

# LEGALFOXES LAW TIMES

## HINDU MARRIAGE IN RELATION TO THE LAWS OF EVIDENCE: A COMPARATIVE STUDY

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### **Abstract**

In Hindu law, marriage is considered as an important aspect in one's life. It propagates that the husband is Pati Parmeshwar (deity) to his wife. Wife should worship her husband as if he were a deity and should follow his commands. With advancement in law and society this mentality is fading away. Now, the parties can go to the court to obtain divorce or other remedies available by this Act. But, in order to present their case and to record evidence in the courts of law, knowledge and applicability of the Indian Evidence Act, 1872 is most important. The Evidence Act has sections which deal with situations in which husband and wife might end up. Situations like these include legitimacy of their children, or offences committed against the wife or their private conversation acting as a privilege, etc. This article shows the connection of the Evidence Act with Hindu marriage. As to how the laws of evidence are applied in various situations during marriage.

### **Keywords**

Marriage, presumption, Indian Evidence Act, dowry death, privileged communication, legitimacy

## Introduction

In Indian culture, the concept of marriage was prevalent for a long time. According to ancient Hindu texts, a man cannot be said to have a material existence unless he took a wife. According to Shastra, a man is only half of himself.<sup>1</sup> Marriage has always been an essential phase of life for both man and woman. Its importance is explained as a religious and spiritual duty because a man has to beget children in order to carry on his family and inheritance and most of the worships and rituals have to be performed in presence of a spouse.

## Presumption as to marriage

Questions may arise as to when a presumption can be raised that the persons living together are married. This question was answered in the case of Ashok Kumar v. Smt. Usha Kumari,<sup>2</sup> the Delhi High Court has held that there will be a strong presumption in favour of marriage if the persons are recognised as husband and wife.

Section 50 of the Indian Evidence Act, 1872 which is relating to the opinion of relationship as a relevant fact, affirms the ruling of Delhi High Court but it also provides exception of this rule as in the proceedings of divorce and in prosecutions under section 494, 495, 497 or 498 under the Indian Penal Code, 1860

## Registration of marriage

The Supreme Court in a landmark judgment of Smt. Seema v. Ashwani Kumar<sup>3</sup> ordered compulsory registration of marriages of all religions and also directed central and state governments to make the necessary amends.

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<sup>1</sup>R.K. AGARWAL, HINDU LAW 38 (Central Law Agency, 26th ed. 2019).

<sup>2</sup>AIR 1984 Del. 347

<sup>3</sup>AIR 2006 SC 1158

This judgment should be read in light of section 8 of Hindu Marriage Act as it provides that if the State Government is of the opinion that registration is necessary, may provide that the entering of the particulars in Hindu Marriage Register shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine.

### **Evidence of Registration of marriage**

Section 35 of the Indian Evidence Act deals with entries in any public or other official book, register, record or an electronic record which is made by a public servant while discharging his official duty, or by any other person on whom a duty lies by the laws of the country. Any such entry is a relevant fact. The registration of marriages will come under the virtue of section 35 and therefore will become a relevant fact admissible in the courts.

In the case of *Bhilaji Bandhu Sutar and Lohar v. Rangarao Shankar Sutar*,<sup>4</sup> a woman, who was described as a wife of a man on Ration Card and voter's list, lived with him as a wife for about 22 years during his lifetime and with his knowledge. After the man's death, when the issue arose whether this woman was the wife of that man, it was observed that all the records were public records and were made by the officers in performance of their duty. Therefore, it was held that she was the wife of the man in question

It is pertinent to note that registration of marriage under this section simply acts as a proof of a lawfully solemnized Hindu marriage. So, if a marriage is not registered under the Hindu marriage register that cannot invalidate the marriage. Similarly if there is no marriage but the marriage is registered then such registration certificate cannot validate the marriage.

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<sup>4</sup>AIR 2014 NOC 519 Bom.

In a case, where the girl registered her marriage with a boy solely because she was told that it is necessary for employment abroad, when in fact there was no such marriage. Here, the Madras High Court held that in these circumstances the registration of marriage is null and void.<sup>5</sup>

Section 21-C of Hindu Marriage Act, provides an exception to the documentary evidence in any proceedings under this act. It provides that a document will not be inadmissible on the ground that it is not properly stamped or registered. Section 40-C of Special Marriage Act, 1954 is on similar footing and section 47 of the act, provides that Marriage Certificate Book shall be admissible as evidence to the statements contained therein.

### **Presumption of death**

Presumption of death is an important concept in both the subjects- Hindu marriage and the laws of evidence. Section 13(1) of Hindu Marriage Act provides for grounds of divorce and judicial separation available to both the parties- husband and wife. Presumption of death is one of the grounds available therein. Section 13(1)(vii) provides that a party will be eligible for divorce (and for judicial separation by the virtue of section 10) when the other party is not heard for about 7 years by the persons who would have usually heard, had the party been alive.

This provision is on the similar lines as of section 108 of evidence act. Section 108 further provides that the burden of proving that the party is alive will be on the person affirming it.

In *Nirmoo v. Nikka Ram*,<sup>6</sup> The court held that no one can raise objections to the second marriage in absence of a decree of divorce on the basis of presumption of death except the missing spouse

It is important to note that there is simply a presumption of death and not the time of death. So, if a person affirms that the person died at any specific time then the onus will be on that person to prove the death on that particular time.

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<sup>5</sup>AIR 1995 Mad. 161

<sup>6</sup>AIR 1968 Del. 260

## Legitimacy of children

Children are the most important part of the lives of their parents. Children born out of marriage are considered valid. But, sometimes questions are raised against the legitimacy of children, which is divided in 2 circumstances hereunder-

### ❖ **Pregnancy at the time of marriage**

Section 12 of the Hindu Marriage Act provides for grounds of voidable marriages and section 12(1)(d) entitles the man to seek for annulment of marriage if the wife was pregnant at the time of marriage by someone else but him. Here, the man has to prove beyond reasonable doubt that his wife was not pregnant by him. The child born will not be considered legitimate and will not be provided the protection of section 16 of the Hindu Marriage Act.

In Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati,<sup>7</sup> The baby was born to the respondent only after 171 days of marriage. The child was born fully healthy and there was no sign of premature delivery. Also there was no evidence that the husband had met his wife before marriage. So, the petitioner was entitled to the decree.

However, there are few limitations provided in section 12(2)(b) without fulfilling them, the child will not be considered illegitimate-

- that the petitioner was ignorant of the facts;
- that the suit has been instituted within one year of the marriage;
- That the petitioner does not have marital sex after knowing the facts alleged.

### ❖ **Birth during marriage is a conclusive proof of legitimacy**

Section 112 of the Indian Evidence Act confers legitimacy to the child who is born during a valid marriage or after the dissolution of marriage if within two hundred and eighty days, the mother remains unmarried in that period.

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<sup>7</sup>AIR 1965 SC 364

The section only mentions during the continuance of marriage and after the marriage within 280 days but it will also cover the birth of the child before marriage or pregnancy of woman at the time of marriage if the husband and wife had access to each other.

The presumption of legitimacy under this section is a conclusive one. Which means that the court will observe this as proved and it can only be disproved by a very strong and conclusive evidence and that strong evidence has to be of 'non-access'.<sup>8</sup> The word access means only the existence of the opportunity for intercourse between the spouses.<sup>9</sup> The non-access has to be proved when the child could have been begotten. DNA tests will not be enough to throw the presumption under this section.

The section 112 of the Indian Evidence Act and section 12(1)(d) of the Hindu Marriage Act covers similar situation but at two different instances. While the provision under Hindu Marriage Act deals with pregnancy at the time of marriage, the other deals with it during the continuance of marriage and after the marriage. The difference among them is that non access can be easily proved in the circumstances before marriage but very difficult to prove during the continuance of marriage.



### **Marital offences**

Earlier cases of deaths of young brides were at an alarming rate and crime against those women happens at the home of their husband where she has a new family. The husband's family was not likely to give the evidence in favour of the wife by incriminating the husband. Therefore, the bride had no protection at all as the person whom she married and was supposed to protect her, is now torturing her and subjecting her to cruelty. Therefore, a need was felt for laws which will be in favour of the bride and throw a presumption against the husband and his family. Section 113-A and 113-B was introduced in the evidence for this effect.

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<sup>8</sup> Shyam Lal v. Sanjeev Kumar, AIR 2009 SC 3115

<sup>9</sup> Karapaya Servai v. Mayandi, AIR 1934 PC 49

### ❖ Abatement of suicide

Section 113-A of Indian Evidence act, provides that when a woman committed suicide within 7 years of her marriage and has been subjected to cruelty by the husband or any of his relatives, the court may presume, having regard to other circumstances that the suicide had been abetted by her husband or such relative. Cruelty here refers to the offence defined in section 498A of the Indian Penal Code, 1860.

In *Arjun Kushwaha v State of M.P.*,<sup>10</sup> relations of husband and wife were drained because of dowry demands. Husband assaulted the wife as she talked to her mother. Wife poured kerosene on herself but the husband continued with his abusive and provocative language. It was held as an instigation to suicide and the husband was convicted.

In another case, where the wife was sorrowful that her husband is illiterate and her mother-in-law works with a hand floor grinder. Here, mother-in-law was given the benefit of doubt.<sup>11</sup> Hence, the section mentions to regard other circumstances and not just that there is cruelty and death within 7 years of marriage.



### ❖ Dowry death

The term dowry could be understood as certain gifts given by the bride or bride's family to the groom and his family. This offence begins when the husband and his family start harassing and cruelty to the bride to extract more dowry and eventually kills her. Dowry death is provided under section 304B of the Indian Penal Code, 1860.

Section 113-B of evidence act states that the court shall presume that the person has caused dowry death if it could be proved that soon before her death such person subjected her to cruelty or harassment in relation to dowry.

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<sup>10</sup> 1999 Cri. LJ 2538

<sup>11</sup> *Rajbabu v. State of M.P.*, AIR 2008 SC 312

To establish dowry death, prosecution only has to prove basic requirements of the section after which the court will presume that such person has committed dowry death and the onus will be upon that person to rebut the presumption. The expression 'soon before death' indicates application of proximity test and has to be seen in respect of the facts and circumstances of the situation. There should be a proximate live link as to the death of the woman with cruelty and harassment.<sup>12</sup>

It is important to note that the presumption in section 113-B is heavier as compared to that in section 113A.

### **Privileged communication between spouses**

Section 122 of the Indian Evidence Act, 1872 protects communication between spouses from being disclosed. This section provides that a person who is or has been married cannot be compelled to disclose any communication made by the other spouse and that person will not be permitted unless the person who made it or his representative-in-interest consents to the same, except suits between the spouses and any proceeding in which one spouse is being prosecuted for the crime against another spouse.

This section is based on public policy that there should be trust and confidence between the spouses. Spouses tend to trust each other and this section provides them the opportunity to come clean in front of their spouse with everything. It should be noted that this section will apply even after the dissolution of marriage. But communications which are made before the commencement or after the dissolution of marriage are not privileged.

This privilege has certain exceptions mentioned within the section-

- Acts other than communications

The section only covers communication between the spouses but acts other than communications are left unprotected. In the leading case of Ram Bharose v. State of

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<sup>12</sup> M. Srinivasulu v. State of A.P., AIR 2007 SC 3146



U.P.,<sup>13</sup> the accused was on trial for killing a neighbour to rob ornaments for his wife. The accused told his wife that he went to the house of the victim to get the ornaments. This was held to be inadmissible because of the privilege but she testified about his conduct that she saw him coming down from the roof early morning after which his husband went in the fodder store to take a bath and put on the same clothes. After that he presented her with the ornaments. The accused was held liable.

- Evidence by third persons

The privilege is between the spouses only and not the third person. Therefore, if any person heard or overheard any communication between the spouses, he can testify to that. In Kerala, certain letters were sent by the husband to his wife which contained defamatory matters to her father. Wife passed those letters to her father, who wanted to prove them. The Kerala court rejected the letters, however, the Supreme Court overruled the decision.<sup>14</sup>

- Waiver of Privilege

Waiver can be done by the party who made the communication or by his/her representative-in-interest. The consent to the waiver could be either expressed or implied by a conduct like one spouse is going to the witness box to testify but the other spouse has not in good time objected to the disclosure.

- Crimes or suits between married persons

The privilege does not apply when a suit is brought by the married persons against each other or where a crime is committed by one spouse against another. The Protection of Women from Domestic Violence Act, 2005 goes one step ahead as section 32 mentions that the court may conclude that the crime has been done by the accused on the basis of sole testimony of his wife.

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<sup>13</sup>AIR 1954 SC 704

<sup>14</sup> M.C. Verghese v. T.J. Ponnann, AIR 1970 S.C. 1876

## CONCLUSION

Marriage is an essential part of human life. Union of two persons who may have never even met before, is not easy thing to do. Various kind of situations can arise when two persons start to live together. The Evidence Act deals with burden of proof and preponderance of probability. It is interesting to note how it applies perfectly to the situations arising out of marriage. It works in consonance with the public policy and works in the benefit of the victim, as it protects the wife from the terror of her matrimonial house and raising presumption against husband and his relatives. Law of evidence on one hand protects the very basis of marriage i.e. the trust and confidence among spouses by protecting their communication and on the other hand when marriage does not go well, deals with presumptions in offences done by one spouse over another.

