



# The Divorce Act, 1869

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# The Divorce Act, 1869<sup>1</sup>

[Act 4 of 1869]

[26th February, 1869]

*An Act to amend the law relating to Divorce and Matrimonial Causes*<sup>2</sup>

**Preamble.**—Whereas it is expedient to amend the law relating to the divorce of persons professing the Christian religion, and to confer upon certain Courts jurisdiction in matters matrimonial; It is hereby enacted as follows:—

**CASE LAW ▶ Object.**—Matrimonial disputes should be decided in a pragmatic manner keeping in view the ground realities. For this purpose, a host of factors must be taken into consideration most important being whether the marriage can be saved and the couple can live together happily and maintain proper atmosphere for rearing children, *Sujata Uday Patil v. Uday Madhukar Patil*, (2006) 13 SCC 272.

For the divorce law to be meaningful in freeing the parties from the bond of marriage which has failed, it must provide for economic independence of the divorced woman irrespective of her blameworthiness in bringing about such a state of affairs, *Reynold Rajamani v. Union of India*, (1982) 2 SCC 474.

▶ **Jurisdiction.**—The Divorce Act excludes jurisdiction of Ecclesiastical Tribunal (Church Court) or any tribunal/court other than the courts envisaged by it to annul a marriage, *Molly Joseph v. George Sebastian*, (1996) 6 SCC 337.

Divorce Courts in India have no jurisdiction to decree dissolution of a marriage between parties not domiciled in India, though the marriage was celebrated and the parties were resident in India, and the acts of adultery relied on were committed within the jurisdiction of the Indian Courts, *Keyes v. Keyes and Gray*, [1921] P. 204.

**Statement of Objects and Reasons.**—The object of this Bill is to place the matrimonial Law administered by the High Courts, in the exercise of their original jurisdiction, on the same footing as the Matrimonial Law administered by the Court for Divorce and Matrimonial Causes in England.

The 9th Section of the Act of Parliament for establishing High Courts of Judicature in India, (24 and 25 Vic. Ch. 104) provides that the High Courts shall exercise such Matrimonial Jurisdiction as Her Majesty by Letters Patent shall grant and direct. Under the authority thus conferred by Parliament, the 35th Section of the Letters Patent, constituting the High Courts of Judicature, provides as follows:—

“And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have jurisdiction in matters Matrimonial between our subjects professing the Christian religion, and that such jurisdiction shall extend to the local limits within which the Supreme Court now has Ecclesiastical Jurisdiction. Provided always that nothing herein contained shall be held to interfere with the exercise of any Jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof”.

In the Despatch of the Secretary of State transmitting the Letters Patent (Letter from Secretary of State, Judicial No. 24 dated 14-5-1862), the 33rd and 34th paragraphs are to the following effect:—

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1. For Statement of Objects and Reasons, see Calcutta Gazette, 1863, p. 173; for Report of Select Committee, see Gazette of India, 1869, p. 192; for Proceedings in Council, see Calcutta Gazette, 1862, Supplement, p. 463, *ibid.*, 1863, Supplement, p. 43, and Gazette of India, 1869, Supplement, p. 291.
  2. The words “in India” omitted by Act 3 of 1951, S. 3 and Sch. (w.e.f. 1-4-1951).

"33. Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the Presidency in the same position under the High Court, as to matters matrimonial in general as they now are under the Supreme Court, and this they believe to be effected by Clause 35 of the Charter. But they consider expedient that the High Court should possess, in addition, the powers of decreeing divorce, which the Supreme Court does not possess, in other words, that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England, established in virtue of the Act 20 and 21 Vic. C. 85, and in regard to which further provisions were made by 22 and 23 Vic. C. 61, and 23 and 24 Vic. C. 144. The Act of Parliament for establishing the High Court, however, does not purport to give to the Crown the power of importing into the Charter all the provisions of the Divorce Court Act, and some of them the Crown clearly could not so import, such for instance as those which prescribe the period of remarriage, and those which exempt from punishment clergymen refusing to remarry adulterers. All these are, in truth, matters for Indian legislation, and I request that you will immediately take the subject into your consideration and introduce into your Council a Bill for conferring upon the High Court the jurisdiction and powers of the Divorce Court in England, one of the provisions of which should be to give an appeal to the Privy Council in those cases in which the Divorce Court Act gives an appeal to the House of Lords.

34. The objects of the proviso at the end of Clause 35 is to obviate any doubt that may possibly arise as to whether, by vesting the High Court with the powers of the Court for Divorce and Matrimonial Causes in England, it was intended to take away from the Courts within divisions of the Presidency not established by Royal Charter any jurisdiction which they might have in matters matrimonial, as, for instance, in a suit for alimony between Armenians or Native Christians. With any such jurisdiction it is not intended to interfere."

In addition to the Act of Parliament mentioned by the Secretary of State as regulating the jurisdiction of the English Divorce Court the Statutes 25 and 26 Vic. Ch. 81 has been passed in the year just expired (1862). The object of this Statute to render perpetual 23 and 24 Vic. Ch. 144 the duration of which had been originally limited to two years.

The draft of a Bill has been prepared to give effect to the Secretary of State instructions, but some variations from the English Statutes in respect of Procedure have been adopted.

With a view to uniformity in practice in the several branches of jurisdiction, the Bill provides that the Procedure of the Code of Civil Procedure shall be followed, instead of the Rules of Her Majesty's Court for Divorce and Matrimonial Causes in England and it omits the provision in 20 and 21 Vic. Ch. 85 respecting the occasional trial of questions of fact by juries.

In respect of fees, it has been considered that the Act 20 of 1862 (lately continued by the Governor-General in Council for another year) renders special legislation unnecessary.

The power of intervening in suits, given by 23 and 24 Vic. Ch. 144, to the Attorney General and the Queen's Proctor is, in this Bill, given to the Advocate General and the Solicitor to Government.

There are also other variations of a minor and verbal character.

The Draft Bill having been submitted to the Judges of the several High Courts, with request that they would favour the Government with their opinions on it communications have been received, from the Judges at Calcutta and Bombay and will be laid before the Council. In these letters there are several important suggestions, and the Honourable the Chief Justice of the High Court at Calcutta has intimated that he considers it doubtful whether decrees by the High Court under the proposed Act, dissolving the marriages of persons who have been married in England would have legal effect there. The question is one of considerable difficulty as well as of great importance, and has been stated to the Secretary of State, with the view of obtaining the opinion of Her Majesty's Law Officers, and, if necessary, some legislative measure to remove all doubts." — Calcutta Gazette, 1863, p. 173.

**Statement of Objects and Reasons of Amendment Act 49 of 2001.**—The Law Commission of India in its 27th, 54th and 129th Reports and the Committee on Subordinate Legislation (11th Lok Sabha) had recommended that the tendency to obtain the adjournments on frivolous grounds in the



cases pending in Courts should be curbed. The Malimath Committee also recommended that remedial measures should be taken immediately for speedy disposal of the cases pending in courts.

2. Sections 36 and 41 of the Indian Divorce Act, 1869, Sections 39 and 49 of the Parsi Marriage and Divorce Act, 1936, Sections 36 and 38 of the Special Marriage Act, 1954 and Sections 24 and 26 of the Hindu Marriage Act, 1955 do not contain any time limit for disposal of applications for alimony pendente lite or the maintenance and education of minor children. More than 670 cases are understood to be pending in various High Courts under Section 24 of the Hindu Marriage Act, 1955.

3. As part of the judicial reforms process, it is proposed to make necessary amendments in the enactments mentioned in Paragraph 2 with a view to making provisions that an application for alimony pendente lite or the maintenance and education of minor children shall be disposed of within sixty days from the date of service of notice on the respondent.

4. The Bill seeks to achieve the above object.

## I.—PRELIMINARY

**1. Short title, commencement of Act.**—This Act may be called the <sup>3</sup>[\* \* \*] Divorce Act, and shall come into operation on the first day of April, 1869.

**2. Extent of Act.**—<sup>4</sup>[This Act extends to <sup>5</sup>[the whole of India <sup>6</sup>[except the State of Jammu and Kashmir<sup>7</sup>]].]

**Extent of power to grant relief generally.**—<sup>8</sup>[Nothing hereinafter contained shall authorise any Court to grant any relief under this Act except where the petitioner <sup>9</sup>[or respondent] professes the Christian religion,

**and to make decrees of dissolution.**—or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented,

**or of nullity.**—or to make decrees of nullity of marriage except where the marriage has been solemnized in India and the petitioner is resident in India at the time of presenting the petition,

or to grant any relief under this Act, other than a decree of dissolution of marriage or of nullity of marriage, except where the petitioner resides in India at the time of presenting the petition.]

**3. Interpretation-clause.**—In this Act, unless there be something repugnant in the subject or context,—

<sup>10</sup>[(1) “**High Court**”.—“High Court” means with reference to any area,—

(a) in a State, the High Court for that State;

<sup>11</sup>[(b) in Delhi, the High Court of Delhi;

3. The word “Indian” omitted by Act 51 of 2001, S. 2 (w.e.f. 3-10-2001).

4. Subs. by A.O. 1948 (w.e.f. 23-3-1948).

5. Subs. by A.O. 1950 (w.e.f. 26-1-1950).

6. Subs. for “except Part B States” by Act 3 of 1951, S. 3 and Sch. (w.e.f. 1-4-1951).

7. Now made applicable to the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh. [Vide S.O. 3912(E), dt. 30-10-2019 (w.e.f. 31-10-2019)].

8. Subs. by Act 25 of 1926, S. 2 (w.e.f. 25-3-1926).

9. Ins. by Act 30 of 1927, S. 2 (w.e.f. 23-9-1927).

10. Subs. by A.O. (No. 2) 1956.

11. Subs. by the Himachal Pradesh (Adaptation of Laws on State and Concurrent Subjects) Order, 1968, for sub-clause (b) (w.e.f. 1-11-1966).



(bb) in Himachal Pradesh, the High Court of Punjab & Haryana up to and inclusive of the 30th April, 1967 and the High Court of Delhi thereafter;]

(c) in Manipur and Tripura, the High Court of Assam;

(d) in the Andaman and Nicobar Islands, the High Court at Calcutta;

(e) in the Laccadive, Minicoy and Amindivi Islands, the High Court of Kerala;

<sup>12</sup>[(ee) in Chandigarh, the High Court of Punjab and Haryana;]

and in the case of any petition under this Act, "High Court" means the High Court for the area where the husband and wife reside or last resided together:]

<sup>13</sup>[(2) "**District Judge**".—"District Judge" means a Judge of a principal civil court of original jurisdiction however designated:]

(3) "**District Court**".—"District Court" means, in the case of any petition under this Act, the Court of the District Judge within the local limits of whose ordinary jurisdiction, or of whose jurisdiction under this Act <sup>14</sup>[the marriage was solemnized or], the husband and wife reside or last resided together:

(4) "**Court**".—"Court" means the High Court or the District Court, as the case may be:

(5) "**Minor children**".—"minor children" means, in the case of sons of Native fathers, boys who have not completed the age of sixteen years, and, in the case of daughters of Native fathers, girls who have not completed the age of thirteen years: In other cases it means unmarried children who have not completed the age of eighteen years:

(6) "**Incestuous adultery**".—<sup>15</sup>[\* \* \*]

(7) "**Bigamy with adultery**".—<sup>16</sup>[\* \* \*]

(8) "**Marriage with another woman**".—"marriage with another woman" means marriage of any person, being married, to any other person, during the life of the former wife, whether the second marriage shall have taken place within <sup>17</sup>[India] or elsewhere:

(9) "**Desertion**".—"desertion" implies an abandonment against the wish of the person charging it: and

12. *Ins.* by the Punjab Reorganisation (Chandigarh) (Adaptation of Laws on State and Concurrent Subjects) Order, 1968 (w.e.f. 1-11-1966).

13. *Subs.* by A.O. 1950 (w.e.f. 26-1-1950).

14. *Ins.* by Act 51 of 2001, S. 3 (w.e.f. 3-10-2001).

15. *Omitted* by Act 51 of 2001, S. 3 (w.e.f. 3-10-2001). Prior to omission it read as:

"(6) *Incestuous adultery*—"Incestuous adultery" means adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity (whether natural or legal) or affinity:"

16. *Omitted* by Act 51 of 2001, S. 3 (w.e.f. 3-10-2001). Prior to omission it read as:

"(7) *Bigamy with adultery*—"Bigamy with adultery" means adultery with the same woman with whom the bigamy was committed:"

17. *Subs.* for "the dominions of Her Majesty" by A.O. 1950 (w.e.f. 26-1-1950).



- (10) **“Property”**.—“property” includes, in the case of a wife, any property to which she is entitled for an estate in remainder or reversion or as a trustee, executrix or administratrix; and the date of the death of the testator or intestate shall be deemed to be the time at which any such wife becomes entitled as executrix or administratrix.

## II.—JURISDICTION

### 4. Matrimonial jurisdiction of High Courts to be exercised subject to Act.

**Exception.**—The jurisdiction now exercised by the High Courts in respect of divorce *a mensa et toro*, and in all other causes, suits and matters matrimonial, shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained, and not otherwise: except so far as relates to the granting of marriage-licenses, which may be granted as if this Act had not been passed.

**5. Enforcement of decrees or orders made heretofore by Supreme or High Court.**—Any decree or order of the late Supreme Court of Judicature at Calcutta, Madras or Bombay sitting on the ecclesiastical side, or of any of the said High Courts sitting in the exercise of their matrimonial jurisdiction, respectively, in any cause or matter matrimonial, may be enforced and dealt with by the said High Courts, respectively, as hereinafter mentioned, in like manner as if such decree or order had been originally made under this Act by the Court so enforcing or dealing with the same.

**6. Pending suits.**—All suits and proceedings in cause and matters matrimonial, which when this Act comes into operation, are pending in any High Court, shall be dealt with and decided by such Court, so far as may be, as if they had been originally instituted therein under this Act.

### 7. Court to act on principles of English Divorce Court.—<sup>18</sup>[\* \* \*]

**CASE LAW ► Exercise of Power.**—Section 7 directs the High Court and District Courts to “act and give relief on principles and rules” conformable to principles and rules on which the Court for Divorce and Matrimonial Causes in England acts and gives relief. The expression “principles and rules” does not mean the grounds on which a suit or proceeding may be instituted. The stage contemplated by Section 7 relates to the norms by which the court will exercise its jurisdiction for the purpose of disposing of the suit or proceeding pending before it where the grounds relate to stage of pleading, *Reynold Rajamani v. Union of India*, (1982) 2 SCC 474.

**8. Extraordinary jurisdiction of High Court.**—The High Court may, whenever it thinks fit, remove and try and determine as a Court of original

18. Omitted by Act 51 of 2001, S. 4 (w.e.f. 3-10-2001). Prior to omission it read as:

“7. *Court to act on principles of English Divorce Court.*—Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief:

Provided that nothing in this section shall deprive the said Courts of jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded.”



jurisdiction any suit or proceeding instituted under this Act in the Court of any District Judge within the limits of its jurisdiction under this Act.

**Power to transfer suits.**—The High Court may also withdraw any such suit or proceeding, and transfer it for trial or disposal to the Court of any other such District Judge.

**CASE LAW ► Nature and Scope.**—High Court's power under Section 8 to transfer suit to the court of "any other such District Judge" is not limited to transfer only to any District Judge, which can be exercised by transferring suit or proceeding from the court of one District Judge to any other District Judge within the jurisdiction of the High Court with the only limitation that the court to which suit is transferred must be a Principal Civil Court of original jurisdiction within the meaning of Section 3(2), *Mabel Treeza Pinto v. Francis Pinto*, (2005) 7 SCC 761.

**9. Reference to High Court.**—When any question of law or usage having the force of law arises at any point in the proceedings previous to the hearing of any suit under this Act by a District Court or at any subsequent stage of such suit, or in the execution of the decree therein or order thereon.

The Court may, either of its own motion or on the application of any of the parties, draw up a statement of the case and refer it, with the Court's own opinion thereon, to the decision of the High Court.

If the question has arisen previous to or in the hearing, the District Court may either stay such proceedings, or proceed in the case pending such reference, and pass a decree contingent upon the opinion of the High Court upon it.

If a decree or order has been made, its execution shall be stayed until the receipt of the order of the High Court upon such reference.

### III.—DISSOLUTION OF MARRIAGE

<sup>19</sup>[**10. Grounds for dissolution of marriage.**—(1) Any marriage solemnised, whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnisation of the marriage, the respondent—

- (i) has committed adultery; or
- (ii) has ceased to be Christian by conversion to another religion; or
- (iii) has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or
- (iv) <sup>20</sup>[\* \* \*]
- (v) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or

19. Subs. by Act 51 of 2001, S. 5 (w.e.f. 3-10-2001).

20. Omitted by Act 6 of 2019, S. 2 (w.e.f. 1-3-2019). Prior to omission it read as:

"(iv) has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or"



- (vi) 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 the respondent if the respondent had been alive; or
- (vii) has wilfully refused to consummate the marriage and the marriage has not therefore been consummated; or
- (viii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or
- (ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or
- (x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.

(2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.]

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 10 (prior to substitution by Act 51 of 2001), the words “or to the High Court”, wherever occurring in the section, shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

**CASE LAW ► Constitutionality.**—Section 10 with regard to Christian wife in reference to Chapter III of the Constitution declared unconstitutional, *Youth Welfare Federation v. Union of India*, (1997) 1 AP LJ 159 (HC)(FB).

According to Section 10 of the Act that while the husband can seek dissolution of marriage on the ground that his wife has been guilty of adultery, the wife has to prove that the husband is guilty of adultery which is (1) incestuous, (2) coupled with cruelty which without adultery would have entitled her to divorce a mensa et toro, (3) coupled with desertion without reasonable excuse for 2 years or upwards, etc. Therefore, as far as the ground of adultery is concerned husband is in a much favourable position when compared to the wife since she has to prove adultery with one or other aggravating circumstances indicated in the Section itself. This is clearly in violation of Articles 14, 15, and 21 of the Constitution of India. If offending portions are severed and quashed as ultra vires, the remaining portions of the provisions validly stand along with the other provisions in Section 10, *Ammini E.J. v. Union of India*, (1995) 2 AP LJ 53 (DNC)(Ker).

► **Ex-Parte Divorce.**—Husband died after obtaining ex-parte divorce decree against wife. Application by wife for setting aside that decree is maintainable, *R. Lakshmi v. K. Saraswathi Ammal*, (1996) 6 SCC 371.

Effect of setting aside ex parte divorce decree where plaintiff spouse had already expired would abate since there would be no subsisting marriage to be dissolved, *Yallawwa v. Shantavva*, (1997) 11 SCC 159.

► **Grounds of Divorce.**—The grounds for divorce are limited as set forth in Section 10 of the Act and constitute the only conditions on which the court has jurisdiction to grant divorce. Courts can construe the ground liberally but cannot add to it. Section 7 does not permit inclusion of additional grounds to those already specified in Section 10. That is the job of legislature, *Reynold Rajamani v. Union of India*, (1982) 2 SCC 474.

► **Conversion.**—Marriage solemnised under a particular statute and according to one personal law cannot be dissolved according to another personal law on conversion of one of the parties to that religion, *Sarla Mudgal v. Union of India*, (1995) 3 SCC 635.

► **Cruelty.**—Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. An instance of mis-behaviour in isolation is not a correct approach to identify mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference, *Parveen Mehta v. Inderjit Mehta*, (2002) 5 SCC 706.

Cruelty is a mixed question of law and fact. Kind and degree of cruel treatment so as to constitute matrimonial offence depends upon facts and circumstances of the case, *Sujata Uday Patil v. Uday Madhukar Patil*, (2006) 13 SCC 272.

Denial of conjugal relationship between parties amounts to cruelty, *E.B. Mary Raveena v. Antony Ravikumar*, (2012) 3 MWN (Civil) 337 (Mad) (DB).

Mere preferring of complaint alone cannot be construed to be an act of cruelty. If filing of complaint is termed as cruelty, then very purpose of law, which provides for protection of society would become a mockery. However, if Complaint is found to be false, then it would cause mental cruelty to sufferer, *Raju v. V. Victoria*, (2012) 2 MWN (Civil) 479 (Mad) (DB).

It cannot be accepted that the husband can be guilty of cruelty only when both parties were residing together. The relationship of husband and wife does exist and merely because the wife is staying away from the husband it cannot be said that the husband cannot be guilty of cruelty against the wife, *Jordan Diengdoh v. Swaranjeet Singh Chopra*, ILR (1984) 2 Del 14.

When a party to divorce is unable to prove adultery, the false allegation of adultery becomes an act of cruelty, *D. Nagappan v. T. Virgin Rani*, (2009) 3 CTC 15.

The word "cruelty" and the kind or degree of "cruelty" necessary which may amount to a matrimonial offence has not been defined in the Act. The law has no standard by which to measure the nature and degree of cruel treatment that may satisfy the test. It may consist of a display of temperament, emotion or perversion whereby one gives vent to his or her feelings, without intending to injure the other. It need not consist of direct action against the other but may be misconduct indirectly affecting the other spouse even though it is not aimed at that spouse. It is necessary to weigh all the incidents and quarrels between the parties keeping in view the impact of the personality and conduct of one spouse upon the mind of the other. Cruelty may be inferred from the facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence and inference on the said point can only be drawn after all the facts have been taken into consideration. Where there is proof of a deliberate course of conduct on the part of one, intended to hurt and humiliate the other spouse, and such a conduct is persisted cruelty can easily be inferred. Neither actual nor presumed intention to hurt the other spouse is a necessary element in cruelty, *Sujata Uday Patil v. Uday Madhukar Patil*, (2006) 13 SCC 272.



"Cruelty" is not confined to physical cruelty — Matrimonial alliance is irretrievably broken where one of the spouses persistently causes mental torture, disgrace and harassment, *John Vincent v. Nancy*, 2016 SCC OnLine Mad 23291 : (2016) 5 LW 701 (Mad).

► **Desertion.**—In proceedings for divorce, the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt, *Bipinchandra Jaisinghbhai Shah v. Prabhavati*, AIR 1957 SC 176.

As per Section 10(10) for dissolution of marriage on ground of desertion, there ought to be two years period of desertion immediately preceding petition, *E.B. Mary Raveena v. Antony Ravikumar*, (2012) 3 MWN (Civil) 337 (Mad) (DB).

Previous cohabitation is essential for pleading desertion, except in cases of mental or physical incapacity or other special circumstances, *Savitri Pandey v. Prem Chandra Pandey*, (2002) 2 SCC 73.

Heavy burden lies upon a petitioner who seeks divorce on the ground of desertion to prove four essential conditions, namely, (1) the factum of separation; (2) animus deserendi; (3) absence of his or her consent; and (4) absence of his or her conduct giving reasonable cause to the deserting spouse to leave the matrimonial home. The offence of desertion must be proved beyond any reasonable doubt and as a rule of prudence the evidence of the petitioner shall be corroborated, *Lachman Utamchand Kirpalani v. Meena*, AIR 1964 SC 40.

Divorce act can be invoked to dissolve marriage when either professes Christian religion, where parties domiciled in India at the time of presentation of petition. "Desertion" is not withdrawal from a place but from a state of things essential in a matrimonial life. "Desertion" is a matter to be inferred from the facts and circumstances of a given case. Desertion starts when the factum of separation and the animus deserendi co-exists, *L. Stella v. V. Ponnusamy*, 2015 SCC OnLine Mad 12733 : (2015) 5 LW 214 (DB) (Mad) : (2016) 158 AIC 342 (Mad).

► **Adultery.**—Adultery as a ground for divorce must be after the solemnisation of marriage and not before the marriage. No presumption in law that a girl who was compelled to have sexual activities with another man continues the same activity forever, *Arokia Raj Morais v. Mabia Bibia Rani Morais*, (2006) 43 AIC 361 (Mad HC).

► **Unsoundness of Mind.**—Degree and extent of mental disorder to justify a decree of divorce is incurable unsoundness of mind of a kind that the other spouse cannot reasonably be expected to live with him or her, *Sharda v. Dharmpal*, (2003) 4 SCC 493.

► **Non-consummation.**—Non-consummation amounts to mental cruelty, within Sections 10(1)(viii) and (x), hence, marriage dissolved, *Candida Justina v. Sunderbabu*, 2016 SCC OnLine Mad 11309 : (2016) 4 LW 146 (Mad) (DB).

<sup>21</sup>[**10-A. Dissolution of marriage by mutual consent.**—(1) Subject to the provisions of this Act and the rules made thereunder, a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Indian Divorce (Amendment) Act, 2001, on the ground that they have been living separately for a period of two years or more, that they have not been able to live together and they have mutually agreed that the marriage should be dissolved.

21. Ins. by Act 51 of 2001, S. 6 (w.e.f. 3-10-2001).



(2) On the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and making such inquiry, as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of decree.]

<sup>22</sup>[**11. Adulterer or adulteress to be co-respondent.**—On a petition for dissolution of marriage presented by a husband or wife on the ground of adultery, the petitioner shall make the alleged adulterer or adulteress a co-respondent, unless the petitioner is excused by the Court from so doing on any of the following grounds, namely:—

- (a) that the wife, being the respondent is leading the life of a prostitute or the husband, being respondent is leading an immoral life and that the petitioner knows of no person with whom the adultery has been committed;
- (b) that the name of the alleged adulterer or adulteress is unknown to the petitioner although the petitioner has made due efforts to discover it;
- (c) that the alleged adulterer or adulteress is dead.]

**12. Court to be satisfied of absence of collusion.**—Upon any such petition for the dissolution of a marriage, the Court shall satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or not the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery, or has condoned the same, and shall also enquire into any countercharge which may be made against the petitioner.

**CASE LAW ► Evidence/Proof of.**—The petitioner who approached the Court for divorce on the ground of adultery is only required to prove his case by preponderance of probabilities and need not satisfy beyond reasonable doubt. Circumstantial evidence can also be considered and taken note on. Previously, the matrimonial offences have to be proved by the petitioner beyond a reasonable doubt, but recently the view has been changed and it has been held that the petitioner is only required to prove his case by preponderance of probabilities and the degree of probability depending upon the gravity of the offences. The accepted rule, therefore, is that circumstantial evidence is all that can normally be expected in proof of the charge. The circumstances must be such as lead to it by fair inference, as a necessary conclusion, and unless this were so, no protection whatever could be given to marital rights, *Pasumpon Gandhi v. Shirley Gandhi*, (2003) 3 AIC 733 (Mad).

**13. Dismissal of petition.**—In case the Court, on the evidence in relation to any such petition, is satisfied that the petitioner's case has not been proved, or is not satisfied that the alleged adultery has been committed,

or finds that the petitioner has, during the marriage, been accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of,

22. Subs. by Act 51 of 2001, S. 7 (w.e.f. 3-10-2001).

or that the petition is presented or prosecuted in collusion with either of the respondents,

then and in any of the said cases the Court shall dismiss the petition.

<sup>23</sup>[\* \* \*]

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 13, the last paragraph, namely, “when a petition is dismissed by a District Court under this section, the petitioner may, nevertheless, present a similar petition to the High Court” shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

**14. Power to Court to pronounce decree for dissolving marriage.**—In case the Court is satisfied on the evidence that the case of the petitioner has been proved,

and does not find that the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of,

or that the petitioner is presented or prosecuted in collusion with either of the respondents,

the Court shall pronounce a decree declaring such marriage to be dissolved <sup>24</sup>[\* \* \*].

Provided that the Court shall not be bound to pronounce such decree if it finds that the petitioner has, during the marriage, been guilty of adultery,

or if the petitioner has, in the opinion of the Court, been guilty of unreasonable delay in presenting or prosecuting such petition,

or of cruelty towards the other party to the marriage,

or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse,

or of such wilful neglect or misconduct of or towards the other party as has conducted to the adultery.

**Condonation.**—No adultery shall be deemed to have been condoned within the meaning of this Act unless where conjugal cohabitation has been resumed or continued.

**CASE LAW ► Interpretation.**—The words “satisfied on the evidence” in Section 14 of the Act imply that the duty of the Court is to pronounce a decree if satisfied with the evidences, *Earnist John White v. Kathleen Olive White*, 1958 SCR 1410.

**► Exercise of Power.**—Under the Indian Divorce Act, 1869, the condition for the grant of a relief is the satisfaction of the Court as to the existence of the grounds for granting the particular relief. The satisfaction must necessarily be founded upon material which is relevant for the consideration of the Court, and this

23. *Omitted* by Act 51 of 2001, S. 8 (w.e.f. 3-10-2001). Prior to omission it read as:

“When a petition is dismissed by a District Court under this section, the petitioner may nevertheless, present a similar petition to the High Court.”

24. The words “in the manner and subject to all the provisions and limitations in Sections 16 and 17 made and declared” *omitted* by Act 51 of 2001, S. 9 (w.e.f. 3-10-2001).



would include the evidence adduced in the case. The expression "If the court is satisfied" is similar to "satisfied on the evidence", *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati*, (1964) 7 SCR 267.

**15. Relief in case of opposition on certain grounds.**—In any suit instituted for dissolution of marriage, if the respondent opposes the relief sought on the ground, in case of such suit instituted by a husband, of his adultery, cruelty, or desertion <sup>25</sup>[\* \* \*] or, in case of such suit instituted by a wife, on the ground of her adultery <sup>26</sup>[or cruelty or desertion], the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had presented a petition seeking such relief, and the respondent shall be competent to give evidence of or relating to such <sup>27</sup>[adultery,] cruelty or desertion.

**16. Decrees for dissolution to be nisi.**—Every decree for a dissolution of marriage made by a High Court <sup>28</sup>[\* \* \*], shall, in the first instance, be a decree *nihi*, not to be made absolute till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court, by general or special order from time to time, directs.

**Collusion.**—During that period any person shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not being brought before the Court.

On cause being so shown, the Court shall deal with the case by making the decree absolute, or by reversing the decree *nihi*, or by requiring further inquiry, or otherwise as justice may demand.

The High Court may order the costs of Counsel and witnesses and otherwise arising from such cause being shown, to be paid by the parties or such one or more of them as it thinks fit, including a wife if she have separate property.

Whenever a decree *nihi* has been made, and the petitioner fails, within a reasonable time, to move to have such decree made absolute, the High Court may dismiss the suit.

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 16—

(1) In the first paragraph the words "made by a High Court, not being a confirmation of a decree of a District Court" and "or special" shall be *omitted*.

(2) In the second paragraph the words "or special" occurring between the words "General" and "Order", shall be *omitted*.

(3) In the fourth and fifth paragraphs for the words "High Court", the word "Court" shall be *substituted*.—U.P. Act XXX of 1957, S. 2 and Sch.

25. The words "without reasonable excuse" *omitted* by Act 51 of 2001, S. 10 (w.e.f. 3-10-2001).

26. *Subs.* for "and cruelty" by Act 51 of 2001, S. 10 (w.e.f. 3-10-2001).

27. *Ins.* by Act 51 of 2001, S. 10 (w.e.f. 3-10-2001).

28. The words "not being a confirmation of a decree of a District Court" *omitted* by Act 51 of 2001, S. 11 (w.e.f. 3-10-2001).



<sup>29</sup>[**17. Power of High Court to remove certain suits.**—During the progress of the suit in the Court of the District Judge, any person suspecting that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce, shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to apply to the High Court to remove the suit under Section 8, and the Court shall thereupon, if it thinks fit, remove such suit and try and determine the same as a court of original jurisdiction, and the provisions contained in Section 16 shall apply to every suit so removed; or it may direct the District Judge to take such steps in respect of the alleged collusion as may be necessary, to enable him to make a decree in accordance with the justice of the case.]

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 17 (prior to substitution by Act 51 of 2001)—

(1) Paragraph one to five shall be *omitted*.

(2) In paragraph six the words “or special” occurring between the words “general” and “order”, shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

**CASE LAW ► Constitutionality.**—The procedure prescribed by Section 17 of the Act (*prior to 2001 Amendment*) requiring confirmation by the High Court of a decree for dissolution of a marriage made by the District Judge prolongs the agony of the affected parties even though none of the parties is desirous of preferring an appeal which is not justified especially when no such procedure is prescribed by other Acts dealing with dissolution of marriages, namely, Special Marriage Act, 1954 and Hindu Marriage Act, 1955 and is liable to be struck down by a suitable amendment, *P.E. Mathew v. Union of India*, (1999) 3 AP LJ 38 (DNC) (Ker).

Section 17 does not contemplate confirmation of a decree for judicial separation passed in the terms of Section 22. Section 17 read with Section 20 contemplates confirmation of a decree dissolving marriage under Ch. III or a decree declaring the marriage to be null and void under Ch. IV, *Arun Kumar Sinha v. Manjula Sinha*, (1981) 2 CHN 1.

The procedure contemplated by Sections 16, 17 and 20 are unreasonable and are arbitrary in nature and achieves no useful object or purpose. The procedure provided tends to perpetuate the agonies of the affected parties for no useful purpose. If such a procedure is absent in other similar enactments, there is no reason why this procedure should be applied to Christian spouses. The said procedure, is liable to be struck down by suitable amendments, *Pragati Varghese v. Cyril George Varghese*, (1997) 3 Mah LJ 602.

► **Final Decree.**—Any decree of dissolution passed by the Family Courts needs no confirmation by the High Court but such judgment of the Family Court is subject to Appellate Jurisdiction of the High Court under Section 19 and is not subject to confirmation as provided in Section 17 of the Divorce Act, 1869, *Asis Ubaldo Rodrigues v. Maria Asis Rodrigues*, (2006) 2 CTC 32.

**17-A. Appointment of officer to exercise duties of King's Proctor.**—<sup>30</sup>[\* \* \*]

29. Subs. by Act 51 of 2001, S. 12 (w.e.f. 3-10-2001).

30. Ins. by Act 15 of 1927 and *omitted* by Act 51 of 2001, S. 13 (w.e.f. 3-10-2001). Prior to omission it read as:

“17-A. *Appointment of officer to exercise duties of King's Proctor.*—The Government of the State within which any High Court exercises jurisdiction, may appoint an officer who shall, within the jurisdiction of the High Court in the State, have the like right of showing cause why a decree for the

31[\* \* \*]

## IV.—NULLITY OF MARRIAGE

**18. Petition for decree of nullity.**—Any husband or wife may present a petition to the District Court <sup>32</sup>[\* \* \*], praying that his or her marriage may be declared null and void.

**CASE LAW ► Solemnization of Marriage.**—A petition under Section 18 of the Divorce Act first postulates a marriage between the parties under the Christian Marriage Act, 1872 and the grounds for making a petition should be those as mentioned in Section 19 of the Divorce Act, *Jordan Diengdoh v. Swaranjeet Singh Chopra*, ILR (1984) 2 Del 14.

## STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 18, for the words “District or to the High Court”, the words “District Court” shall be *substituted*.—U.P. Act XXX of 1957, S. 2 and Sch.

**19. Grounds of decree.**—Such decree may be made on any of the following grounds:—

- (1) that the respondent was impotent at the time of the marriage and at the time of the institution of the suit;
- (2) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity;
- (3) that either party was a lunatic or idiot at the time of the marriage;
- (4) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

Nothing in this section shall affect the jurisdiction of the <sup>33</sup>[District] Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.

## STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 19, in the last paragraph for the words “High Court” the word “Court” shall be *substituted*.—U.P. Act XXX of 1957, S. 2 and Sch.

**CASE LAW ► Exercise of Power.**—Under Section 19 of the Divorce Act, 1869, a decree for declaration that marriage is null and void can be passed either by the High Court or the District Court on any one of the four specific grounds mentioned therein. However, the proviso to Section 19 states that nothing in the Section shall affect the jurisdiction of the High Court to pass a decree of nullity of marriage on the ground that consent of either party was obtained by force or fraud. The High Court alone has exclusive jurisdiction to pass a decree of nullity of marriage on the ground that consent of either party was obtained by fraud or force. High

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dissolution of a marriage should not be made absolute or should not be confirmed, as the case may be, as is exercisable in England by the King's Proctor; and the said Government may make rules regulating the manner in which the right shall be exercised and all matters incidental to or consequential on any exercise of the right.”

31. Second paragraph *omitted* by Act 3 of 1951, S. 3 and Sch. (w.e.f. 1-4-1951). Prior to omission it read as: “In relation to the jurisdiction of any such High Court as aforesaid in an Indian State this section shall have effect as if the reference to the Provincial Government was a reference to the Central Government.”

32. The words “or to the High Court” *omitted* by Act 51 of 2001, S. 14 (w.e.f. 3-10-2001).

33. *Subs.* for “High” by Act 51 of 2001, S. 15 (w.e.f. 3-10-2001).



Court with reference to any area in the State means the High Court for that State and is not restricted merely to persons residing within the limits of original civil jurisdiction of the High Court, *Joseph John Carvalho v. Leila Joseph Carvalho*, (1992) 2 Mah LJ 1566.

► **Interpretation.**—The word “impotence” is not related to a particular gender like male only. It relates to either gender. The criterion is the practical impossibility of consummation of marriage on account of impotency of either the husband or the wife. Incapability of copulation on the part of either of the spouses either due to structural defects in the organs of generation or due to some other cause resulting in non-consummation of marriage is impotence and the said word is equally applicable to both husband and wife. It should not be misunderstood with the word ‘sterility’, *Kola Emmanuel v. Nallipogu Sunanda*, (1998) 1 AP LJ 367 (FB).

► **Validity of Marriage.**—Section 19 of the Divorce Act lays down in categorical terms that a marriage may be declared null and void, *inter alia*, where the parties are within the prohibited degree of consanguinity. There is no exception contained in ground No. 2 in the said section, *Lakshmi Sanyal v. Sachit Kumar Dhar*, (1972) 2 SCC 647.

Marriage within prohibited degrees has not been defined under Section 19 of the Act. As a result, the question of capacity to marry and impediments in the way of marriage would have to be resolved by referring to the personal law, *Lakshmi Sanyal v. Sachit Kumar Dhar*, (1972) 2 SCC 647.

► **Impotency as a ground for nullity of marriage.**—A decree of nullity may in some circumstances be obtained despite the birth of a child of which the husband is admittedly the father. Medical evidence proves that fecundation *ab extra* is not an impossibility in human affairs. It is an established fact that conception is possible without penetration of the vagina. Hence, it does establish consummation of marriage. The birth of a child is not conclusive evidence that the marriage has been consummated as it is well established that fecundation *ab extra* can take place. Further, that impotence is inability to consummate the marriage and to be a ground for nullity; such inability must exist at the time of marriage and continue to exist at the time of the institution of the suit. For this purpose, sexual intercourse has been defined as ordinary and complete intercourse, not partial and imperfect intercourse. Furthermore, that impotency means incapacity to consummate the marriage, and not merely incapacity for procreation. The test is consummation and capacity of consummate, *Manjula S. Deshmukh v. Suresh Deshmukh*, 1978 SCC OnLine Del 190 : ILR (1979) 1 Del 395 : PLR (1979) 81 Del 90 : AIR 1979 Del 93.

## 20. Confirmation of District Judge’s decree.—<sup>34</sup>[\* \* \*]

### STATE AMENDMENTS

**UTTAR PRADESH.**—Section 20 shall be *deleted*.—U.P. Act XXX of 1957, S. 2 and Sch.

**21. Children of annulled marriage.**—Where a marriage is annulled on the ground that a former husband or wife was living, and it is adjudged that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, or when a marriage is annulled on the ground of insanity, children begotten before the decree is made shall be specified in the decree, and shall be entitled to succeed, in the same manner as

34. Omitted by Act 51 of 2001, S. 16 (w.e.f. 3-10-2001). Prior to omission it read as:

“20. *Confirmation of District Judge’s decree.*—Every decree of nullity of marriage made by a District Judge shall be subject to confirmation by the High Court, and the provisions of section seventeen, clauses one, two, three and four, shall *mutatis mutandis* apply to such decrees.”

legitimate children, to the estate of the parent who at the time of the marriage was competent to contract.

### V.—JUDICIAL SEPARATION

**22. Bar to decree for divorce *a mensa et toro*; but judicial separation obtainable by husband or wife.**—No decree shall hereafter be made for a divorce *a mensa et toro*, but the husband or wife may obtain a decree of judicial separation, on the ground of adultery, or cruelty, or desertion<sup>35</sup>[\* \* \*] for two years or upwards, and such decree shall have the effect of a divorce *a mensa et toro* under the existing law, and such other legal effect as hereinafter mentioned.

**CASE LAW ► Constitutionality.**—Section 22 of the Act does not provide to make the decree absolute, held to be against the scheme of Article 21 of the Constitution, *Youth Welfare Federation v. Union of India*, (1997) 1 AP LJ 159 (HC)(FB).

► **Judicial Separation.**—Section 22 provides for neither dissolution nor declaration of the marriage to be null and void. It merely effects judicial separation between the parties to the marriage with such consequence as are provided by the provision itself, *Arun Kumar Sinha v. Manjula Sinha*, (1981) 2 CHN 1.

► **Uniform Civil Code.**—Neither irretrievable breakdown of marriage nor mutual consent nor failure of resumption of cohabitation for a certain period after passing decree for judicial separation is a ground for divorce under the Divorce Act. As a result, divorce cannot be granted on any of these grounds under the Act. The Legislature must intervene in such matters and provide for a uniform code of marriage and divorce, *Jorden Diengdeh v. S.S. Chopra*, (1985) 3 SCC 62.

**23. Application for separation made by petition.**—Application for judicial separation on any one of the grounds aforesaid, may be made by either husband or wife by petition to the District Court<sup>36</sup>[\* \* \*]; and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.

### STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 23, the words “or the High Court” shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

**24. Separated wife deemed spinster with respect to after-acquired property.**—In every case of a judicial separation under this Act, the wife shall, from the date of the sentence, and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire, or which may come to or devolve upon her.

Such property may be disposed of by her in all respects as an unmarried woman, and on her decease the same shall, in case she dies intestate, go as the same would have gone if her husband had been then dead:

Provided that, if any such wife again cohabits with her husband, all such property as she may be entitled to when such cohabitation takes place shall be held

35. The words “without reasonable excuse” *omitted* by Act 51 of 2001, S. 17 (w.e.f. 3-10-2001).

36. The words “or the High Court” *omitted* by Act 51 of 2001, S. 18 (w.e.f. 3-10-2001).



to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

**CASE LAW ► Judicial Separation.**—Section 24 of the Act lays down that in every case of a Judicial Separation under the Act the wife shall, from the date of the sentence and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire; or which may come to or devolve upon her. Therefore the decree of Judicial Separation comes into operation from the very date of passing the same. Therefore the decree of judicial separation need not require confirmation by the High Court, *G. Prabimala Sundari Bai v. G. Premaratnam*, (1981) 1 AP LJ 5 (SN).

**25. Separated wife deemed spinster for purposes of contract and suing.**—In every case of a judicial separation under this Act, the wife shall, whilst so separated, be considered as an unmarried woman for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any contract, act or costs entered into, done, omitted or incurred by her during the separation:

Provided that where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same is not duly paid by the husband, he shall be liable for necessaries supplied for her use:

Provided also that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband.

#### *Reversal of Decree of Separation*

**26. Decree of separation obtained during absence of husband or wife may be reversed.**—Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at any time thereafter, present a petition to the Court by which the decree was pronounced, praying for a reversal of such decree, on the ground that it was obtained in his or her absence, and that there was reasonable excuse for the alleged desertion, where desertion was the ground of such decree.

The Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly; but such reversal shall not prejudice or affect the rights or remedies which any other person would have had, in case it had not been decreed, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the sentence of separation and of the reversal thereof.

#### VI.—PROTECTION-ORDERS

**27. Deserted wife may apply to Court for protection.**—Any wife to whom Section 4 of the Indian Succession Act, 1865 <sup>37</sup>(10 of 1865), does not apply, may, when deserted by her husband, present a petition to the District Court <sup>38</sup>[\* \* \*], at any time after such desertion, for an order to protect any property which she may have acquired or may acquire, and any property of which she may have become

37. See now the Indian Succession Act, 1925 (39 of 1925).

38. The words "or the High Court" omitted by Act 51 of 2001, S. 18 (w.e.f. 3-10-2001).

possessed or may become possessed after such desertion, against her husband or his creditors, or any person claiming under him.

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 27, the words “or the High Court” shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

**28. Court may grant protection-order.**—The Court, if satisfied of the fact of such desertion, and that the same was without reasonable excuse, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and other property from her husband and all creditors and persons claiming under him. Every such order shall state the time at which the desertion commenced, and shall, as regards all persons dealing with the wife in reliance thereon, be conclusive as to such time.

**29. Discharge or variation of orders.**—The husband or any creditor of, or person claiming under him, may apply to the Court by which such order was made for the discharge or variation thereof, and the Court, if the desertion has ceased, or if for any other reason it thinks fit so to do, may discharge or vary the order accordingly.

**30. Liability of husband seizing wife’s property after notice of order.**—If the husband, or any creditor of, or person claiming under, the husband, seizes or continues to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to return or deliver to her the specific property, and also to pay her a sum equal to double its value.

**31. Wife’s legal position during continuance of order.**—So long as any such order of protection remains in force, the wife shall be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

#### VII.—RESTITUTION OF CONJUGAL RIGHTS

**32. Petition for restitution of conjugal rights.**—When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, either wife or husband may apply, by petition to the District Court<sup>39</sup>[\* \* \*], for restitution of conjugal rights, and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 32, the words “or the High Court” shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

39. The words “or the High Court” *omitted* by Act 51 of 2001, S. 18 (w.e.f. 3-10-2001).



**33. Answer to petition.**—Nothing shall be pleaded in answer to a petition for restitution of conjugal rights, which would not be ground for a suit for judicial separation or for a decree of nullity of marriage.

### VIII.—DAMAGES AND COSTS

**34. Husband may claim damages from adulterer.**—<sup>40</sup>[\* \* \*].

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 34, the words “or the High Court” shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

**35. Power to order adulterer to pay costs.**—<sup>41</sup>[\* \* \*]

### IX.—ALIMONY

**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 <sup>42</sup>[expenses of the proceedings and] 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 <sup>43</sup>[the expenses of the proceedings and] alimony pending the suit as it may deem just:

<sup>44</sup>[\* \* \*];

40. *Omitted by Act 51 of 2001, S. 19 (w.e.f. 3-10-2001).* Prior to omission it read as:

“34. *Husband may claim damages from adulterer.*—Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition to the District Court or the High Court limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner.

Such petition shall be served on the alleged adulterer and the wife, unless the Court dispenses with such service, or directs some other service to be substituted.

The damages to be recovered on any such petition shall be ascertained by the said Court, although the respondents or either of them may not appear.

After the decision has been given, the Court may direct in what manner such damages shall be paid or applied.”

41. *Omitted by Act 51 of 2001, S. 20 (w.e.f. 3-10-2001).* Prior to omission it read as:

“35. *Power to order adulterer to pay costs.*—Whenever in any petition presented by a husband the alleged adulterer has been made a co-respondent, and the adultery has been established, the Court may order the co-respondent to pay the whole or any part of the costs of the proceedings:

Provided that the co-respondent shall not be ordered to pay the petitioner’s costs:

(1) if the respondent was at the time of the adultery living apart from her husband and leading the life of a prostitute, or

(2) if the co-respondent had not at the time of the adultery reason to believe the respondent to be a married woman.

*Power to order litigious intervenor to pay costs.*—Whenever any application is made under section seventeen, the Court, if it thinks that the applicant had no grounds for intervening, may order him to pay the whole or any part of the costs occasioned by the application.”

42. *Ins. by Act 49 of 2001, S. 2 (w.e.f. 24-9-2001).*

43. *Ins. by Act 49 of 2001, S. 2 (w.e.f. 24-9-2001).*

44. *The proviso omitted by Act 51 of 2001, S. 21 (w.e.f. 3-10-2001).* Prior to omission it read as:

“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.”

<sup>45</sup>[Provided further that the petition for the expenses of the proceedings and alimony pending the suit shall, as far as possible, be disposed of within sixty days of service of such petition on the husband.]

**CASE LAW ▶ Appeal.**—Order of alimony pendente lite made under Section 36 is appealable under Section 55, *Vera Aranha v. Jacob Harlad Aranha*, 1987 Mah LJ 849.

▶ **Permanent Alimony.**—Section 36 gives the right to a wife to file an application for alimony pendente lite 'in any suit' under the Act, the proviso to Section 36 makes it very clear that such an application is maintainable even in a petition filed under Sections 18 and 19. The proviso provides that the alimony granted under Section 36 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, *E.A. Benny v. Raichel Bindu*, (1999) 2 AP LJ (DNC 1) 45.

**37. Power to order permanent alimony.**—<sup>46</sup>[Where a decree of dissolution of the marriage or a decree of judicial separation is obtained by the wife, the District Court may 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.

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 37—

(1) For the words "High Court" the word "Court" shall be substituted.

(2) The second paragraph namely, "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," shall be omitted.—U.P. Act XXX of 1957, S. 2 and Sch.

**CASE LAW ▶ Applicability.**—Section 37 applies only to cases where a decree is passed declaring the marriage to be dissolved or on any decree of judicial separation obtained by the wife, *Lydia Renuka v. K. Solomon Raju*, (1994) 1 AP LJ 37 (SN).

▶ **Execution of Decree.**—Decree for alimony and maintenance is not extinguished on the death of the husband and is executable against the deceased husband's estate in the hands of his heirs, *Aruna Basu Mullick v. Dorothea Mitra*, (1983) 3 SCC 522 : 1983 SCC (Cri) 739.

45. Ins. by Act 49 of 2001, S. 2 (w.e.f. 24-9-2001).

46. Subs. by Act 51 of 2001, S. 22 (w.e.f. 3-10-2001).



► **Exercise of Power.**—The Court has power to increase the alimony amount or make subsequent orders for payment of increased amount under Section 37, *B. Iswarayya v. Swarnam Iswarayya*, (1930-31) 58 IA 350.

► **Permanent Alimony.**—Claim seeking alimony under Section 37 is sustainable only in cases of dissolution of marriage or judicial separation. It is not maintainable in the case of declaration that the marriage is null and void, *Lydia Renuka v. K. Soloman Raju*, (1994) 1 AP LJ 324.

**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.

## X.—SETTLEMENTS

**39. Power to order settlement of wife's property for benefit of husband and children.**—<sup>47</sup>[\* \* \*]

**40. Inquiry into existence of ante-nuptial or post-nuptial settlements.**—<sup>48</sup>[The District Court may, before passing a decree for dissolution of the marriage or a decree of nullity of marriage, inquire into] the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree and may make such orders, with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife, or of the children (if any) of the marriage, or of both children and parents, as to the Court seems fit:

Provided that the Court shall not make any order for the benefit of the parents or either of them at the expense of the children.

## STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 40—

(1) For the words "High Court" the word "Court" shall be *substituted*.

(2) The second paragraph namely, "and the District Court, after its decree for dissolution of marriage or of nullity of marriage has been confirmed," shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

47. *Omitted by Act 51 of 2001, S. 23 (w.e.f. 3-10-2001). Prior to omission it read as:*

"39. *Power to order settlement of wife's property for benefit of husband and children.*—Whenever the Court pronounces a decree of dissolution of marriage or judicial separation for adultery of the wife, if it is made to appear to the Court that the wife is entitled to any property the Court may, if it think fit, order such settlement as it thinks reasonable to be made of such property or any part thereof, for the benefit of the husband, or of the children of the marriage, or of both.

Any instrument executed pursuant to any order of the Court at the time of or after the pronouncing of a decree of dissolution of marriage or judicial separation, shall be deemed valid notwithstanding the existence of the disability of coverture at the time of the execution thereof.

*Settlement of damages.*—The Court may direct that the whole or any part of the damages recovered under section thirty-four shall be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife."

48. *Subs. by Act 51 of 2001, S. 24 (w.e.f. 3-10-2001).*



## XI.—CUSTODY OF CHILDREN

**41. Power to make orders as to custody of children in suit for separation.**—In any suit for obtaining a judicial separation the Court may from time to time before making its decree, make such interim orders, and may make such provision in the decree, as it deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of such suit, and may, if it thinks fit, direct proceedings to be taken for placing such children under the protection of the said Court:

<sup>49</sup>[Provided that the application with respect to the maintenance and education of the minor children pending the suit shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.]

**CASE LAW ► Custody of Child.**—In determining whether father or mother should get the custody of minor child, only consideration of the court should be the child's welfare but court is not bound to interview the child in each instance in order to arrive at a decision. Where family environment is full of tension and strain causing disruption of normal mental growth of the child and consequently affecting his/her education also, it would be proper to keep the child away, preferably in a Boarding School, *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka*, (1982) 2 SCC 544.

**42. Power to make such orders after decree.**—The Court, after a decree of judicial separation, may upon application (by petition) for this purpose make, from time to time, all such orders and provision, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree or by interim orders in case the proceedings for obtaining such decree were still pending.

**CASE LAW ► Welfare of Child.**—Section 42 expressly embodies the legislative recognition of the fundamental rule that the Court as representing the State is vested with the power as also the duty and responsibility of making suitable orders for the custody, maintenance and education of the minor children to suit the changed conditions and circumstances. However, under the Divorce Act the sons of Indian fathers cease to be minors on attaining the age of 16 years and their daughters cease to be minors on attaining the age of 13 years Section 3(5), *Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 SCC 840.

**43. Power to make orders as to custody of children in suits for dissolution or nullity.**—<sup>50</sup>[In any suit for obtaining a dissolution of marriage or a decree of nullity of marriage instituted in a District Court, the Court may from time to time before making its decree, make such interim orders as it may deem proper] with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the suit,

and may, if it thinks fit, direct proceedings to be taken for placing such children under the protection of the Court.

49. *Ins.* by Act 49 of 2001, S. 3 (w.e.f. 24-9-2001).

50. *Subs.* by Act 51 of 2001, S. 25 (w.e.f. 3-10-2001).



## STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 43—

(1) In the first paragraph the words “instituted in, or removed to a High Court” shall be *omitted*.

(2) The second paragraph shall be *omitted*.

(3) In the third paragraph for the words “High Court or District Court (as the case may be)” the word “Court” shall be *substituted*.—U.P. Act XXX of 1957, S. 2 and Sch.

**CASE LAW ► Maintenance.**—Section 43 of the Divorce Act, inter alia, confers power on the Court to make interim orders with respect to maintenance of “minor children, the marriage of whose parents is the subject matter of the suit” the Court is of the view that this specific power conferred by Section 43 of the Act is in addition to the power conferred on the Court by Section 36 to grant alimony pendente lite, *P. Soloman Sukumar v. Latha Madhuri*, (1997) 3 AP LJ 87 (HC).

► **Visitation rights.**—In highly estranged relationship, High Court, having regard to earlier background of case, declined visitation rights, to father which was not sustainable, *Manoj Anslem Rebeiro v. Candace Elizebeth Rebeiro*, (2017) 11 SCC 493.

**44. Power to make such orders after decree or confirmation.**—<sup>51</sup>[Where a decree of dissolution or nullity of marriage has been passed, the District Court may, upon application] by petition for the purpose, make from time to time all such orders and provisions, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree absolute or decree (as the case may be), or by such interim orders as aforesaid.

## STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 44—

(1) In the first paragraph for the words “High Court” the word “Court” shall be *substituted*.

(2) The second paragraph, i.e. the words “and the District Court, after a decree for dissolution of marriage or of nullity of marriage has been confirmed” shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

## XII.—PROCEDURE

**45. Code of Civil Procedure to apply.**—Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure, <sup>52</sup>[1908].

**46. Forms of petitions and statements.**—The forms set forth in the schedule to this Act, with such variation as the circumstances of each case require, may be used for the respective purposes mentioned in such schedule.

**47. Petition to state absence of collusion.**—Every petition under this Act for a decree of dissolution of marriage, or of nullity of marriage, or of judicial separation

51. Subs. by Act 51 of 2001, S. 26 (w.e.f. 3-10-2001).

52. Ins. by Act 51 of 2001, S. 27 (w.e.f. 3-10-2001).

<sup>53</sup>[\* \* \*] shall <sup>54</sup>[\* \* \*] state that there is not any collusion or connivance between the petitioner and the other party to the marriage.

**Statements to be verified.**—The statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in manner required by law for the verification of plaints, and may at the hearing be referred to as evidence.

**CASE LAW ► Evidence/Proof of.**—Even though under Section 47 of the Divorce Act, statements in the petition “may, at the hearing be referred to as evidence” the settled rule of practice has all along been not to decree dissolution on such statements without oral evidence in support thereof, *Ramish Francis Toppo v. Violet Francis Toppo*, (1988) 2 CHN 241.

**48. Suits on behalf of lunatics.**—When the husband or wife is a lunatic or idiot, any suit under this Act (other than a suit for restitution of conjugal rights) may be brought on his or her behalf by the committee or other person entitled to his or her custody.

**49. Suits by minors.**—Where the petitioner is a minor, he or she shall sue by his or her next friend to be approved by the Court; and no petition presented by a minor under this Act shall be filed until the next friend has undertaken in writing to be answerable for costs.

Such undertaking <sup>55</sup>[\* \* \*] shall be filed in Court, and the next friend shall thereupon be liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit.

**50. Service of petition.**—Every petition under this Act shall be served on the party to be affected thereby, either within or without <sup>56</sup>[India], in such manner as the High Court by general or special order from time to time directs:

Provided that the Court may dispense with such service altogether in case it deems necessary or expedient so to do.

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 50, for the words “High Court by general or special order from time to time directs”, the words “Court may direct” shall be *substituted*.—U.P. Act XXX of 1957, S. 2 and Sch.

**51. Mode of taking evidence.**—The witnesses in all proceedings before the Court, where their attendance can be had, shall be examined orally, and any party may offer himself or herself as a witness, and shall be examined, and may be cross-examined and re-examined, like any other witness:

- 
53. The words “or of reversal of judicial separation, or for restitution of conjugal rights, or for damages, shall bear a stamp of five rupees, and” *omitted* by Act 7 of 1870, S. 2 and Sch. III (w.e.f. 1-4-1870).
  54. The words “in the first, second and third cases mentioned in this section,” *omitted* by Act 7 of 1870, S. 2 and Sch. III (w.e.f. 1-4-1870).
  55. The words “shall bear a stamp of eight annas and” *omitted* by Act 7 of 1870, S. 2 and Sch. III (w.e.f. 1-4-1870).
  56. *Subs.* for “the Provinces” which had been *subs.* by A.O. 1948, for, “British India” by A.O. 1950 (w.e.f. 26-1-1950).



Provided that the parties shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally, and after such cross-examination may be re-examined orally as aforesaid by or on behalf of the party by whom such affidavit was filed.

**52. Competence of husband and wife to give evidence as to cruelty or desertion.**—On any petition presented <sup>57</sup>[by a husband or a wife, praying that his or her marriage may be dissolved by reason of his wife or her husband, as the case may be, having been guilty of adultery, cruelty or desertion], the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

**53. Power to close doors.**—The whole or any part of any proceeding under this Act may be heard, if the Court thinks fit, with closed doors.

**54. Power to adjourn.**—The Court may from time to time adjourn the hearing of any petition under this Act, and may require further evidence thereon if it sees fit so to do.

**55. Enforcement of, and appeal from, orders and decrees.**—All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from, in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from, under the laws, rules and orders for the time being in force.

58[\* \* \*]

**No appeal as to costs.**—Provided <sup>59</sup>[shall be] that there shall be no appeal on the subject of costs only.

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 55—

(1) The first proviso shall be *omitted*.

(2) In the second proviso, the word “also” shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

**CASE LAW ► Appeal.**—The right of appeal created by Section 55 is unqualified and absolute. No words of limitation of this right of appeal are discernible. The words “under any law for the time being in force” in the first clause of Section 55 refer to the procedure and do not relate to the right of appeal. Similarly, the language of Section 45, which imports the regulation of the proceedings by the Civil Procedure Code, 1908 does not suggest that the substantive right of appeal created by Section 55 is controlled or restricted by such procedure. Section 45 is intended to regulate the proceedings and is not intended to limit the right of appeal, *Vera Aranha v. Jacob Harlad Aranha*, (1988) 1 AP LJ 8 (DNC)(Bom).

57. *Subs.* by Act 51 of 2001, S. 28 (w.e.f. 3-10-2001).

58. *Omitted* by Act 51 of 2001, S. 29 (w.e.f. 3-10-2001). Prior to omission it read as:

“Provided that there shall be no appeal from a decree of a District Judge for dissolution of marriage or of nullity of marriage : nor from the order of the High Court confirming or refusing to confirm such decree:”

59. *Subs.* for “also” by Act 51 of 2001, S. 29 (w.e.f. 3-10-2001).

► **Final Decree.**—The decree passed by the High Court, dissolving the marriage, in appeal against the dismissal of claim by the District Court is a final decree and cannot be deemed to be a decree nisi under the Divorce Act. The decree passed in appeal is not a 'decree nisi'. It is a final decree which terminates the relationship between husband and wife, *Anilkumar Vasant Lokhande v. Purushottam Vinayak Sansare*, (1993) 2 Mah LJ 1510.

**56. Appeal to the Supreme Court.**—Any person may appeal to <sup>60</sup>[the Supreme Court] from any decree (other than a decree *nisi*) or order under this Act of a High Court made on appeal or otherwise,

and from any decree (other than a decree *nisi*) or order made in the exercise of original jurisdiction by Judges of a High Court or of any Division Court from which an appeal shall not lie to the High Court,

when the High Court declares that the case is a fit one for appeal to <sup>61</sup>[the Supreme Court].

### XIII.—RE-MARRIAGE

<sup>62</sup>[**57. Liberty to parties to marry again.**—Where a decree for dissolution or nullity of marriage has been passed and either the time for appeal has expired without an appeal having been presented to any court including the Supreme Court or an appeal has been presented but has been dismissed and the decree or dismissal has become final, it shall be lawful for either party to the marriage to marry again.]

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Section 57, for the existing section, the following shall be substituted:

“57. *Liberty to parties to marry again.*—When six months after the date of any decree absolute dissolving a marriage have expired, and no appeal has been presented against such decree,

or when any such appeal has been dismissed, or when in the result of any such appeal any marriage is declared to be dissolved,

but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death.”—U.P. Act XXX of 1957, S. 2 and Sch.

**58. English clergyman not compelled to solemnize marriages of persons divorced for adultery.**—No clergyman in Holy Orders of the <sup>63</sup>[\* \* \*] Church of England <sup>64</sup>[\* \* \*] shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty or censure for solemnising or refusing to solemnize the marriage of any such person.

**59. English Minister refusing to perform ceremony to permit use of his Church.**—When any Minister of any Church or Chapel of the said <sup>65</sup>[\* \* \*] Church refuses to perform such marriage-service between any persons who but for such

60. Subs. for “Her Majesty in Council” by A.O. 1950 (w.e.f. 26-1-1950).

61. Subs. for “Her Majesty in Council” by A.O. 1950 (w.e.f. 26-1-1950).

62. Subs. by Act 51 of 2001, S. 30 (w.e.f. 3-10-2001).

63. The word “United” omitted by Act 12 of 1873, S. 1 and Sch. (w.e.f. 7-8-1873).

64. The words “and Ireland” omitted by Act 12 of 1873, S. 1 and Sch. (w.e.f. 7-8-1873).

65. The word “United” omitted by Act 12 of 1873, S. 1 and Sch. (w.e.f. 7-8-1873).



refusal would be entitled to have the same service performed in such Church or Chapel, such Minister shall permit any other Minister in Holy Orders of the said Church, entitled to officiate within the diocese in which such Church or Chapel is situate, to perform such marriage-service in such Church or Chapel.

#### XIV.—MISCELLANEOUS

**60. Decree for separation or protection-order valid as to persons dealing with wife before reversal.**—Every decree for judicial separation or order to protect property, obtained by a wife under this Act shall, until reversed or discharged, be deemed valid, so far as necessary, for the protection of any person dealing with the wife.

No reversal, discharge or variation of such decree or order shall affect any rights or remedies which any person would otherwise have had in respect of any contracts or acts of the wife entered into or done between the dates of such decree or order, and of the reversal, discharge or variation thereof.

**Indemnity of persons making payment to wife without notice of reversal of decree or protection-order.**—All persons who in reliance on any such decree or order make any payment to, or permit any transfer or act to be made or done by, the wife who has obtained the same shall, notwithstanding such decree or order may then have been reversed, discharged or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the decree or order been discontinued, be protected and indemnified as if, at the time of such payment, transfer or other act, such decree or order were valid and still subsisting without variation, and the separation had not ceased or been discontinued,

unless, at the time of the payment, transfer or other act, such persons had notice of the reversal, discharge or variation of the decree or order or of the cessation or discontinuance of the separation.

**61. Bar of suit for criminal conversation.**—After this Act comes into operation, no person competent to present a petition under Sections 2 and 10 shall maintain a suit for criminal conversation with his wife.

**62. Power to make rules.**—The High Court shall make such rules under this Act as it may from time to time consider expedient, and may from time to time alter and add to the same:

Provided that such rules, alterations and additions are consistent with the provisions of this Act and the Code of Civil Procedure <sup>66</sup>[, 1908].

All such rules, alterations and additions shall be published in the Official Gazette.

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66. *Ins.* by Act 51 of 2001, S. 31 (w.e.f. 3-10-2001).

### SCHEDULE OF FORMS

#### *No. 1.—Petition by husband for a dissolution of marriage with damages against co-respondent, by reason of adultery.*

(See Sections 10 and 34)

In the (High) Court of .....  
 To the Hon'ble Mr. Justice ..... [or  
 To the Judge of] .....  
 The ..... day of ..... 20.....  
 The petition of A.B. of.....

SHEWETH,

1. That your petitioner was on the ..... day of ..... 20 ..... was lawfully married to C.B., then C.D., spinster at ..... (a).

2. That from his said marriage, your petitioner lived and cohabited with his said wife at ..... and at..... in ..... and lastly at ..... in ..... and that your petitioner and his said wife have had issue of their said marriage *five* children, of whom *two* sons only survive, aged respectively *twelve* and *fourteen* years.

3. That during the *three* years immediately preceding the ..... day of ..... 20 ..... X.Y. was constantly, with a few exceptions, residing in the house of your petitioner at ..... aforesaid, and that on divers occasions during the said period, the dates of which are unknown to your petitioner, the said C.B. in your petitioner's said house committed adultery with the said X.Y.

4. That no collusion or connivance exists between me and my said wife for the purpose of obtaining a dissolution of our said marriage or for any other purpose.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree a dissolution of the said marriage, and that the said X.Y. do pay the sum of rupees 5,000 as damages by reason of his having committed adultery with your petitioner's said wife, such damages to be paid to your petitioner, or otherwise paid or applied as to this (Hon'ble) Court seems fit.

(Signed) A.B.(b).

#### *Form of Verification*

I, A.B., the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

- (a) If the marriage was solemnized out of India, the adultery must be shown to have been committed in India.
- (b) The petition must be signed by the petitioner.

#### STATE AMENDMENTS

UTTAR PRADESH.—In Form 1—

(i) the words and the brackets "(High)" and "(or to the Judge of)", and the words "To the Hon'ble Mr. Justice" shall be *omitted*.

(ii) the word and brackets "(Hon'ble)" wherever occurring, shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

#### *No. 2.—Respondent's statement in answer to No. 1.*

In the Court of .....

The.....day of .....



Between A.B., petitioner,  
C.B., respondent, and  
X.Y., co-respondent.

C.B., the respondent, by, D.E., her attorney (*or vakil*) in answer to the petition of A.B., says that she denies that she has on divers or any occasions committed adultery with X.Y., as alleged in the third paragraph of the said petition.

Wherefore the respondent prays that this (Hon'ble) Court will reject the said petition.

(Signed) C.B.

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Form No. 2, the word and the brackets “(Hon'ble)” shall be *omitted*.—U.P. Act 30 of 1957, S. 2 and Sch.

#### *No. 3.—Co-respondent's statement in answer to No. 1*

In the (High) Court of .....

The.....day of .....

Between A.B., petitioner,  
C.B., respondent, and  
X.Y., co-respondent.

X.Y., the co-respondent, in answer to the petition filed in this cause, saith that he denies that he committed adultery with the said C.B. as alleged in the said petition.

Wherefore the said X.Y. prays that this (Hon'ble) Court will reject the prayer of the said petitioner and order him to pay the costs of and incident to the said petition.

(Signed) X.Y.

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Form No. 3, the words and brackets “(High)” and “(Hon'ble)” shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

#### *No. 4.—Petition for Decree of Nullity of Marriage*

(See Section 18)

In the (High) Court of .....

To the Hon'ble Mr Justice ..... [or To the Judge of .....]

The .....day of ..... 20 .....

The petition of A.B. falsely called A.D.,

SHEWETH,

1. That on the .....day of ....., your petitioner, then a spinster, eighteen years of age, was married in fact, though not in law, to C.D., then a bachelor of about thirty years of age, at [*some place in India*].

2. That from the said .....day of ....., until the month of ....., your petitioner lived and cohabited with the said C.D., at divers places, and particularly at ..... aforesaid.

3. That the said C.D. has never consummated the said pretended marriage by carnal copulation.

4. That at the time of the celebration of your petitioner's said pretended marriage, the said C.D. was, by reason of his impotency or malformation, legally incompetent to enter into the contract of marriage.

5. That there is no collusion or connivance between her and the said *C.D.* with respect to the subject of this suit.

Your petitioner therefore prays that this (Hon'ble) Court will declare that the said marriage is null and void.

(Signed) *A.B.*

*Form of Verification: See No. 1*

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Form No. 4, the words and the brackets “(High)”, “(or to the Judge of)”, and “(Hon'ble)” and the words “To the Hon'ble Mr. Justice” shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

#### *No. 5.—Petition by wife for judicial separation on the ground of her husband's adultery*

(See Section 22)

In the (High) Court of .....

To the Hon'ble Mr. Justice..... [or to the Judge of .....]

The ..... day of ..... 20 .....

The petition of *C.B.*, of ..... the wife of *A.B.*

SHEWETH,

1. That on the ..... day of ..... your petitioner, then *C.D.*, was lawfully married to *A.B.*, at the Church of....., in the .....

2. That after her said marriage, your petitioner cohabited with the said *A.B.* at ..... and at, ..... and that your petitioner and her said husband have issue living of their said marriage, *three* children, to wit, etc., etc., (*a*).

3. That on divers occasions in or about the months of *August, September* and *October* ..... the said *A.B.*, at ..... aforesaid, committed adultery with *E.F.*, who was then living in the service of the said *A.B.* and your petitioner at their said residence ..... aforesaid.

4. That on divers occasions in the months of *October, November* and *December*..... the said *A.B.*, at ..... aforesaid, committed adultery with *G.H.*, who was then living in the service of the said *A.B.* and your petitioner at their said residence.....aforesaid.

5. That no collusion or connivance exists between your petitioner and the said *A.B.* with respect to the subject of the present suit.

Your petitioner therefore prays that this (Hon'ble) Court will decree a judicial separation to your petitioner from her said husband by reason of his aforesaid adultery.

(Signed) *C.B.(b)*

*Form of Verification: See No. 1*

(*a*) State the respective ages of the children.

(*b*) The petition must be signed by the petitioner.

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Form No. 5, the words and the brackets “(High)”, “(or to the Judge of)”, and “(Hon'ble)” and the words “To the Hon'ble Mr. Justice” shall be *omitted*.—U.P. Act 30 of 1957, S. 2 and Sch.



**No. 6.—Statement in answer to No. 5**

In the (High) Court of .....

B. against B.

The.....day of .....

The respondent, A.B. by W.Y., his attorney [or vakil] saith,—

1. That he denies that he committed adultery with E. F., as in the third paragraph of the petition alleged.
2. That the petitioner condoned the said adultery with E.F., if any.
3. That he denies that he committed adultery with G.H., as in the fourth paragraph of the petition alleged.
4. That the petitioner condoned the said adultery with G.H., if any.

Wherefore this respondent prays that this (Hon'ble) Court will reject the prayer of the said petition.

(Signed)A.B.

**STATE AMENDMENTS**

**UTTAR PRADESH.**—In Form No. 6, the words and the brackets “(High)” and “(Hon'ble)” shall be *omitted*.—U.P. Act 30 of 1957, S. 2 and Sch.

**No. 7.—Statement in reply to No. 6**

In the (High) Court of .....

B. against B

The ..... day of .....

The petitioner, C.B., by her attorney [or vakil], says—

- (1) That she denies that she condoned the said adultery of the respondent with E. F., as in the second paragraph of the statement in answer alleged.
- (2) That even if she had condoned the said adultery, the same has been revived by the subsequent adultery of the respondent with G. H., as set forth in the fourth paragraph of the petition.

(Signed) C.B.

**STATE AMENDMENTS**

**UTTAR PRADESH.**—In Form No. 7, the words and the brackets “(High)” shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

**No. 8.—Petition for a judicial separation by reason of cruelty**

(See Section 22)

In the (High) Court of .....

To the Hon'ble Mr. Justice ..... [or To the Judge of .....].

The ..... day of ..... 20 .....

The petition of A.B. (wife of C.B.) of .....

SHEWETH,

1. That on the ..... day of ....., your petitioner, then A.D., spinster, was lawfully married to C.B., at .....

2. That from her said marriage, your petitioner lived and cohabited with her said husband at ..... until the ..... day of ....., when your petitioner

separated from her said husband as hereinafter more particularly mentioned, and that your petitioner and her said husband have had no issue of their said marriage.

3. That from and shortly after your petitioner's said marriage, the said *C.B.* habitually conducted himself towards your petitioner with great harshness and cruelty, frequently abusing her in the coarsest and most insulting language, and beating her with his fists, with a cane, or with some other weapon.

4. That on an evening in or about the month of ....., the said *C.B.* in the highway and opposite to the house in which your petitioner and the said *C.B.* were then residing at ..... aforesaid, endeavoured to knock your petitioner down, and was only prevented from so doing by the interference of *F.D.*, your petitioner's brother.

5. That subsequently on the same evening, the said *C.B.*, in his said house at ..... aforesaid, struck your petitioner with his clenched fists a violent blow on her face.

6. That on one Friday night in the month of ....., the said *C.B.*, in ..... without provocation, threw a knife at your petitioner, thereby inflicting a severe wound on her right hand.

7. That on the afternoon of the ..... day of ....., your petitioner, by reason of the great and continued cruelty practised towards her by her said husband, with assistance withdrew from the house of her said husband to the house of her father at ....., that from and after the said ..... day of ....., your petitioner hath lived separate and apart from her said husband, and hath never returned to his house or to cohabitation with him.

8. That there is no collusion or connivance between your petitioner and her said husband with respect to the subject of the present suit.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree a judicial separation between your petitioner and the said *C.B.*, and also order that the said *C.B.*, do pay the costs of and incident to these proceedings.

(Signed) *A.B.*

*Form of Verification: See No. 1*

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Form No. 8, the words and the brackets "(High)", "(Hon'ble)" and "(or to the Judge of)" and the words "To the Hon'ble Mr. Justice" shall be *omitted*.—U.P. Act 30 of 1957, S. 2 and Sch.

#### *No. 9.—Statement in answer to No. 8*

In the (High) Court of .....

The ..... day of .....

Between *A. B.*, petitioner, and

*C. B.*, respondent.

*C.B.*, the respondent, in answer to the petition filed in this cause by *W.J.* his attorney [*or vakil*] saith that he denies that he has been guilty of cruelty towards the said *A.B.*, as alleged in the said petition.

(Signed) *C. B.*



## STATE AMENDMENTS

**UTTAR PRADESH.**—In Form No. 9, the word and the brackets “(High)” shall be omitted.—U.P. Act XXX of 1957, S. 2 and Sch.

*No. 10.—Petition for reversal of decree of separation*

(See Section 24)

In the (High) Court of .....

To the Hon'ble Mr Justice..... [or To the Judge of .....] ]

The ..... day of ..... 20 .....

The petition of A. B., of .....

SHEWETH,

1. That your petitioner was on the ..... day of ..... lawfully married to .....

2. That on the ..... day of....., this (Hon'ble) Court at the petition of ....., pronounced a decree affecting the petitioner to the effect following, to wit,—

*[Here set out the decree.]*

3. That such decree was obtained in the absence of your petitioner, who was then residing at .....

*[State facts tending to show that the petitioner did not know of the proceedings; and, further, that had he known he might have offered a sufficient defence.]*

or

That there was reasonable ground for your petitioner leaving his said wife, for that his said wife .....

*[Here state any legal grounds justifying the petitioner's separation from his wife.]*

Your petitioner, therefore, prays that this (Hon'ble) Court will reverse the said decree.

(Signed) A. B.

Form of Verification: See No. 1

## STATE AMENDMENTS

**UTTAR PRADESH.**—In Form No. 10, the words and the brackets “(High)”, “(or to the Judge of)” and “(Hon'ble)” and the words “To the Hon'ble Mr. Justice” shall be omitted.—U.P. Act 30 of 1957, S. 2 and Sch.

*No. 11.—Petition for Protection-order*

(See Section 27)

In the (High) Court of .....

To the Hon'ble Mr. Justice..... [or to the Judge of .....] ]

The day of ..... 20, .....

The petition of C. B., of the wife of A. B.

SHEWETH,

That on the ..... day of ..... she was lawfully married to A.B., at .....

That she lived and cohabited with the said A.B. for ..... years at....., and also at ....., and hath had .....

children, issue of her said marriage, of whom ..... are now living with the applicant, and wholly dependent upon her earnings.

That on or about....., the said *A.B.*, without any reasonable cause, deserted the applicant, and hath ever since remained separate and apart from her.

That since the desertion of her said husband, the applicant hath maintained herself by her own industry [or on her own property, *as the case may be*], and that thereby and otherwise acquired certain property consisting of ..... [*here state generally the nature of the property*].

Wherefore she prays an order for the protection of her earnings and property acquired since the said, ..... day of....., from the said *A.B.*, and from all creditors and persons claiming under him.

(Signed) *C.B.*

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Form No. 11, the words and the brackets “(High)” and “(or to the Judge of)” and words “To the Hon’ble Mr Justice” shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

#### *No. 12.—Petition for Alimony pending the suit*

(See Section 36)

In the (High) Court of .....

B. against *B*

To the Hon’ble Mr Justice ..... [*or To the Judge of* .....]

The ..... day of 20 .....

The petition of *C.B.*, the lawful wife of *A.B.*

SHEWETH,

1. That the said *A.B.* has for some years carried on the business of ....., at ....., and from such business derives the nett annual income of from Rs ..... to .....

2. That the said *A.B.* is possessed of plate, furniture, linen and other effects at his said house ....., aforesaid, all of which he acquired in right of your petitioner as his wife, or purchased with money he acquired through her, of the value of Rs 10,000.

3. That the said *A.B.* is entitled, under the will of his father, subject to the life interest of his mother therein, to property of the value of Rs 5000 or some other considerable amount. (*a*)

Your petitioner, therefore, prays that this (Hon’ble) Court will decree such sum or sums of money by way of alimony, pending the suit, as to this (Hon’ble) Court may seem meet.

(Signed) *C.B.*

*Form of Verification: See No. 1*

(a) The Petitioner should state her husband’s income as accurately as possible.

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Form No. 12, the words and the brackets “(High)”, “(or to the Judge of)” and “(Hon’ble)” and the words “To the Hon’ble Mr. Justice” shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.



**No. 13.—Statement in answer to No. 12**

In the (High) Court of .....

B. against B

A.B. of ....., the above-named respondent, in answer ..... to the petition for alimony, pending the suit, of C.B., says—

1. In answer to the first paragraph of the said petition, I say that I have for the last ..... years carried, on the business of ....., at ....., and that, from such business, I have derived a nett annual income of Rs 900, but less than Rs 1000.

2. In answer to the second paragraph of the said petition, I say that I am possessed of plate, furniture, linen and other chattels and effects at my said house ..... aforesaid, of the value of Rs 7000, but as I verily believe of no larger value. And I say that a portion of the said plate, furniture and other chattels and effects of the value of Rs 1500, belonged to my said wife before our marriage, but the remaining portions thereof I have since purchased with my own monies. And I say that, save as hereinbefore set forth, I am not possessed of the plate and other effects as alleged in the said paragraph in the said petition, and that I did not acquire the same as in the said petition also mentioned.

3. I admit that I am entitled under the will of my father, subject to the life-interest of my mother therein, to property of the value of Rs 5000, that is to say, I shall be entitled under my said father's will, upon the death of my mother, to a legacy of Rs 7000, out of which I shall, have to pay to my father's executors the sum of Rs 2000 the amount of a debt owing by me to his estate, and upon which debt I am now paying interest at the rate of five per cent per annum.

4. And, in further answer to the said petition, I say that I have no income whatever except that derived from my aforesaid business, that such income, since my said wife left me, which she did on the ..... day of ..... last, has been considerably diminished, and that such diminution is likely to continue. And I say that out of my said income, I have to pay the annual sum of Rs 100 for such interest as aforesaid to my late father's executors, and also to support myself and my two eldest children.

5. And, in further answer to the said petition, I say that, when my wife left, my dwelling-house on the ..... day of ..... last, she took with her, and has ever since withheld and still withholds from me, plate, watches and other effects in the second paragraph of this my answer mentioned, of the value of, as I verily believe, Rs 800 at the least; and I also say that, within five days of her departure from my house as aforesaid, my said wife received bills due to me from certain lodgers of mine, amounting in the aggregate to Rs....., and that she has ever since withheld and still withholds from me the same sum.

(Signed) A. B.

**STATE AMENDMENTS**

**UTTAR PRADESH.**—In Form No. 13, the word and brackets “(High)” shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

**No. 14.—Undertaking by minor's next friend to be answerable for respondent's costs**

(See Section 49)

In the (High) Court of .....

I, the undersigned A. B., of ..... being the next friend of C.D. who is a minor, and who is desirous of filing a petition in this Court, under the Indian Divorce Act, against D.D. of ....., hereby undertake to be responsible for the costs of the said D.D. in such suit, and that, if the said C.D. fail to pay to the said D.D. when and in such manner as the Court shall order



all such costs of such suit as the Court shall direct him [*or her*] to pay to the said *D.D.*, I will forthwith pay the same to the proper officer of this Court.

Dated this ..... day of ..... 20 .....

(Signed) A. B.

#### STATE AMENDMENTS

**UTTAR PRADESH.**—In Form No. 14, the word and brackets “(High)” shall be *omitted*.—U.P. Act XXX of 1957, S. 2 and Sch.

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