

The party to marriage
must not have his



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The conditions given in the section are binding and definite, in absence of which the validity of marriage becomes doubtful. Section 5 of the Act, which deals with these conditions dispenses with the requirement of the identity of the caste. Section 5 lays down that a marriage may be solemnised between any two Hindus if the following conditions are fulfilled, namely (1)

Monogamy: Neither party has a living spouse at the time of marriage; (2)

Soundness of Mind: Neither party at the time of marriage (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 unfit for marriage and the procreation of children; or (c) Has been subject to recurrent attacks of insanity or epilepsy. (3) Age of Marriage: The bridegroom has completed the age of 21 years and the bride the age of 18 years at the time of marriage.

(4) Beyond Prohibited Degrees: The parties are not within the degree of prohibited relationship unless customs or usage governing each of them permits of a marriage between the two; (5) Beyond Sapinda Relationship:

The parties are not Sapinda of each other, unless the custom or usage governing each of them permits of a marriage between the two. (1) As

Regards the First Condition: Section 5(1) provides the rule of monogamy and prohibits polygamy and polyandry. It now specifies unequivocally that “

Hindu can have only one marriage subsisting at a time”. Prior to the Act of 1955 a Hindu male could marry more than one wife irrespective of the fact that his previous wife was alive at the time of his subsequent marriage. Now the section requires that either party to marriage must not have his spouse living at the time of marriage and in the event of breach of this condition the

erring party would fall within the mischief of Sections 494 and 495 of the Indian Penal Code and also would be liable for punishment under Section 17 of the Hindu Marriage Act. The Supreme Court in *Smt. Yamuna Bai Anant Rao Adhav v.*

Anant Rao Sliiva Ram Adliava, has laid down that in the event of breach of first condition specified in Section 5(1) the marriage is rendered null and void under Section 11(1) of the Act and since it is void ab initio, the wife cannot claim maintenance under Section 125 of the Code of Criminal Procedure. In *Bhogadi Kannababu and others v. Vaggitia Pydamma and others*, the Supreme Court observed that Clause (i) of Section 5 is one such condition which clearly provides that no marriage can be performed, if there is a living spouse. If, however, marriage has been so solemnized by the husband, such marriage is void ab initio and she cannot inherit the property. In *Gidabia alias Snrjee Dein and others v. Sitabiya alias jagpatia and others*, the Allahabad High Court also observed that if the petitioner married deceased, i. e.

, during the subsistence of his first marriage, such marriage would be void and she would not be entitled for any share in the property of the deceased. Recently in *Nilesli Narain Rajesli Lai v. Kashmira Bliupendra Bai Banker*, husband who was Christian had married a Hindu girl.

The marriage was solemnized according to the Hindu rituals and was registered under the Hindu Marriage Act. After some time a baby girl was bom after which the wife was deserted by the husband and he filed a suit under section 11 of Hindu Marriage Act for declaration of marriage between the parties as void because at the time of his marriage the first marriage was

subsisting. In this case the court held that marriage between the parties is void ab intio. Because during the subsistence of his first marriage, such marriage would be void. The courts have expressed the view that a party to the bigamous marriage could be punished only upon the proof of the prior marriage having been solemnised according to religious ceremonies and customs. The subsequent marriage would require proof of essential religious ceremonies or rites, mere admission would not render it a complete marriage.

The offence of bigamy would be constituted only when at the time of the performance of subsequent marriage, the spouse of the such party to marriage was alive and that marriage was not void or invalid. Even where the subsisting marriage was voidable, the offence of bigamy would be made out upon the performance of subsequent marriage. But in every case the offence would be punishable if the essential requirements of law and religion had been duly fulfilled and performed. The same view has been reaffirmed by the Supreme Court in *Shanti Deo Verma v. Kanchcin Prasad*, where the court held that by the fact that parties were living like husband and wife and oral evidence to that effect, it cannot be proved that they were validly married and religious ceremonies were duly performed. Without the performance of religious ceremonies and rites a Hindu marriage cannot get recognition in law but where these ceremonies or rites are not properly performed or they are not observed in accordance with customary rites of either party to marriage, the label of unlawfulness shall not be attached to such a marriage. In the case of *Dr. D.*

N. Mukerji v. State, Dr.

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Mukerji was prosecuted for bigamy. Whilst his first wife was alive he developed courtship with another woman and performed a false marriage with her. His second marriage was alleged to have accomplished with the help of three religious ceremonies performed at three different times in different ways.

The first one consisted of marriage in full moon night making the moon as witness to it called Chandra Anusthan, the second one being in the temple of goddess Kali, where garlands were exchanged in front of the deity and tilak was put on the forehead of the complainant, Smt. Harbans Kaur by the accused, Dr. D. N. Mukerji and both of them walked seven steps around the deity to satisfy the requirement of a valid marriage. On the third occasion a similar performance was gone through again by them before Guru Granth Sahib in order to give effect to the marriage. None of the above three ceremonies or rites was recognised by the community of either party to marriage or given any religious sanction.

Consequently, it could not be said that they had performed their marriage in accordance with law and hence the alleged second marriage with Harbans Kaur did not constitute the offence of bigamy so as to make Dr. Mukerji liable for punishment under Section 495 of the Indian Penal Code. In this way by non-performance of religious rites and ceremonies under the Act or performing them not in conformity therewith, a Hindu male could manage to keep a woman even during the life time of his first wife, for which no legal action can be taken against him under the Act. In order to prosecute a person for bigamy it is necessary to prove that he or she has already a living spouse and the prior marriage has been duly celebrated with the

performance of ceremonies. If the previous marriage was not solemnised properly, the law would not recognise it as a marriage and the parties would not be known as husband and wife of each other. Under such conditions parties to such marriage could settle a fresh marriage without rendering themselves liable to any punishment. According to Section 5(1), subsequent marriage would be illegal and ineffective where, on the day of its performance, either party to it had his or her spouse living even if such a marriage had been performed outside India.

In that event the party to bigamous marriage would be guilty of the offence of bigamy even if that marriage is performed in any corner of the world. Mere intention or motive of the parties to such bigamous marriage, howsoever sincere it may be, would not create relationship of husband and wife between them. In *Santosh Kunuiri v. Surject Singli*, the High Court has ruled that even in a case where in her own suit, the wife has obtained a declaration that her husband could remarry during her life time, the marriage of her husband with another woman would be illegal despite the consent of his first wife and giving such declaratory relief by the court concerned would be erroneous and illegal. The breach of the first condition of Section 5 results in two legal consequences, namely, (a) such a marriage would become null and void under Section 11; and (b) the erring party to such a marriage would be liable to be prosecuted under Section 17 of the Act and punishment under Section 494 and 495 of the Indian Penal Code. Again the question arises as to whether any party to the marriage can restrain the other party from remarriage by appropriate order of injunction? The Court in the case of *Unin Shanker v. Rajdevi*, has returned the answer to the question

in affirmative and laid down that despite want of appropriate provision to the effect in the Hindu Marriage Act, 1955, any party to the marriage could be restrained remarrying under the appropriate order of injunction.

The High Court of Mysore in *Shankernppa v. Vnsappaf* has clearly laid down that a wife can be granted injunction to restrain her husband from remarrying. The parties to the marriage retain their right to seek preventive remedy in case there be apprehension about remarriage of his or her spouse. The prohibition of bigamous marriages under Section 5(1) of the Act does not violate Article 25 of the Constitution of India. In case of violation of the provisions of Section 5(1) even a third person in addition to the parties to such a marriage can challenge the validity thereof and can get a declaration of nullity in respect of such a marriage if he becomes aggrieved thereby in any way. The Punjab High Court recently in *subject singh v. Mohinder pal singh*, has also ruled to the same effect which was endorsed by Allahabad High Court in *Ram Pyari v.*

Dliaramdas. In *Sarla Mitdgal v. Union of India*/ the husband converted himself into a Muslim by adopting Islam, and then married another wife. Here the question was whether by conversion the first marriage is annulled or it becomes void and whether the husband commits an offence of bigamy.

The court said that the first marriage subsists and the husband commits an offence of bigamy. Against this an appeal was filed by the husband and this appeal was disposed of along with the case of *Lily Thomas* by the Supreme Court. In *Lily Thomas v. Union of India*, the same questions arose before the Court for consideration. The Supreme Court observed that the institution of

marriage under every personal law is a sacred institution. Under the Hindu Law, marriage is a sacrament. Both these have to be preserved, therefore, religion is not a commodity to be exploited, it is a matter of faith.

When a non-Muslim married according to religious rites stipulating monogamy, renounces his religion, converts to Islam and solemnizes a second marriage, according to Islamic rites, without divorcing his first wife, the second marriage is void. Here a person feigns to have adopted another religion, just for some worldly gain or benefit, and this is religious bigotry. The conversion does not automatically dissolve the first marriage.

Since a bigamous marriage is an offence under Section 17 of the Hindu Marriage Act, any marriage solemnized by the husband during the subsistence of the first Hindu marriage is void under Section 11 and an offence under Section 17 read with Section 494 of the Indian Penal Code. The Court affirmed the decision in Sarla Mudgal case and dismissed the husband's appeal. (2) Second Condition—Lunacy: Section 5(2) of the Act, 1955 was amended by the Marriage Law Amendment Act, 1976 and the restructured clause lays down as one of the conditions for a Hindu marriage is that neither party must be suffering from unsoundness of mind, mental disorder, insanity [or epilepsy] at the time of marriage. Section 12(I)(b) renders, at the instance of the aggrieved party, the marriage voidable, if the other party was suffering from any such mental disability at the time of marriage. The sub-section provides that neither party, at the time of marriage (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or (b) though capable of giving valid consent, has been suffering from mental disorder of such a kind or to such an extent as to

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be unfit for marriage and the procreation of children; or (c) has been subjected to recurrent attacks of insanity. The term “ at the time of marriage” connotes that if at the time of marriage the parties to it were of sound mind but later became insane or mentally unsound then this eventuality would not affect the validity of marriage.

The Allahabad High Court has decided an important point on this aspect and held that a party to marriage must be so much mentally deformed that it becomes impossible for the other party to carry marital life with him or her. In this respect it would be necessary to establish that such mental disability existed either from before or since the time of marriage. In the event of subsequent mental disabilities in either party to marriage the aggrieved party can have recourse to the provisions of Section 13 and obtain a decree of divorce.

If the factum of prior mental disability in either party to marriage had been concealed, or has been avoided to be stated by the parents of either party, the marriage could be declared to be void under Section 12(I) (c) of the Act and it would be no defence to plead that it was the duty of the other party to have himself investigated and discovered the truth. Before the enforcements of the Amendment Act, the High Court of Calcutta in the case of Anima Rai v. Probodh Mohan Rai, laid down that since the expression “ insane” has not been defined under the Act, its meaning and purport would be the same as under Section 3(5) of the Insanity Act which provides that any person suffering from mental derangement of any kind may be regarded as idiot or insane. The Act is not concerned with different categories of insanity from the point of view of Section 5(2) of the Hindu Marriage Act, 1955, it would be <https://assignbuster.com/the-party-to-marriage-must-not-have-his/>

sufficient to establish that the party to the marriage was of unsound mind at the time of marriage and the burden to establish this fact would rest upon the petitioner, filing the petition for divorce. The inference of insanity cannot be drawn from the fact that the other party did not appear in the court as a witness. Section The Hindu Marriage Laws Amendment Act, 1976 added a new provision in Section 5(2) in supersession of the previous one relating to mental unsoundness expanding the scope of the previously used expression “ idiocy and lunacy” so as to include now every kind of mental disorder as a ground of nullity of marriage under Section 12 of the Act.

But in this respect it is noteworthy that Section 5 (2) of the Act is a contradiction in terms inasmuch as none who is-affected by unsoundness of mind can give a valid consent to the marriage under any circumstances. The provisions in Section 5(2)(a) of the Act to the effect that at the time of marriage neither bride nor the bridegroom be disabled from giving a valid consent to marriage on account of any mental disorder appears to be redundant and suffers from verbosity. Similarly, the provision in Section 5(2) (b) of the Act providing that if the bride or bridegroom is capable of giving a valid consent but suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and procreation of children, is superfluous and contradictory in terms. A person suffering from any kind of mental disorder of whatever degree becomes unfit for giving a valid consent.

Unfitness for marriage and procreation are not at all related to mental disorder. A mental deformity in any person would not necessarily disable him from producing children. There is no correlation between mental disorder and potency to beget the children. Hence the amended provisions as

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contained now in Section 5(2) become partially redundant and suffer from superfluity. Generally it is not possible to discover that a person of unsound mind is also unable to produce children. In *Suit. Alka Sharma v.*

Avimsh Chandra, the Madhya Pradesh High Court held that the word 'and' between expression unfit for marriage and procreation of children in Section 5(2)(b) should read as 'and', 'or'. The court can nullify the marriage if either condition or both conditions contemplated exist due to mental disorder making living together of parties highly unhappy.

Similarly the provisions of Section 5(2) (c) of the Act emit doubtful inferences. Would it be necessary that a person who had been a victim of lunacy or epilepsy for sometime before his marriage or ever had been a victim of hysteric fits becomes unfit to have marital relations? It is very strange that clause (a) of sub-section 2 of Section 5 speaks of giving a valid consent to marriage whereas clause (c), thereof contains nothing of the sort. It leads to an inevitable inference that this sub-section did not require any amendment at all. On the contrary, the amendment brought into it has given rise to certain degree of ambiguity and anomaly.

Recently in *Triveni Singh v. State of U. P.*

, the Allahabad High Court held that, annulment of marriage cannot be sought on ground that wife had HIV infection or any other disease at the time of marriage. Marriage can be dissolved under this clause only on the ground of mental disease. (3) Third Condition—Age of the Parties: Section 5(3)

prescribed the age of the bridegroom as eighteen years and that of bride as fifteen years but by the Child Marriage Restraint (Amendment) Act, 1978 the

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words 'the eighteen' and 'fifteen' stand substituted by twenty one and eighteen respectively. Now for a valid marriage the bridegroom must have attained the age of 21 years and the bride of 18 years at the time of marriage. But the breach of this pre-requisite did not affect the validity of marriage, but on the other hand, rendered it as an offence, inviting penal consequences to the erring parties.

The guilty party to such marriage or the parent or guardian concerned who is responsible for getting the marriage solemnised, or negligently fails to prevent it from being solemnised shall be liable for simple imprisonment upto 15 days or a fine of Rs. 1000/- or both under Section 18 of the Act. Now position has changed in the contravention of the condition specified in Clause (iii) of Section 5, with rigorous imprisonment which may extend to two years, or with fine which may extend to one lakh rupees or with both.' Before the aforesaid amendment the consent of the guardian of the girl was necessary if she was below eighteen years of age. If the consent of the guardian was obtained by force or fraud the aggrieved party could under Section 12(l) (c) of the Act have the marriage declared void by making a petition to this effect. A marriage solemnised in violation of Section 5(iii) would not be void although the person guilty of the stipulated condition as to the minimum age would be liable to be punished under Section 18(a) of the Act.

Under the old Hindu law the marriageable age of the bride was between 8 and 12 years and that of the bridegroom within 25 years, but the Child Marriage Restraint Act, 1929, as amended by the Act of 1949, redetermined the age of marriage and prohibited the same between a bride less than 15

years of age and a bridegroom below 18 years. It was essential to have the consent of the bride's guardian if she was under 18 years of age. But where the parties voluntarily chose to continue the marital relations as such after the marriage the necessity of the guardian's consent fell to the background. In *Pinniti Venkataranin v. State*, the Andhra Pradesh High Court laid down that any marriage solemnised in contravention of cl. (iii) of Section 5 is neither void nor voidable, the only consequences being that the persons concerned are liable for punishment under Section 18.

Thus a marriage in contravention of Section 5(3) does not render the marriage null and void. But where a bride had been married before completion of her fifteenth year and on attaining that age repudiates the marriage, she would be entitled to a decree of divorce under Section 18(2) (iv) of the Act which was inserted by the Marriage Laws (Amendment) Act, 1976. The option of getting a decree of divorce would be available till the completion of her eighteenth year. Barring these two consequences, one arising under Section 18 and the other arising under clause (iv) of the sub-section (2) of Section 13, there is no other consequence whatsoever, resulting from the contravention of the provisions of cl. (iii) of Section 5. (4)

Fourth Condition: (a) Prohibition as to Prohibited Degrees of Relationship:

Section 5(4): Under sub-section (iv) of Section 5, marriages between persons falling within the prohibited degrees of relationship have been prohibited.

Section 3(g) defines degrees of prohibited relationship as follows:— Two persons would be regarded to be within prohibited degrees— (a) If one is a lineal ascendant of the other; or (b) If one was the wife or the husband of a lineal ascendant or descendant of the other; or (c) If one was the wife of the

brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other. (d) If two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters. It is noteworthy that relationship in the above context would also include— (i) Relationship by half or uterine blood as well as by full blood; (ii) Illegitimate blood relationship as well as legitimate; (iii) Relationship by adoption as well as by blood. An exception has been made in this clause to the effect that a marriage of persons though related to each other within the prohibited relationship shall be permissible if the custom or usage governing both the parties to the marriage permits a marriage between them. The custom which allows a marriage between persons within prohibited degrees must fulfil the requirements of a valid custom. The custom must not be unreasonable or opposed to public policy.

Order of Prohibited Relationship: Section 3(f) furnishes details of prohibited relationship according to which a marriage with the following relations cannot result in a lawful wedlock— (i) Wife of his lineal ascendant, (ii) Wife of lineal descendant, or (iii) brother's wife, (iv) Wife of his father's brother, (v) Wife of his mother's brother, (vi) Wife of his grandfather's brother, (vii) Wife of his grandmother's brother, (viii) Sister, (ix) Brother's sister, (x) Sister's daughter, (xi) Father's sister, (xii) Mother's sister, (xiii) Father's sister's daughter, (xiv) Father's brother's daughter, (xv) Mother's brother's daughter. Similarly no girl could marry the following relatives— (1) Her lineal ascendant such as father or grandfather, (2) Husband of her lineal ascendant, (3) Husband of her lineal descendant such as her son-in-law, husband of son's daughter, (4) Brother, (5) Father's brother, (6) Mother's brother, (7) Nephew,

(8) Sister's son, (9) Uncle's son, (10) Father's sister's son, (11) Mother's sister's son, (12) Mother's brother's son. Prof. Mahmood clearly summarised the above position in a tabular form as under:— Prohibited Degree in Marriage: For Men: i. Mother ii. Grandmother how soever high iii. Former wife of father or grand-father how soever high iv.

Former wife of brother v. Former wife of either parent's brother vi. Former wife of grand-parent's brother vii. Sister viii. Either parent's sister ix. Daughter of a brother or sister x. Daughter of either parent's brother xi.

Daughter of either parent's sister For Women: i. Father ii. Grandfather how soever high iii. Former husband of mother or grand-mother howsoever high iv. Brother of former husband v. Nephwe of fromer husband vi. Grand-nephew of former husband vii.

Brother viii. Son of a brohte ror sister viii. Son of either parent's brother ix. Son of either parent's sister A marriage falling within the prohibited degrees of relationship would be void under Section 11 of the Act. Moreover Section 18(b) punishes the erring party with the simple imprisonment which may extend upto one month, or with fine which may extend to one thousand rupees, or with both. Where marriage between persons under prohibited relationship is permitted by custom in a particular community such a marriage would receive the recognition of a valid marriage, for example, in South India, a marriage with sister's daughter or with mother's brother's daughter has been recognised by customary law. The validity of custom shall be examined by the court in the context of clause (a) of Section 3, which lays down several conditions for its validity.

The High Court of Punjab in *Smt. Shakuntala Devi v. An tar Nath*, has observed that the conditions of a valid marriage under Section 5(iv) of the Act stand qualified by custom meaning thereby that in the event of custom being established, the marriage despite prohibited relationship between parties to it would constitute a legal and valid marriage but these customs must be proved to be very old and beyond human memory. (5) Fifth Condition—Beyond Sapinda relationship—Section 5(v): This clause provides that no marriage is valid if it is made between parties who are related to each other as Sapindas unless such marriage is sanctioned by usage or customs governing both the parties. A marriage in violation of this condition will be void and the party violating the provisions of Section 5(v) would be liable to punishment under Section 18(b) which lays down simple imprisonment for one month or a fine of Rs. 1000/- or both. The restriction based on Sapinda relationship was applicable ever since before the enforcements of this Act.

If parties to the marriage are governed by such custom which permits marriages between Sapindas, the said prohibition would not apply and the marriage would continue to be valid. The view was expressed by the Punjab High Court recognising the Sagotra marriage in Vaishya Agrawal community.” Certain customs of the same nature prevail in the province of Madras recognising marriages among the offsprings of the brothers and sisters.