reside in the shared household :

A) Where the property is in the name of the husband and the in-laws, the wife has a right to reside

1) Jyotsana Sharda v. Gaurav Sharda, Delhi High Court [Criminal Revision petition No. 132 and 133/ 2009, MANU/DE/3520/2009]

B) Where the property was owned by the Husband but has subsequently been transferred in the name of the in-laws, with intention to deny the wife's rights, the women has a right to reside in the shared household.

1) P. Babu Venkatesh and Ors v. Rani, Madras High Court, [MANU/TN/0612/2008] C) Where the husband has a right, title or interest in the property for the purpose of section 17 of PWDVA is shared household and hence the aggrieved person has a right to reside in the household

1) Rajkumar Rampal Pandey v. Sarita Rajkumar Pandey, Bombay High Court [MANU/MH/1295/2008]

D) Evenet Singh v. Prashant Choudhury and Kavita Choudhury v. Evenet Singh [MANU/DE/3497/2010]

IV) Residence Orders :

1) Vandana v. T. Srikanth Krishnamachari and Anr, Madras High Court [(2007) 6 MLJ 205 (Mad)

2) Ishpal Singh Kahai V. Mrs. Ramanjeet Kahai, Bombay High Court [MANU/ MH/0385/2011]

3) Yama Vs. Ankit Manubhai Patel, Gujarat High Court [MANU/GJ/0546/2014]

IV : Reliefs : Interim and Exparte Orders

A) Ex-parte ad interim orders on the basis of affidavit

1) Preceline George @ Antony Preceline v. State of Kerala & ors Kerala High Court at Ernakulum in WP (C) No. 30948 of 2009 (Q).

2) Sri Sujoy Kumar Sanyal V. Smt Shakuntala Sanyal (Halder) and Anr., Calcutta High Court, (MANU/WB/0597/2010)

V: Court Jurisdiction :

1. Sharad Kumar Panday v. Mamta Pandey, II (2010) DMC 600 (Delhi H.C.)

2. Neeraj Goswami v. State of Uttar Pradesh, 2013 Cr.L.J. 1767

3. Hima Chugh v. Pritam Ashok Sadaphule, 2013 Cr.L.J. 2182

VI: Domestic violence

Physical violence

1. Ishpal Singh Kahai v. Ramanjeet Kahai, (Bombay H.C.) Writ Petition No.576 of 2011 (23.03.2011)

Economic abuse

1. Rakesh Sachdeva v. Neelam Sachdeva, 2011 Cr.L.J. 158 (Jharkhand H.C.)(09.07.2010)

2. Preetam Singh v. State of U.P., 2013 Cr.L.J. 22 (Allahabad H.C.) (31.07.2012)

3. Vidyawati v. Kishen, 2013 Cr.L.J. 4469 (Calcutta H.C.) (08.02.2013)

4. Harish Bairani v. Meena Bairani, RLW 2011 (2) 1763 (Rajasthan H.C.) (02.05.2011)

5. Jovita Olga Ignesia Mascarehas e Coutinho. v. Rajan Maria Coutinho,

6. 2011 Cr.L.J. 754, I (2011) DMC 257 (Bombay H.C. (Goa Bench)) (24.08.2010)

7. Sikakollu Chandramohan v. Sikakollu Saraswathi Devi, Crl.R.C. No. 1093 of 2010 (Andhra Pradesh

H.C.)(06.07.2010)

8.Om Prakash v. State of Rajasthan, S.B. Criminal Revision Petition No.1220/2010 (Rajasthan H.C) (29.04.2011)

VII: Mechanisms under the Act

Monetary relief

A) 1. Sukrit Verma and Anr v. State of Rajasthan, Rajasthan High Court (Jaipur Bench) [MANU/RH/0337/2011

2. Om Prakash v. State Rajasthan, Rajasthan High Court (Jaipur Bench) [MANU/RH/0324/2011]

B) Payment of maintenance

1) Rajesh Kurre V. Safurabai & others, Chattisgarh High Court at Bilaspur in Criminal Misc Petition No. 274 of 2008

C) Quantum of maintenance

1) Jasbir Kaur Sehgal v Dist. Judge Dehradun [(1997) 7 SCC 7, MANU/ SC/0835/1997]

D) Maintenance can be granted irrespective of whether she has separate income of her own or not.

1) Anup Avinash Varadpande v. Anusha Anup Varadpande, Bombay High Court, [MANU/MH/0042/2010]

E) Maintenance can be granted irrespective of whether the aggrieved person is currently living with the husband or not.

1) Om Prakash v. State of Rajasthan & Anr [MANU/RH/0324/2011]

F) Maintenance under two different Acts

Manish Jain Vs. Akanksha Jain Legal Crystal Citation : legal crystal.com/109766

VI: Procedures and Enforcement :

A. Domestic Incident report is not mandatory:

1) Shambhu Prasad Singh v. Manjari, Delhi High Court [MANU/DE/0899/2012]

2) Nand Kishor v. Kavita and Anr, [MANU/MH/0957/2009]

B. Application under PWDVA:

1. Milan Kumar Singh & Anr V State of Uttar Pradesh, 2007 Cri LJ 4742 [MANU/ UP/0827/2007]

2. Kusum Lata Sharma vs State & Anr. on 2 September, 2011

C: Amending Application :

The Apex Court in KUNAPAREDDY @ NOOKALA SHANKA BALAJI VS. KUNAPAREDDY SWARNA KUMARI has held that a complaint or petition under Domestic Violence Act can be amended and court is not powerless to allow such amendment applications.

VII: Direction to the Police to implement order P. Babu Venkatesh and Ors V. Rani, Madras High Court, [MANU/TN/0612/2008]

VII-A: Application in Pending Proceedings : Section 26 of the Act

1. [Krishna Bhattacharjee vs Sarathi Choudhury, (2016) 2 SCC 705)

Pending Judicial Separation is not a bar to grant reliefs to woman.

2. Prakash Nagardas Dubal-Shah Vs Sou. Meena Prakash Dubal Shah & Ors(SC)

Wherein Hon'ble Apex court held that : The unsuccessful divorce proceedings cannot adversely affect the maintainability of application

VII: Limitation and Past Acts of Violence :

Inderjit Singh Grewal vs State Of Punjab & Anr on 23 August, 2011

IX:Appeal :Section 29 of the Act

Shalu Ojha v. Prashant Ojha, 2015 Cr.L.J. 63 (Supreme Court) (18.9.2014)

Abhijit Bhikaseh Auti v. State of Maharashtra, 2009 Cr.L.J. 889 (Bombay H.C.) (16.09.2008)

Smita Singh v. Bishnu Priya Singh, 2013 Cr.L.J. 4826

X: Procedure of Inquiry :

2012 (1) LW (Cri.) 325 Abizar N.Rangwala and Ors Vs Ms. Sakina W/o. Mr.Abizar N. Rangwala Protection of Women from Domestic Violence Act (2005), Sections 12, 18, 19, 20 and 21, Criminal Trial / Marking of documents, examination of witnesses CrI.O.P. is filed for a direction to the learned VII Metropolitan Magistrate to take up the proceedings as per Section 28(a)(b) and evidence be let in giving sufficient opportunity to examine the respondent and cross-examine and opportunity to the petitioners to let in evidence. Apprehension in the mind of the first petitioner / husband is that he was not given opportunity to cross-examine with regard to the marking of the documents. It is a summary trial procedure where the parties are entitled to cross-examine those witnesses as per the Act – as per section 28 of the Act all proceedings under Sections 12, 18 to 22 and 23 and offences under Section 31 shall be governed by the provisions of the

Crl.P.C. Documents produced by the respondent has not been allowed to be cross-examination of the witness is allowed on the documents produced by the witness, the sanctity of the documents produced by the witness, the sanctity of the documents could not be considered – Act grants only interim protection and for clothing and maintenance such as guarding of their wards. Petitioner is at liberty to cross-examine the respondent's evidence with relevant questions.

XI: Retrospective Effect :

1. V.D. Bhanot v. Savita Bhanot (2012) 3 SCC 183.
2. Saraswathy Vs Babu (decided on 25-11-2013) (SC)(2014 (3) SCC 712)

XII: Enforcement of Orders :

Razia Begum vs State NCT Of Delhi & Ors, Crl.MC- 4246/09 & 4375/09, COURT: DELHI HIGH COURT, Date of Order: 4th October, 2010 It has to be noticed that although Domestic Violence Act is not a penal law but it is a peculiar Act where non-compliance of the order passed under the Act has been made as an offence under Section 31 of the Act and an FIR can be registered against the person who does not comply with the order and this offence is triable by the same Magistrate who passed the interim order for protection or maintenance. In view of this provision under Section 31, it becomes incumbent and responsibility of the Magistrate to be careful in passing order and to specify as to whether there was domestic relationship between the aggrieved person and the respondent and who was the person responsible for compliance of the order.

Conclusion :

Delay in relief or implementation of court order shall not dilute the overall purpose of the law on ground. Being the major role of implementing the Act effectively is on shoulders of Judiciary we need rise for the hour by acting pro-actively while dealing cases under the Act by taking the object of framing such an enactment meant to provide immediate justice to woman in distress.

NRI MARRIAGES – ISSUES AND CHALLENGES WITH SPECIAL REFERENCE TO CUSTODY OF CHILDREN

**The glory of woman in the West is
wifehood whereas the glory of woman
in the East is motherhood.**

—Swami Vivekananda

Introductory

As of 2017, over 30 million NRIs live all over the world. 'NRI marriages are heterogeneous and problematic group, involving sensitive and intricate issues of law as well as facts'.

In a philosophical sense, a marriage is a union of two individuals as husband and wife, and is recognized by law. In Hinduism, a marriage joins two individuals for life, so that they can pursue duty (dharma), possession (artha), physical desires (kama), and ultimate spiritual release (moksha) together.

Non-Resident Indian (NRI) marriage is a family related issue and is mostly well-planned personal decision in life. The term Non-Resident Indian is a new coinage of post-independence era. In the past, Indians migrated to foreign lands for different reasons and acquired citizenship of the country of their domicile. These people are no called as Overseas Citizens of India (OCI). During British period, Indians went abroad for higher education but mostly came back to settle in India. But, after independence, started migrating for personal or professional reasons and were subjected to cross-

cultural influences.

Meaning of the word 'NRI'

The abbreviation 'NRI' stands for Non-Resident Indian. "NRI" means an individual, being a citizen of India or a person of Indian origin who is resident outside India. Section 2 of Foreign Exchange Management Act, 1999 (Act 42 of 1999) (FEMA) only defines "a person resident in India" and also define "a person resident outside India". But, it does not define the word 'Non-Resident Indian'.

Meaning of the word "PIO"

The word 'PIO' stands for 'Person of Indian Origin'. It means a foreign citizen who any time held an Indian passport; or he/she or either of his/her parents or grandparents or great grandparents was born in India and was permanently resident in India or that he/she is spouse of a Indian citizen or Indian Origin.'

Meaning of the word "OCI"

The word 'OCI' stands for 'Overseas Citizens Of India'. These 'Persons Of Indian Origin-PIOs' are now called 'Overseas Citizens Of India (OCI)' as defined under Citizenship (Amendment) Act, 2005.

Between whom Non-Resident Indian marriage can be performed?

Non Resident Indian marriages may be between following five categories.

1. Non-resident Male and an Indian Female
2. Non-resident female and an Indian male
3. Both Indian spouses who later on migrate to a foreign land either together or separately
4. Both non-resident Indian spouses who marry under Indian marriage laws either in India or in a foreign country
5. An Indian spouse, male or female, marrying a foreign spouse under Indian marriage laws either in India or in a foreign country.

Two Contrasting issues relating NRI marriages.

1. NRI marriages are transforming the living standard and economic welfare of most families.
2. These are creating disastrous problems for many families for which there seems to be no easy remedy either in law or in civil society.

Other Issues and Challenges relating to NRI marriages:

1. Multiple marriages by NRI youths: They are leaving their wives in lurch, in many cases with children. Now, it is called as 'Run away marriages', 'Short Liaison', 'Holiday-Wife-Syndrome'.
2. Culture: Western Countries do not discourage splitting of marriages. Obtaining divorce in USA, Europe and foreign countries is very easy. Most of our Indian are living in those countries.
3. Leaving NRI in India:- After a short, honeymoon, the husband had gone back, promising to soon send her ticket that never came. In many instances, the woman would already have been pregnant when he left and so both she and the child (who was born later) were abandoned. The husband never called or wrote and never came back again.
4. NRI wife and children are subjected to cruelty in abroad: Woman who went to her husband's home in a foreign country only to be brutally battered, assaulted, abused both mentally and physically, ill fed, and ill-treated by him in several other ways. She was therefore either forced to flee or was forcibly sent back. NRI wife was not allowed to bring back her children along. The children were abducted or forcibly taken away from the woman.
5. Huge Dowry: Woman who was herself or whose parents were held to ransom for payment of huge sums of money as dowry, both before and after the marriage.
6. Bigamy: Woman who learnt on reaching the country of her NRI husband's residence that he was already married in the other country to another woman, whom he continued to live with.
7. Denial of maintenance: Woman who was denied maintenance in India on the pretext that the marriage had already been dissolved by the Court in another country
8. Technical legal obstacles: NRI wife has to face obstacles related to jurisdiction of courts, service

of notices or orders, or enforcement of orders.

9. Trial of criminal case held up: Woman who sought to use criminal law to punish her husband and in-laws for dowry demands and/or matrimonial cruelty and found that the trial could not proceed as the husband would not come to India and submit to the trial or respond in any way to summons, or even warrant of arrest.

10. Indian Courts have limited jurisdiction: Woman who was coaxed to travel to the foreign country of the man's residence and get married in that country, who later discovered that Indian courts have even more limited jurisdiction in such cases.

11. VISA problems: In USA, NRI spouses on H4 or F2 visa are prohibited from any employment. Some countries impose employment restrictions on spouses of overseas Indians who are on work/student visa. According to Immigration Laws in USA, H4 dependant-visa holders are not eligible for a social security number. Without this number, the individual faces great difficulties in opening a bank account or to secure a driver's license and cannot be gainfully employed either.

12. Fraudulent NRI marriages: 1. Broken marriage. All broken marriages are not fraudulent marriages. Here, Dowry expectation, bigamous intention, incapability of spouse to cope with mutual differences etc. 2. Fraudulent marriage. Concealment of material facts about marital status, education, age, medical/health conditions etc.

13. Citizenship: Law Commission of India in its 65th Report has proposed that the domicile of woman should be determined independently of that of husband, in conformity with the spirit of the Indian Constitution. Our Constitution does not permit dual citizenship or dual nationality except for minors where the second nationality was involuntarily acquired. Under Section 5 (1)(c) of Citizenship Act, 1955, a woman married to a citizen of India does not automatically become an Indian citizen, though she may make an application and be registered as a Citizen of India.

Child custody: Issues and Challenges:

As to child custody is concerned, in general sense, looking at the role of mother in past towards children and taking primary responsibility for their health, safety, education and overall welfare; which parents deal with mundane but necessary arrangements of their lives – clothing, haircuts, extracurricular activities, gifts for friends, doctors' and dentists' appointments, contact with their extended family; and mother has the best perception of the emotional needs of the children specifically female child. The local law of our country is to determine as to what is best for the welfare of the children. As per Hague Convention on the Civil Aspects of International Child Abduction, children who have been "wrongfully taken" or "wrongfully retained" overseas should normally be returned promptly to their country of habitual residence. In *Karan Singh Bajwa vs Jasbir Singh Sandhu And Others*, CRWP No.1432 of 2012, Dt. on 3 September, 2012, in the interest of children and the family, the Hon'ble High Court of Punjab and Haryana imposed nine (9) conditions regarding NRI child custody. An issue of International children abduction is considered in this case. And it was observed that in custody and access cases, the welfare of the child whose future is at stake is of paramount consideration.

Australian State practice:- Giving importance to best interest for child welfare must be sine qua non to govern the issues relating to child custody. As to this issue, Australian State practice provide important tips in determining the welfare of the child. Some tips are:

1. When children are progressing well in a reasonable secure environment, court will require good reasons for ordering a different placement. See. *Curr vs. Curr*, 1979 FLR 90-611.
2. Siblings should not be separated.
3. Children's wishes should be respected.
4. Family Law Act provides that the wishes of a child of 14 years as to custody/access will prevail unless court thinks otherwise. (Family Law Act & 64 (i) (b) Court may also give considerable weight to the wishes of the younger children who have certain degree of maturity and understanding of the situation (*Schmidt vs. Schmidt*, 1979 FLC 90-685).

5. Young children, especially girls are normally best placed in the care of their mother's.
7. Generally speaking, access should be ordered as aspect of children's welfare and not as a 'consolation prize' for the parents who loses custody unless, it poses, some fairly demonstrable risk to the child.
6. Examining the feasibility of invoking the provisions of Extradition Act, 1962. Section 20 provides for return of any person accused of or convicted for an extradition offence, from the foreign country to India.

What Laws are applicable to NRI marriages?

1. The NRI marriages may be solemnized under either,
 - a). the Hindu Marriage Act, 1955,
 - b). the Special Marriage Act, 1954,
 - c). the Foreign Marriage Act, 1969 or
 - d). any other personal law governing the spouses.

The law under which the parties have married will determine the law that will be applicable to the couple. It will also affect their children in respect of rights relating to inheritance and succession, as also the couple's right to adopt, to be guardians or to obtain custody of children.

2. (a) **Hindu Law:** Under section 2 of The Hindu Marriage Act, 1955, it requires that both the parties who are getting married must be Hindus. So that if a non-Hindu wants to marry a Hindu under the Hindu Marriage Act, 1955, the non-Hindu partner will have to get converted to Hinduism before their marriage can take place. This marriage can be registered under the same Act under Section 8 or even under the Special Marriage Act, 1954 under Section 15 but such registration by itself does not confer on the spouses all the rights guaranteed under the Special Marriage Act, 1954. The Special Marriage Act, 1954 is a secular Act where religion or caste of the spouses is legally not relevant, as Section 4 has used the words "any two persons". The concept of marriage under the Special Marriage Act is monogamous, that is union for life, dissolvable by judicial authority of law only. Even succession to the property of such persons is also not governed by their personal law i.e. by the law of the community to which the party belongs; it will be governed by Indian Succession Act, 1925.

(b) **Muslim Law:** The Muslim law, on the other hand, as applied in India permits a Muslim marriage between two Muslims or between a Muslim man and a Christian/Parsi woman but not a Hindu/Budhist or Sikh woman.

(c) **Christian Law:** The Christian law of marriage permits a marriage between any two Christians or even a Christian and a non-Christian under it.

3. The word "Special" be dropped from the title of the Special Marriage Act, 1954 and it be simply called "The Marriage Act, 1954" or "The Marriage and Divorce Act, 1954". The suggested change will create a desirable feeling that this is the general law of India on marriage and divorce. See. Law Commission of India's 212th Report.

4. A provision be added to the application clause in the Special Marriage Act, 1954 that "all inter -religious marriages except those within the Hindu, Buddhist, Sikh and Jain communities, whether solemnized or registered under this Act or not shall be governed by this Act".

5. The Foreign Marriage Act, 1969, which is just an extension of The Special Marriage Act, 1954 provides that facility for an Indian national to marry abroad with another Indian national or a national of another country or with a person domiciled in another country. Under this Act, a marriage may have been solemnized in India or before a marriage officer in a foreign country. Under this Act, bigamy is void and punishable under Section 19.

5. Section 29 of Hindu Marriage Act, 1955 gives statutory recognition to customary marriages and divorces. This aspect is very important as far as a certain category of Indian immigrants are concerned those men who have migrated abroad from parts of rural India and have subsequently remarried after divorcing their Indian wives by pleading customary divorce. Before permanent settlement can be obtained by the Indian immigrant, who has subsequently remarried a woman of

foreign origin and extraction, the immigration authorities will require evidence regarding the legal validity of the customary divorce obtained in India.

6. For the application of Hindu Marriage Act, 1955 as well as Special Marriage Act, 1954, the parties must be domiciled in India at the time of marriage while the question of domicile is not relevant under The Foreign Marriage Act, 1969.

7. Every Hindu domiciled in India shall be governed by the Hindu Marriage Act, 1955 and those whose marriage has been solemnized under the Special Marriage Act, 1954 would be governed by the Special Marriage Act, 1954.

8. **Two situations:** 1. Parties marrying under their personal law in a foreign country are governed by the law in force in that country in respect of such marriage for matrimonial relief. 2. Parties marrying in a foreign country according to the civil law of that country, relief can be claimed in India under Sub-Section (1) of Section 18 of the Foreign Marriage Act, 1969.

9. Section 17 (6) of the Foreign Marriage Act, 1969 being a deeming provision, makes the provisions of the Special Marriage Act, 1954 applicable to all marriages performed under the Foreign Marriage Act, 1969 for purposes of matrimonial relief.

10. A marriage solemnized under British Marriage Act, 1949, between a Muslim husband and a Hindu wife in 1966 is a foreign marriage within the meaning of Foreign Marriage Act, 1969.

11. If NRIs contract civil marriages abroad under foreign laws without solemnizing ceremonial marital customary rites simultaneously either in India or abroad nor register their marriage under any of the Indian marriage laws, such marriages do not come within the ambit of Indian law in any way.

12. But, if the NRI couple, in addition take the precaution of solemnizing their marriage under the Foreign Marriage Act, 1969 in any Indian diplomatic office abroad, such a marriage can come under the jurisdiction of Indian courts.

13. Alternatively, NRI spouses may have to choose either their foreign nationality law or their domicile law abroad to resolve their marital disputes in accordance with such laws.

14. Before permanent settlement can be obtained by the Indian immigrant, who has subsequently remarried a woman of foreign origin and extraction, the immigration authorities will require evidence regarding the legal validity of the customary divorce obtained in India.

15. The Special Marriage Act, 1954 provides for a civil form of marriage, which can be availed of by any one domiciled in India irrespective of the religion, through registration as provided in Chapter II of the Special Marriage Act, 1954, by fulfilling the conditions laid down in clause (a) to (e) of Section 4 of the said Act. It is now clear that the Hindus availing of Chapter II of the Special Marriage Act, 1954 i.e. Sections 4 to 14 would be outside the pale of the Hindu Marriage Act, 1955.

16. As was held in *Mariamonia P. v Padmanabham*, AIR 2001 Mad. 350, customary divorce was recognized both before and after passage of Hindu Marriage Act, 1955, it is not necessary for the parties in such a case to go to Court to obtain divorce on grounds recognized by custom.

17. For the application of Hindu Marriage Act, 1955 as well as Special Marriage Act, 1954, the parties must be domiciled in India at the time of marriage while the question of domicile is not relevant under The Foreign Marriage Act, 1969.

18. It was held in *Vinaya Nair v. Corporation of Kochi*, AIR 2006 Ker.275 that Hindu Marriage Act, 1955 has extra-territorial operation and applies to all Hindus even if they reside in different parts outside India.

19. only those Hindus having permanent residence in India will be covered by the Hindu Marriage Act, 1955. There cannot be a Hindu marriage between a Hindu and a Christian. See. *Jacinta Kamath v. Padmanabha K.*, AIR 1992 Kant 372.

20. As was pointed in *Sanjay Mishra v. Eveline Joe*, AIR 1993 MP 54, as a Hindu marriage between a Hindu and a Christian is invalid and issuance of a certificate of marriage does not cure the invalidity.

How to use the existing legal mechanism to solve issues relating to NRI marriages.

1. Validity of NRI marriages will be decided in two ways: Generally, the under the following two ways, NRI marriages will be judged.

a). Whether a religious or civil ceremony has been observed; whether due formalities under the relevant marriage Act have been complied with. The rule is that the law of the place where the ceremony takes place (lex loci celebrationis) will be seen.

b). The rule of personal laws of parties. This is called 'the law of domicile'. See. Apex Court ruling in Lakshmi Sanyal v. S.K. Dhar, AIR 1972 Goa 2667

Section 8(5) of Hindu Marriage Act, 1955 specifically lays down that failure to register a Hindu marriage does not affect its validity. The formal validity of marriage is not as vital as the essential validity to a particular society. Non-observance of any formality renders a marriage voidable only, not void.

1. The existing legislation for bilateral agreements is available on the basis of reciprocity. To say explicitly, these are, Section 44A of Code of Civil Procedure, 1908, Section 3 of Maintenance Orders enforcement Act, 1921 and Section 13 of CPC. These laws enable recognition and enforcement of foreign divorce decree, maintenance orders, and child custody etc.

2. In 2012, Section 10(3) of Passport Act was introduced to confiscate passports of people having suspicious marital records.

3. Initiating action under section 3 and other relevant provisions of IPC/Cr.P.C such as Section 188 Cr.P.C; Section 82 (Proclamation for person absconding); Section 83 Cr.P.C (Attachment of property of person absconding);

4. Initiating action against parents and relatives who intentionally refuses to or feign ignorance on the whereabouts of their son, etc.

5. In the event of initiation of any criminal proceedings against the accused NRI husband or his relatives, the provisions of section 285 (3) of Criminal Procedure Code, 1973 can be put into action.

6. The guidelines for initiating action may also include application of section 18 of Hindu Adoption and Maintenance Act, 1956 application for a stay on husband's property- whether in his name or ancestral properties and the right of the women to matrimonial home which includes the right to reside with her in laws.

7. In Ajay Aggarwal v. Union of India Justice K.Ramaswamy in his separate judgment held that sanction under Section 188 is not a condition precedent to take cognizance of the offence. If need be it could be obtained before trial begins.

8. Section 188 Cr.P.C operates where an offence is committed by a citizen of India outside the country. Requirements are, therefore, 1. – commission of an offence; 2. – by an Indian citizen; and 3. – that it should have been committed outside the country.

9. Substantive law of extra-territory in respect of criminal offences is provided for by Section 4 of IPC and the procedure to inquire and try it is contained in section 188 Cr.P.C.

10. Effect of these sections is that an offence committed by an Indian citizen outside the country is deemed to have been committed in India. Proviso to Section 188 Cr.P.C. however provides the safeguard for the NRI to guard against any unwarranted harassment by directing, "that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government".

11. Since the proviso begins with a non obstante clause its observance is mandatory. But it would come into play only if the principal clause is applicable, namely, it is established that an offence as defined in Clause (n) of Section 2 of the Cr.P.C. has been committed and it has been committed outside the country. See. Vijaya Saradhi Vajja vs Devi Sriropa Madapati And Anr., 2007 CriLJ 636.

12. Section 44 of Evidence Act:- This section gives to any party to a suit or proceeding the right to

show that the judgment which is relevant under Section 41" was delivered by a court not competent to deliver it, or was obtained by fraud or collusion". Fraud, in any case bearing on jurisdictional facts, vitiates all judicial acts whether in rem or in personam. See. R. Viswanathan vs Rukn-Ul-Mulk Syed Abdul Wajid, (1963) 3 SCR 22 at p. 42. It was held: "a judgment of a foreign court to be conclusive between the parties must be a judgment pronounced by a court of competent- jurisdiction and competence contemplated by Section 13 of the Code of. Civil Procedure is in an international sense and not merely by the law of foreign State in which the Court delivering judgment functions".

13. What, if a foreigner commits offence within India? It is implicit under Section 3 of the Penal Code that a foreigner who commits an offence within India is guilty and can be punished as such without any limitation as to his corporeal presence in India at the time. For if it were not so, the legal fiction implicit in the phrase "as if such act had been committed within India" in Section 3 would not have been limited to the supposition that such act had been committed within India, but would have extended also a fiction as to his physical presence at the time in India. See. Mobarik Ali Ahmed Vs. State of Bombay, 1957 AIR 857, 1958 SCR 328.

There is no legislative law in India compared to 'Private International Law. There is no legislative law in India compared to 'Private International Law' or Conflict of Laws as in some western countries. In family and marriage cases involving NRI spouses, Our Indian Courts interprets and rely upon

1. Sections 13 and 14 of the Civil Procedure Code, 1908;
2. Section 44 A of the Civil Procedure Code, 1908.

Sections 13 and 14 CPC deal with the competence to adjudicate and jurisdiction of a foreign Court as to their conclusiveness, Section 44-A CPC deals with presumption of a decree by a foreign Court for its execution.

Section 13 of the Civil Procedure Code, 1908 is the part of procedural law followed in Indian Courts. It concerns with recognition of the foreign decree only. The decree holder has to proceed before an Indian Court by filing a regular suit as the first stage of the enforcement proceedings. The Court after hearing the suit proceedings, may pass a judgment for its enforcement through an execution petition. Thus, a foreign decree is converted into a domestic judgment for its enforcement.

Section 14 lays presumptions as to Foreign Judgments. The Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on

Section 44-A CPC deals with the execution of decrees passed by courts in reciprocating territory. Where a certified copy of a decree of any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

In Vishwanathan v. Abdul Wajid, AIR 1963 SC 1-58, it was observed that a foreign judgment is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error either (1) of fact; or (2) of law". Thus, a foreign judgment can be examined from the point of view of competence but not of errors. Hence, the Indian Court cannot go into the merits of the original claim.

In Gour Gopal Roy v. Sipra Roy, AIR 1978 Cal 163, the Apex court, as to section 44 A of Civil Procedure Code, 1908 that mere production of a Photostat copy of a decree of foreign Court is not sufficient. It is required to be certified by a representative of the Central Government in America.

In Rajiv Tayal v. Union of India and Others, (2005) 124 DLT 502. is another judgment, which shows that the wife also has an available remedy under Section 10 of the Passport Act 1967 for impounding and/or revocation of the passport of her NRI husband if he failed to respond to the

summons by the Indian Courts.

In Venkat Perumal v. State of AP, (1998) II DMC 523. is a judgment passed by the Andhra Pradesh High Court in an application filed by an NRI husband for quashing of the proceedings of the wife's complaint in Hyderabad under Section 498A of the Indian Penal Code 1860 against matrimonial cruelty meted out to her. The Court rejected the plea of NRI husband.

Latest case-law on NRI marriage issues:

1. Marriage held in India. Wife was tortured in Abroad: NRI husband married a woman in India and subjected her to cruelty in abroad. The Superior Court declined quash the FIR. See. Satnam Puri And Anr vs State Of Punjab And Anr Judgment dated 15 September, 2014.

2. In 1994, Dhanwanti Joshi Vs. Madhav Unde the wife found the husband in abroad with his first wife. Then, she left her husband and returned to India. Hon'ble Supreme Court held that their child, who is 35 days old, shall stay under the custody of the mother subject to visitation rights. Here, the loophole of NRI marriage was marrying the second time without telling the second wife.

3. Smt. Seema Vs. Aswini Kumar, Tr. P. (C) No. 291 of 2005, Judgment dt. 14-02-2006, the Supreme Court of India issued certain directions to the Central and the State Governments.

- Marriages of Indian citizens should compulsorily be registered.
- The procedure for registration should be notified by the States within three months

It is incumbent upon the States to provide for registration of NRI marriages taking place in India.

4. In 2010, as seen from the Mrs Rachna Shah's case, she was married NRI residing in Singapore. She found that her husband was not an Engineer, which he claimed earlier, but husband was employed in an insignificant temporary job. She was tortured in abroad. However, after suffering a great deal at his hands, she was finally saved by local police and she was taken to the Indian Embassy and sent back to India.

5. Recently, in 2017, Chepuri Hanumantha Raio, S/O Late ... vs Chepuri Uma Bala, CRIMINAL REVISION CASE No.79 OF 2016 , Judgment dated 27 February, 2017. Maintenance for NRI divorce wife has been discussed in the light of Apex Court Badsha's case. Section 18 of Hindu Adoptions and Maintenance Act, sections 125 and 127 of Cr.P.C were discussed.

6. Venkat Perumal v State of Andhra Pradesh, the Hon'ble High Court declined to quash the criminal proceedings against NRI husband holding the the offence under section 498-A IPC is a continuous offence.

7. The Supreme Court had shown concerns regarding this through its judgment, in cases like Neeraja Sharaph vs. Jayant V. Saraph and has emphasised the need to consider legislative safeguarding of the interests of women and also suggested the following specific provisions:

1. Marriage between an NRI and an Indian woman which has taken place in India may not be annulled by any foreign court.

2. In the case of divorce, adequate alimony should be paid to the wife out of the property of the husband.

3. The decree of Indian court should be made executable in foreign courts both on the principle of comity by entering into reciprocal agreements and notify them under section 44A of the Civil Procedure Code which talk about binding nature of foreign decree i.e.; it is executable as it would have been a decree passed by that court.

Conclusion:

It must be recognized that failure of NRI marriages may be due to a variety of reasons and that both men as well as women are responsible for such failures. The absolving of all women from blame is unjustified. The notion that every case of abandoned bride is due to harassment/dowry demands is over simplistic. Sometimes people marry for purely pragmatic reasons, sometimes called a 'marriage of convenience' or 'sham marriage'. Over-seas Citizenship of India is not a full-fledged citizenship of India. Acquisition of citizenship of another country by a citizen of India results in the

termination of his Indian Citizenship. Our country announced the Government's intention to give dual citizenship to Persons Of Indian Origin (PIOs) domiciled in any country (except Pakistan & Bangladesh). This has since been given legal backing after the Indian Parliament approved the Citizenship (Amendment) Act, 2005. The amended Act enables the Central Government to register, as an Overseas Citizen of India (OCI). The Government should also consider bringing in a comprehensive regulation/legislation to ensure that all protection be accorded by law to Indian women, with regard to marriage, divorce, maintenance, inheritance and custody of children etc.

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