

# VOID AND VOIDABLE MARRIAGE: AN OVERVIEW

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Abstract : - Before passing of the Hindu Marriage Act 1955, Hindu Law permitted polygamous marriage for male. The Hindu Marriage Act brought a radical change in the concept of marriage. Section 5 of the Act Lays down five conditions of valid marriage. Section 11 says, "Any marriage Solemnized at the commencement of this Act shall be null and void and may on a petition presented by either party thereto against the other party be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5. The Act lays down four grounds on which a Hindu marriage becomes voidable, whether such marriage was solemnized before or after the commencement of the Act. A voidable marriage, on other hand, continues to subsist until it is annulled by the court. A child born of a void or voidable marriage is deemed to be the legitimate child of his parents. A void marriage is void ab initio. A voidable marriage is marriage which is perfectly valid till it is annulled by court.

Key words :- valid marriage, void marriage, voidable marriage, impotency, unsoundness of mind, consent, pregnancy of the wife, legitimacy of children.

## Introduction:

Marriage under Hindu law is the voluntary union of one man with a woman to the exclusion of all other. According to Hindu text, a man cannot be said to have a material existence until he took a wife. In Vedic period, the sacredness of the marriage was repeatedly emphasized. It was a religious necessity, rather than mere physical luxury for a Hindu, to marry and to have son. In Vedic period Hindu marriage perform through any of the modes, namely Brahma, Prajapaty, Arsha and Daiva is regarded as indissoluble. According Brihdaranyaka Upnishad, marriage was considered as a Sacrament, a holy union, a union of flash with flesh, bone with bone and soul with soul to continue even in the next world. In the case of Gopal Kishan V. Mithilesh Kumar<sup>1</sup>, the Allahabad High Court observed “the institution of matrimony under the Hindu Law is a sacrament and not a mere socio-legal contract. The sacramental aspect under Hindu Law has three characteristics, (a) Marriage was to be solemnized with the performance of sacred rites and ceremonies, (b) Marriage once entered cannot be dissolved, (c) It is an eternal union. Hindu Marriage Act 1955, has brought radical changes in the concept of marriage. It simply lays down five conditions for valid Hindu marriage. At present largely it has destroy the sacramental aspect. By the amendment in 1976, the element of consent has been introduced. In Muthusami V. Masilamani<sup>2</sup>, the court observed ‘A marriage, whatever else it is, i.e. a sacrament and institution, is undoubtedly a contract entered into for consideration with co-relative rights and duties.’”

Marriage under Hindu Law is not only Sanskar or Sacrament, but the only Sanskar prescribed for women. It was accepted that a Hindu marriage is also a contract.

## Condition for valid Hindu marriage :

First condition provides that neither party has a spouse living (Section 5 (i)). Second condition at the time of the marriage, neither party<sup>3</sup>,

- (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind or
- (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be until for marriage, and procreation of children.
- (c) has been subject to recurrent attacks of insanity or epilepsy. [Section 5 (ii)]

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<sup>1</sup> ILR 28 Cal 758

<sup>2</sup> 33 Mad 342

<sup>3</sup> Vide marriage laws (Amendment) Act, 1976

The third requirement of a valid Hindu marriage is that “the bridegroom has completed the age of (twenty one years)<sup>4</sup> and the bride the age of (eighteen years)<sup>5</sup> at the time of the marriage”. [Section 5 (iii)]

The fourth requirement of Hindu valid marriage is that the parties to the marriage should not be within the degrees of prohibited relationship, unless a custom or usage governing each of them permits such a marriage, Under this clause, a marriage between persons who are within the degrees of prohibited relationship with each other is prohibited. It should also be noted that prohibited relationship includes- i) relationship by half or uterine blood as by full blood, ii) illegitimate blood relationship as well as legitimate, iii) relationship by adoption as well as by blood and all terms of relationship in those clauses shall be construed accordingly. But if the “custom” or “usage” governing each of the parties to the marriage allows the marriage within the degree of prohibited relationship then such marriage will be valid and binding. To be a valid custom or usage such a custom or usage must satisfy the definition of this term laid down in Section 3 of the Act. In Smt. Shakuntala Devi v Amar Nath<sup>6</sup>, the Punjab High Court has held that the validity of marriage under section 5 (iv) simply implies that if a marriage could take place between two Hindus of prohibited degree by force of customs its validity cannot be challenged.

Fifth condition of a valid marriage is that the parties to the marriage should not be sapindas of each other, unless a custom or usage governing each of them permits such a marriage. A marriage between sapindas would be valid only if the custom or usage governing both the parties permits such a marriage. The Act under Section 3 (f) lays down its own rules to determine whether a person is the ‘Sapinda’ of another or not. The Sapinda relationship according to this clause extends as far as:

- (i) the third generation (inclusive) in the line of ascent through the mother, and
- (ii) the fifth generation (inclusive) in the line of ascent through the father.

The question is how to prove a custom or usage. It is well settled that custom cannot be extended by analogy. It must be established inductively, not deductively and it cannot be established by a priori methods.

“Saptapadi” one of the condition for a Hindu marriage, i.e. seven steps taken by bridegroom along with his bride jointly before the sacred fire. The marriage become complete and binding only when the seventh step is taken. It will thus be seen that the Act does not prescribe any special

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<sup>4</sup> Subs for the word [Eighteen years] by Act No.2 of 1978, vide section 6 sch.

<sup>5</sup> Subs for the word [Fifteen years] by Act No.2 of 1978, vide section 6 sch

<sup>6</sup> AIR 1982 P and H 22

ceremony for a Hindu marriage. It is to be noted that even the Saptapadi is not obligatory under the Act.

In order to constitute a valid marriage certain ceremonies have to be necessarily gone through. What ceremonies are necessary would depend upon the custom of the community to which the parties belong. The violation of section 5 of the Hindu Marriage Act affects the validity of marriage. There is only one condition relating to age of the parties, which does not affect the validity of marriage except some penal consequences under section 18 of the Act and a ground of divorce for the wife subject to condition prescribed therein.

## Void Marriage

Section 11 lays down that if any marriage is solemnized after the Act has come into force in contravention of three conditions –

- (i) Neither party should have a spouse living at the time of marriage.
- (ii) The parties should not be within the degrees of prohibited relationship, unless the custom or usage governing each of them permits such a marriage.
- (iii) The parties should not be sapindas of each other, unless the custom or usage governing each of them permits such a marriage.

In *M.M. Malhotra v Union of India*<sup>7</sup>, the Apex court observed that the Marriage covered by section 11 are void ipso jure, that is, void from the very inception and have to be ignored as not existing in Law at all if and when such a question arises. The contravention of the first condition will render the marriage void under section 11, and a competent court may declare such a marriage to be a nullity on a petition presented by either party to such Marriage. Section 494 and 495 of the Indian penal code provides punishment to the parties for a bigamous marriage. Violation of condition the parties to the marriage should not be within the degrees of prohibited relationship such marriage is void and the parties are liable to be imprisoned or fined or (both) under section 18 of the Act. A marriage between Sapindas is void ab initio and the persons contravening the provision of this clause are liable to imprisonment or fine or both under section 18 of the Act.

The first wife, during the subsistence of whose marriage the husband takes second wife, has no right to move for declaration of nullity of the subsequent marriage<sup>8</sup>. Where a person has married another wife during the subsistence of the first marriage, the wife of the first marriage

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<sup>7</sup> AIR 2006 SC 80

<sup>8</sup> *Birendra Bikarm Singh v. Kamala Devo*, AIR (1995) All 243.

cannot move for declaration of nullity. It is only the subsequently married wife who could move for the declaration of nullity of marriage<sup>9</sup>. In respect of a void marriage, no decree of court is necessary<sup>10</sup>.

Void marriage is a marriage which does not exist from its inception. Void marriage is no marriage. They absolutely lack capacity to marry. No legal consequence flows from a void marriage. The parties have no status of husband and wife.

## Voidable marriage

Section 12, Hindu Marriage Act lays down four grounds of voidable marriages: (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds namely -

- (a) That the marriage has not been consummated owing to the impotence of the respondent or
  - (b) Respondent's incapacity to consent or her/his suffering from a mental disorder.
  - (c) That the consent of the petitioner or where the consent of the guardian in marriage of the petitioner was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (amendment) Act, 1978 (2 of 1978) the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstances concerning the respondent or
  - (d) That the respondent was at the time of the marriage pregnant by some person other than petitioner.
2. Notwithstanding anything contained in sub-section (1) no petition for annulling or marriage :
- a) on the ground specified in clause (c) of sub-section (1) shall be entertained if
    - i. the petition is presented more than one year after the force has ceased to operate or, as case may be the fraud had been discovered or
    - ii. the petitioner has, with his or her full consent lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered,
  - b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied.
    - i. That the petitioner was at the time of the marriage ignorant of the facts alleged;

<sup>9</sup> Kedar vrs Suprabha AIR 1963 Pat 34

<sup>10</sup> Lila vrs Laxmi, 1986 All LJ 683

- ii. that proceeding have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the Marriage and
- iii. that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground.

**impotence:** Wharton's Law Lexicon, 14<sup>th</sup> Edition has defined the word "impotence" as follows "Physical inability of a man or woman to perform the act of sexual intercourse. A marriage is void if at the time of the celebration either of the parties to it is incurable impotent or may be declared void by a decree in a suit of nullity of marriage." According to Black's Law Dictionary, impotence has been described as "A man's inability to achieve and erection and therefore to have sexual intercourse, Because an impotent husband cannot consummate a marriage, impotence have been cited as a ground of annulment".

Impotency means the incapacity of a spouse to consummate the marriage by actual sexual intercourse. If at the time of marriage one of the parties is, and continues to be incapable of effecting or permitting its consummation by reason either or any structural defect in the organs of generation especially if this is incurable which renders complete sexual intercourse impracticable or of some incurable mental, moral or other disability resulting in the man, inability to consummate the marriage with a repugnance to the act of consummation with the particular woman, it would amount to impotency<sup>11</sup>.

Prior to amendment of Hindu Marriage Act 1976 it is necessary that the responded was impotent at the time of marriage at the continued but after amendment if the marriage is subsequently capable of consummation be it due to surgical operation or otherwise, no decree for annulment of marriage can be granted<sup>12</sup>.

Where, due to some structural defect in the sexual organs, marriage cannot be consummated it would be the case of physical impotency. In *Jyotsnaben v Pravin Chandra*<sup>13</sup>, the wife has structural defect in vaginal and not capable having sexual intercourse, no uterus or menstrual discharge, it was a case of impotency the grant of decree of nullity was not interfered with. Party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility<sup>14</sup>. In *Prulose vrs. Mary*<sup>15</sup>, the parties lived together for 17 days

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<sup>11</sup> Rayden on Divorce 12<sup>th</sup> Edn. Vol I P 160

<sup>12</sup> Rajendra Prasad v. Smt. Shanti Devi AIR 1978 P&H 181.

<sup>13</sup> AIR 2003 Guj 222

<sup>14</sup> Digvijay Singh v. Partap Kumari, AIR 1970 SC 137.

<sup>15</sup> AIR 1996 Ker 303



and the marriage was not consummated the wife expressed her desire to become a nun, the decree of nullity was granted.

Cases have arisen of a spouse found to have been impotent regarding his or her spouse, but otherwise potent.

Jagdish Lal v Shyama<sup>16</sup> case observation made by G. Prasad J, "In some cases a person may be capable of having sexual intercourse but incapable of performing it with a particular individual, and in such a case he must be regarded as impotent in relation to that particular individual regardless of his potency in general".

**Unsoundness of Mind** : Section 12 (I) (b) provides that "a marriage in contravention of the condition specified in of section 5 (II), is ground of voidable marriage.

After the 1976 Amendment of the Act, the second requirement of a valid Hindu Marriage is that at the time of marriage neither party

- (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind, or
- (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such a extent, as to be unfit for marriage and the procreation of children; or
- (c) has been subject to recurrent attacks of insanity.

Mere mental depression does not amount to mental disorder<sup>17</sup>. All mental abnormalities are not recognized as grounds for grant of decree. If the mere existence of any degree of mental abnormality could justify dissolution of a marriage few marriages would indeed survived<sup>18</sup>. It has been further held that mere certificate of the doctor is not sufficient to prove mental disorder<sup>19</sup>.

### Consent obtained by force and fraud

Section 12 (i) (c) speaks that if the consent of the petitioner or the consent of the guardian wherever necessary was obtained by fraud or force, then the marriage was voidable. The Child Marriage Restraint (Amendment) Act, 1978 has raised the age of marriage of girl to eighteen and therefore the question of minor girl's marriage does not arise. In India in rural area as well as urban area most of the marriage is arranged, the consent of parent or guardian still plays a significant role. In Gursharn Singh v Surjit Kaur<sup>20</sup>, a boy aged 15 years was married to a girl of 31 years by coercion to boy's mother. The marriage was held voidable. In Nand Kishore v Smt.

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<sup>16</sup> AIR 1966 All 150

<sup>17</sup> Hema Reddy v. Rakesh Reddy, AIR 2002 AP 228 (DB),

<sup>18</sup> Ram Narain v. Smt. Rameswari Gupta, AIR 1988 SC 2260

<sup>19</sup> Sudhir Singhal v. Neeta Singhal, AIR 2001 Del 116.

<sup>20</sup> 1986 (I) HL.R 319 (P and H)

Munni Bai<sup>21</sup> Madhya Pradesh High Court has held that the terms force and fraud mean those conditions in which there is absence of real consent. In matrimonial law, 'force' has been given a wide meaning. Force vitiating consent implies not merely use of physical force but also threats to use force.

The word 'fraud' in matrimonial law has a technical meaning. It does not include cases of misrepresentation or active concealment even of material facts including consent of party. The chief element in fraud is deceit. Section 17, contract act defines fraud<sup>22</sup>. Fraud means such circumstances or conditions as to show want of real consent to marriage. Which vitiates the consent expressly or impliedly given by a party to the marriage<sup>23</sup>, it would amount to fraud. Thus concealment of fact of the pro-lapse of uterus<sup>24</sup>, non-disclosure of fact that the husband had undergone vasectomy operation wife never has menses before marriage<sup>25</sup>, would amount to fraud. In Rice vrs Rice<sup>26</sup>, a woman was forced to marry a man who showed a pistol threatening to blow out her brain. It was held that the consent was obtained by force. Similarly Scott vrs Sebright<sup>27</sup>, where the bridegroom told the bride that if at the ceremony she would not behave normally he would shoot her, amount to force.

### **Pregnancy of the wife at the time of marriage:**

Section 12 (l) clause (D) laid down fourth ground of voidable marriage it speaks about respondent was pregnant at the time of marriage by some person other than the petitioner. Three further conditions have to be satisfied under Section 12 in such cases, viz –

- 1) that at the time of the marriage the petitioner was ignorant of such pregnancy;
- 2) that the petitioner has commenced proceedings under section 12 within one year of the marriage; and
- 3) That the petitioner did not have (with his consent) marital intercourse with his wife ever since he discovered that the wife was pregnant by some other man. The Supreme court held that where wife admitted her pregnancy from before the solemnization of marriage, when the husband had not met her the case would be covered under section 12 (i) (d)<sup>28</sup>.

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<sup>21</sup> AIR 1979 MP 45

<sup>22</sup> Harbhajan v. Brij Ballab, 1964 Punj 359

<sup>23</sup> P.J Moor v. Valsa, AIR 2992 Ker 176 (DB)

<sup>24</sup> P.V. K, AIR 1982 Bom 400

<sup>25</sup> Urmila Devi v. Narinder Singh AIR 2007 HP 19

<sup>26</sup> 72 L. T. 122

<sup>27</sup> 12 PD 21

<sup>28</sup> In Mahendra v. Sushila Bai, AIR 1965 SC 364.



Pre-nuptial unchastely of the wife though unknown to the husband at the time of marriage not a ground for nullity<sup>29</sup>.

## Legitimacy of children of void and voidable marriage

Section 112 of the Evidence Act lays down that if a person was born during the continuance of a valid marriage between his mother and any man or within 280 days after its dissolution and the mother remains unmarried, it shall be taken as conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Section 16 of the Hindu Marriage Act lays down of the legitimacy of children of void and voidable marriage – (i) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the marriage laws (amendment) Act, 1976 and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act. (2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of parties to the marriage if at the date of decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child, notwithstanding the decree of nullity. (3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child or a marriage which is null and void or which is annulled by a decree of nullity by section 12, any rights in or to the property of any person other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such right by reason of his not being of the legitimate child of his parents.

Section 16 comes into operation only in a case in which a marriage is in fact proved to have taken place between two persons, but which is void under section 11 or voidable under section 12 where there is a case of no marriage between two people. Section 16 does not come in aid to the case of the children born to such parents<sup>30</sup>.

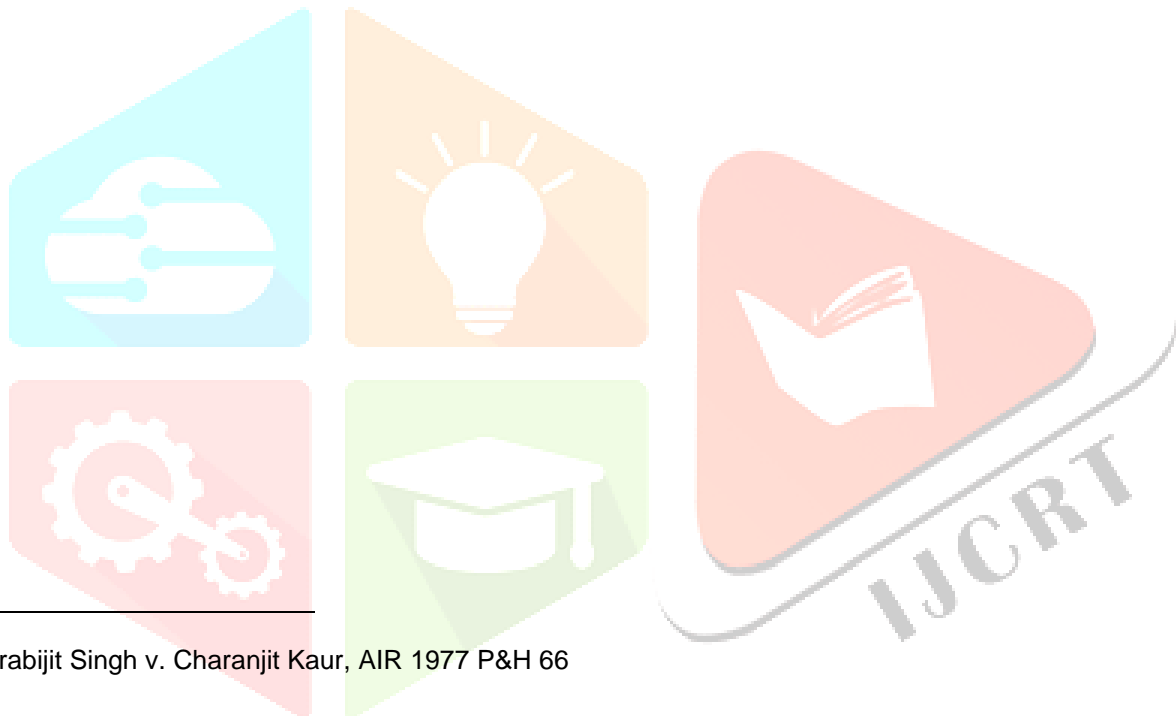
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<sup>29</sup> Surajeet v. Rajkumari, 1967 Punj 172, Raghunath Vrs Vijai, 1972 Bom, 132

<sup>30</sup> Sudershan Karir v. State, AIR 1988 Delhi .368

## Conclusion

A void marriage is void ab initio. It is no marriage it cannot be ratified. A voidable marriage is a marriage which is perfectly valid till it is annulled by court violation of condition (i), (iv) and (v) of section 5 of the Act renders the marriage void under section 11. The ground of voidable marriage and provided in section 12. In void marriage does not alter the status of the parties – they do not become husband and wife on the other hand, a voidable marriage remains valid and binding and continues unless a decree annuls it. The wife of a void marriage is not entitled to maintenance<sup>31</sup>. The parties to a void marriage may perform another marriage and it will be not amounting to the guilt of bigamy.



<sup>31</sup> Sarabjit Singh v. Charanjit Kaur, AIR 1977 P&H 66

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