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According to Abdul Rahim, " If a decree of separation be for a cause imputable to the husband, it has, generally speaking, the effect of a talak.

If the decree for separation be for a cause imputable to the wife, then it will have the effect of annulment of marriage". The Koranic verses on judicial divorce run thus: " And if yet fear a breach between the husband and wife, send a judge out of his and another from her family; if they are desirous of agreement, God will effect a reconciliation between them; for God is knowing and appraised of all". For the practical application of this injunction, the Prophet said: " Let the case be referred to two Muslim arbitrators, free and just, once chosen from the family of each of the parties; and they shall see whether in that particular case reconciliation or separation is desirable; and their decision shall be binding upon them both. There is another tradition too: " If a woman be prejudiced by a marriage, let it be broken of". Ameer Ali says that when the husband is guilty of conduct which makes the matrimonial life intolerable to the wife, when he neglects to perform the duties which the law imposes on him as obligations resulting from marriage, or when he fails to fulfil the engagements voluntarily entered into at the time of the matrimonial contract, she has the right of preferring a complaint before the Kazi or judge and demanding a divorce from the court. Whatever are the Koranic injunction and the traditions, what has happened in India may be summed up in the words of Krishna Iyer, J.

, " Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Koran laid down and the same misconception vitiates the law dealing with the wife's right to divorce". In India, the courts follow the Hanafi doctrines and lay down that the woman has no right of

divorce. Before the Dissolution of Muslim Marriage Act, 1939, Indian Courts granted a decree of divorce to the wife only on two grounds: lian (mutual imprecation) and apostasy. In the latter case, since apostasy of either spouse then resulted in automatic dissolution of marriage, it was doubtful whether a decree of court was necessary. As would be evident, the Dissolution of Muslim Marriage Act, 1939, contains certain fault grounds. The pre-Act fault grounds too have been saved. By judicial interpretation (or valour) breakdown, theory of divorce has been discovered in Muslim law. We would discuss these grounds under the two heads: (i) fault grounds of divorce, and (ii) breakdown of marriage as a ground of divorce.

Fault Grounds:

The Dissolution of Muslim Marriage Act, 1939 as amended by the Act of 1959 is applicable to whole of India and to all Muslims irrespective of the sect or school they may belong. The Act does not apply to the State of Jammu and Kashmir which has its own statute enacted in 1942, with slight modifications. Section 2 contains eight fault grounds. Section 4 relates to apostasy. Clause (ix) of S. 2 saves the existing grounds on which wife may sue for divorce. Under the Act, it is the Muslim wife (not the Muslim husband) who can sue for divorce. The wife may obtain a decree of divorce on anyone of the grounds specified in the Act by filing a suit in the lowest civil court: (i) The whereabouts of the husband are not known for a period of four years, (ii) The failure of the husband to provide maintenance to the wife for a period of two years or more, (iii) The husband being sentenced to a term of imprisonment for a period of seven years or more, (iv) The husband's failure without reasonable cause to perform marital obligations, (v) Impotency, leprosy, and

venereal disease of the husband, (vi) Insanity of the husband, (vii) The repudiation of marriage by the wife, and (viii) Cruelty of the husband.

Four years absence of the husband:

If the whereabouts of the husband are not known to the wife for a period of four years (in Hindu law the period is seven years) or more, the wife is entitled to a decree of divorce. But such a decree will not take effect for a period of six months from the date of such decree, and if the husband appears, either in person or through an agent within that period and satisfies the court that he is prepared to perform his conjugal duties, the court must set aside the decree. In such a suit it is incumbent upon the wife to state in the plaint: (a) names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of filing of plaint, (b) notice of suit shall be served on such persons, and (c) such persons shall have the right to be heard in the suit.

Further, in every suit filed by a wife on his ground, the paternal uncle and brother of the husband, if any, must be cited as party, even if they are not heirs.

Two years' failure to provide maintenance:

If the husband has failed or neglected to provide maintenance to the wife for a period of two years or more, the wife is entitled to a decree of divorce. The inability of the husband to maintain his wife, or the failure to maintain her is on account of his poverty, failing health, loss of work, imprisonment or any other cause whatever, is no basis for refusing the wife's decree for divorce, unless her conduct has been such as to disentitle her to maintenance under

Muslim law. However, it has been held that this right cannot be made conditional or subject to qualification that wife was entitled to claim maintenance or permit husband to plead that he was under no obligation to pay maintenance due to her conduct.

Where the wife is living separate from her husband on account of his failure to pay her prompt dower, and the husband does not provide her maintenance for a period of two years, the wife is entitled to a decree of divorce. Similarly, a wife, who is living separate from her husband on account of his taking a second wife and to whom no maintenance has been provided by the husband for a period of two years or more, is entitled to a decree of divorce. It is no defence that the wife is rich. Maintenance includes all those things which are necessary for the support of life, as food, clothes and lodging. The provision of maintenance should be in consonance with the status of the husband, and sufficient to meet the reasonable wants of the wife. Half-hearted and illusory attempts to provide for maintenance will not do.

Seven years' imprisonment of the husband:

The wife is entitled to a decree of divorce if the husband has been sentenced to imprisonment for a term of seven years or more, but a decree can be passed on this ground only if the sentence has become final.

Failure to perform marital obligations:

On the failure of the husband to perform marital obligations without any reasonable cause for a period of three years or more, the wife is entitled to

obtain a decree for the dissolution of her marriage. The failure, it is submitted, relates to the basic matrimonial obligation.

Impotence of the husband:

Impotence of the husband was a ground of divorce even before the coming into force of the Dissolution of Muslim Marriage Act, 1939. Under the old law, the wife had to prove that the husband was impotent at the time of the marriage, and continued to be so till the filing of the suit, and the wife was not aware of the husband's impotence at the time of marriage. The old law has now been changed. Now the wife is entitled to a decree of divorce, if the husband was impotent at the time of marriage and continued to be so till the filing of the suit; but, before passing a decree in the suit, the court is bound, on the application of the husband, but not otherwise, to make an order requiring the husband to satisfy the court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the court within that period, no decree can be made in the suit.

Under the Act, the burden of proof is on the husband that he is free from impotency. The impotency may be qua the wife. But once he gets himself medically examined, the court has no jurisdiction to direct him to get examined by Medical Board afresh.

Insanity, leprosy and venereal disease:

Insanity of the husband, with or without lucid intervals, pre-marriage as well as post-marriage, arising either before or after the consummation of marriage, was a ground of divorce under the old law, particularly, among the Shias and the Shafis. Under the Act, the requirement is that the husband has

been suffering from insanity for a period of two years or more preceding the presentation of the suit.

The Act does not spell out whether the provision relates to post-marriage or pre-marriage insanity. It also does not specify that insanity must be continuous and incurable. It is possible to take the view that insanity under the Act has the same meaning as was given to it before the coming into force of the Act. Similarly, leprosy is a ground for a decree of divorce.

Leprosy is without qualifications. Even the duration of leprosy is not stated. It would, therefore, appear that it may be of any duration, and it may be of any type; it need not be virulent or incurable. The wife can also file a suit for divorce on the ground that the husband is suffering from virulent venereal disease; it would appear that under the Act, the venereal disease need not be in a communicable form that the only requirement is that the disease should be in a virulent form. Even if the disease has been contracted from the wife, the wife will be entitled to a divorce, since “ the taking advance of one’s wrong” doctrine of Hindu law has not been enacted in the Act.

It is submitted that the court is free to import this doctrine on the general principles of equity he who comes to equity must come with clean hands.

Repudiation of marriage by the wife:

The wife is entitled to file a suit for the dissolution of her marriage on the ground that she was given in marriage by her father or grandfather or any other guardian, before she attained the age of fifteen that the marriage had not been consummated, and that she had repudiated the marriage before

she attained the age of eighteen. This provision existed under the old law also, though in a slightly different form.

Cruelty:

Under the old laws as well as under the Dissolution of Muslim Marriage Act, 1939, cruelty is a ground for divorce. Under the Act, the wife is entitled to a decree of divorce if her husband treats her with cruelty, that is to say: (a) Habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment.

In *Siddique v. Amina*, it was established that husband had administered his wife with some drug causing miscarriage. He also physically tortured her. It was a clear case of cruelty. It is submitted that this definition will include all cases to physical and mental cruelty of the modern matrimonial law. (b) The husband associates with women of evil repute or leads an infamous life.

It appears that if the husband associates with a woman of evil repute the clause will not apply, association should be with women (more than one). This is something like living in adultery, and that, too, not with ordinary women; it should be with prostitutes. "One or two lapses from virtue" will not be enough. (c) The husband attempts to force her to lead an immoral life. In countries where cruelty has been considered to be a ground for matrimonial relief this has been considered to constitute cruelty. (d) The husband disposes of her property or prevents her from exercising her legal rights over it.

In *Zubaida v. Sarda Shaha*, the Lahore High Court opined that the clause was not happily worded. Abdul Rahman, J. observed: "It is not easy to say
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whether it was only meant to convey a person who had been in the habit of selling his wife's property for his own selfish ends or also converts the single act of a person who sells or assigns his wife's property of any value, however insignificant, and not for his own advantage, but, say, for the purpose of procuring medicine for his ailing wife when he did not have the means to buy it himself out of his own money. Nor am I sure that the legislature was not intending to provide for cases where a person gets rid of the whole or substantial portion of his wife's belongings but also for cases where a husband happens to dispose of a ring say of Rs. 3 in value. I should interpret the word property in the sense of a substantial portion of wife's property and its disposal in the sense of getting rid of the property not for wife's benefit but for the selfish ends of the husband, not with the object of meeting a pressing need but more in the sense of waste and this also when done with the object of depriving the wife of her property and not with the consent or for things in and from which her consent might have been reasonably or legitimately presumed, implied or inferred". It is true that disposal of a trifle of fraction of property, may not amount to cruelty under the clause, but then, it is submitted that the learned judge has tried to narrow down the clause so much that unless substantial portion of property is disposed of, it would not amount to cruelty.

Muslim law does not recognize any doctrine (such as Hindu law does), where under the husband can take away wife's property even in need. Then what is a trifle depends not upon the pecuniary value of a thing. A ring, in its pecuniary value, may be worth only Rs. 300, but its sentimental value may be great. It is submitted that any disposal of property which hurts the

sentiments of the wife, or causes emotional or mental strain on her will be covered under this clause. (e) The husband obstructs her in the observance of her religious profession or practice. It is submitted that the clause will apply even when the wife is a non-Muslim.

This clause came in for interpretation before the Kerala High Court. Krishna Iyer J. said that the religious practices, the obstruction of which amounts to statutory cruelty under Section 2(vii) (e), Dissolution of Muslim Marriage Act are “ those observances, the performance of which makes a man or woman Muslim and departure from which deserves to be castigated as un-Islamic not deviation from every inconsequential though orthodox, ritual or mode of life. The statutory vice lies in fundamental violations and obstructions. Again, if every fugitive passion for fashion coming from either spouse can, with lass vegas levity, work a legal disruption of wedlock, marriages will become plaything of passing fancies and too fluid to be regarded as a firm institution a view most subversive of our cultural heritage. It will be cruel to the concept of cruelty and outraging the modesty of the statute to cast the net of guilt so wide as to catch within it such pleasurable pressures as persuasion to see a cinema or don a dainty saree on her young figure”. In this case, the two instances of cruelty complained of by the wife were the fact that the husband forced the wife to see a cinema and to don a sari.

In this case, the wife also alleged that the way of life that the husband led was un-Islamic. The learned judge rightly observed than un-Islamicness of the husband was not covered under the clause, though on facts the judge also found that it was not so; mere departure from standards of suffocating orthodoxy, and from the bigotted beliefs and ritualistic observances, do not

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constitute un-Islamic behaviour; nor is the subscription to religious reforms and modern way of life un-Islamic. (f) The husband who has more wives than one does not treat her (plaintiff) equitably in accordance with the injunctions of the Koran. In an early case, a view was expressed that only a very gross failure to tender to a wife her just rights could be considered to be covered under this clause. It is submitted that this is not correct. The Koran enjoins that a man should take more than one wife only when he can treat them all equitably, otherwise, he should be satisfied with one. Thus, it is submitted, that if a husband fails to treat his wives equitably, then anyone of them, or all of them may sue for divorce under this clause. The unequitable treatment may be gross or mild.

Umatul-Hafiz v. Talib Husain is a case which is clearly covered under this clause. A husband went abroad leaving behind two wives in India. He provided maintenance for one wife from there, but ignored the other. The court held that the other wife was entitled to divorce under this clause. In Md. Sharif v.

Nasrin, the wife had petitioned for divorce under the Dissolution of Muslim Act, 1939 on the ground of husband's cruelty and adultery. The Court said that mere allegation of cruelty or adultery without cogent evidence thereof were not enough to entitle a spouse to divorce. It is necessary that specific instance should be stated and proved.

Further, it has been held that it would be mental cruelty where husband married second time within 5 months of separation from first wife, had child from second wife. The fact that husband willing to live first wife while

continuing with second marriage is no ground to prevent wife from taking divorce. The fact that polygamy is allowed in Muslim law does bar wife to take divorce.

We would pass on to two other grounds which lead to dissolution of marriage under Muslim law. These are imprecation (lian) and apostasy.

Lian or imprecation:

Lian means a testimony confirmed by oath and accompanied with imprecation.

Under the pure Muslim law, the lian may be described thus: When a man charges his wife with adultery, on the application of the wife, he may be called upon either to retract the charge or to confirm it on oath, coupled with an imprecation in these terms: " The curse of God be upon him if he was a liar when he cast at her the charge of adultery". The wife then must be called upon either to admit the truth of the imputation or, to deny it on oath coupled with an imprecation in these terms: ' The wrath of God be upon me if he be a true speaker of the charge of adultery which he has cast upon me". If the wife takes the oath, the Kazi must believe her, and pronounce a divorce. Under the pure Muslim law, the husband was given every opportunity to retract the charge, since false accusation of adultery was a serious offence under Muslim law. Dissolution of marriage by mutual imprecation is mentioned in the Koran and is supported by a tradition. In the Muslim law of modern India, the wife is entitled to sue for dissolution of marriage on the ground that the husband has falsely charged her with adultery. It should be noted that the charge of adultery by itself, does not

lead to the dissolution of marriage; a decree of the court dissolving the marriage is necessary.

The court will pass a decree if the charge of adultery is false; no decree will be passed if the charge is proved to be true. There is conflict of opinion whether the husband can retract the charge after the wife has filed the suit. One view is that he can retract it at any time before the close of evidence.

The Bombay High Court, on the other hand, held that "retraction has no place in the procedure" of Indian Courts. But in a later decision, the court has held that retraction may be made before the end of trial. The retraction in every case must be honest and straight-forward.

Apostasy:

Renunciation of Islam or conversion of a Muslim to some other religion is called apostasy from Islam. Apostasy may be express or implied. When a Muslim says, "I renounce Islam", or "I do not believe in God and the Prophet Muhammad", the apostasy is express, when a Muslim uses grossly disrespectful language towards the prophet or the Koran the apostasy is implied.

Formal conversion to another religion also amounts to apostasy. A mere declaration, such as "I renounce Islam" is enough, no formal conversion is necessary. Muslim law considered apostasy as a treasonable offence.

A male apostate was liable to death sentence and a female apostate to life imprisonment. Under the Muslim law in modern India, the rule came to be established that apostasy of either husband or wife operated as a complete

and immediate dissolution (or instant dissolution, as Ameer Ali puts it). Now, after the coming into force of the Dissolution of Muslim Marriage Act, 1939 the position is as follows: (i) The apostasy of the husband still results in an instant dissolution of marriage, thus, where on the apostasy of the husband, the wife married another man, even before the expiration of idda, it was held that she was not guilty of bigamy. (ii) If a Muslim wife, who belonged to another faith before her marriage, reconverts to her original faith, or to some other faith, then also, it results in the instant dissolution of marriage. (iii) The apostasy of a Muslim wife does not result in the dissolution of marriage, instant or otherwise. Apostasy of the wife does not bar her right to sue for divorce on any ground specified in Section 2, Dissolution of Muslim Marriage Act, 1939. It seems that the Hanafis took the view that the apostasy leads to instant dissolution of marriage only when marriage was not consummated.

But if the marriage was consummated, the cancellation of marriage remained suspended till the completion of the period of idda: with this view the Shafis also agreed.' Ameer Ali is of the view that even in the Hanafi law this was the position taken by the latter jurist. Among the Shias, if the husband apostates before the consummation of marriage, the wife are entitled to half of the dower but if it is she who apostates, then no claim for dower can be advanced.

If marriage is consummated she is entitled to full dower. The Hanafis take the view that the results of the dissolution of marriage on the ground of apostasy are same as of talak. Ameer Ali is of the view that when both parties apostate and adopt another faith, the marriage remains intact by consensus. In Mohd. Abdul Zaid Amhed v. Marina Begum, the Gauhati High <https://assignbuster.com/according-to-two-muslim-arbitrators-free-and/>

Court has added a new dimension to section 2. In this case, wife was seeking divorce under section 2(iv), (viii)(a) of the Act, i. e.

, on the ground of non-performance of martial obligations by husband and cruelty. After this both the parties filed an application for divorce by mutual consent. Since ground of divorce under section 2 were already met, it was held decree of divorce can be passed in terms of compromise between the two even in absence of a specific provision of divorce by mutual consent under the Act.

Breakdown of Marriage as a Ground of Divorce:

In 1945, the Lahore High Court held that a wife is not entitled to a decree of divorce on the ground of incompatibility of temperaments or her hatred for her husband. In 1971, Krishna Iyer J. of the Kerala High Court said: " Daily trivial differences get dissolved in the course of time and may be treated as the teething troubles of early matrimonial adjustment.

While the stream of life, lived in married mutuality, may wash away smaller pebbles, what is to happen if intransigent incompatibility of minds breaks up the flow of the stream? In such a situation, we have a breakdown of the marriage itself and the only course left open is for law to recognize what is a fact and accord a divorce". And a new look is given to the texts of Muslim law, and textual support has been discovered for this view. It is interesting to note that a full Bench of a Pakistani High Court has put across the same theme though more guardedly. It observed, " It is only if the judge apprehends that the limits of God will not be observed, [this is a Koranic text], that is, in their relations to one another, the spouses will not obey God,

that a harmonious married state, as envisaged by Islam, will not be possible then he will grant dissolution". And earlier, the same view was propagated by Tyabji, CJ in Noerbibi v. Pir Bux, " There is no merit in preserving intact the connection of marriage when the parties are not able to, and fail to live within the limits of Allah' " Tyabji, CJ further observed that from the earliest times, Muslim wives have been entitled to divorce when it was clearly shown that: (i) instead of being a reality, a suspension of marriage had in fact occurred, and that (ii) the continuance of marriage involved injury to the wife. The learned Chief Justice remarked that when Muslim law allows divorce to the wife on the ground of husband's non-payment of maintenance, it was not because divorce was by way of punishment of the husband, or was a means of enforcing wife's right of maintenance, but, as an instance, where cessation or suspension of the marriage had occurred. Thus, was laid the foundations of the breakdown theory of divorce—the most modern theory of divorce' and was laid very well.

There are two traditions from which support is sought for this view: (a) First is from the Prophet himself. When one of his Wives, Ashma, asked for divorce from the Prophet, the Prophet granted her request, (b) One Jamila appeared before the Prophet and said that though she had no complaints to make against Sabit, her husband, as to his morals or religion, she could not bring herself to be whole heartedly loyal to him as a Muslim wife ought to be as she hated him, and, therefore, requested the Prophet to grant her divorce, since she did not want to live in kufr (disloyalty). The Prophet inquired of her whether she was willing to give him back the garden that he had given her and her agreeing to do so, the Prophet sent for Sabit, and asked him to take

back the garden and grant her divorce. (This tradition is also quoted in support of khul).

The basic Koranic text in support of this proposition is: “ And if ye fear a breach between husband and wife, send a judge out of her family, and a judge out of his family; if they are desirous of the agreement, God will effect a reconciliation between them; for God is knowing and apprised of all”. There are a few more traditions which support this view. When a couple which found it difficult to pull on together, approached the Prophet, he said; “ Let the case be referred to two Muslim arbitrators; and they shall see whether reconciliation or separation is desirable; and their decision shall be binding upon them both”. On another occasion, the Prophet pronounced: “ If a woman be prejudiced by a marriage, let it be broken”.

On the basis of these Koranic texts and the traditions of the Prophet and agreeing with the above-quoted observations of Tayabji CJ, Krishna Iyer J. in *Yousuf v. Sowamma*, remarked that he was impressed with the reasoning of Tayabji CJ as it accorded well with the Islamic texts and the ethos of the Muslim community, which together, served as a backdrop for the proper understanding of the provisions of the Dissolution of Muslim Marriage Act. The learned judge also observed that in Islam “ the sanctity of family life was recognized; so was the stubborn incompatibility between the spouses as a ground for divorce; for it is intolerable to imprison such a couple in quarrelsome wedlock.

While there is no rose but has a thorn if what you hold is all thorn and no rose, better throw it away. The ground is not conjugal guilt but actual

repulsion". Although Krishna Iyer, J. repeatedly uses the word "incompatibility", what he actually means is this: if a marriage has broken down beyond the possibility of repair, it is better to put it as under. It is submitted, whether or not there is real textual authority for the view propounded by Tyabji, CJ formatively, and more fully by Krishna Iyer J. (in a judicial system which is avowedly wedded to the doctrine that the function of the judge is merely to interpret the law and not to lay it down, a progressive judge with a view to giving a modern twist and progressive look to ancient system has no option but to resort to such subterfuges, which may, in a situation like this, be considered as a legitimate judicial instrument), it accords well with the modern trends. In a uniform civil code which is the cherished constitutional goal, if we have a single ground of divorce, viz., that the marriage has broken down irretrievably, the scope of any controversy is ruled out.

Thus, now we have the following two breakdown grounds of divorce: (a) Non-payment of maintenance by the husband, irrespective of the fact whether the failure has resulted on account of the conduct of the wife. (This is based on the interpretation of clause (ii) of S. 2, Dissolution of Muslim Marriage Act), and (b) When there is "total irreconcilability between the spouses", or, if we may use the term current in the modern matrimonial law of western countries, both the communist and non-communist, the marriage has broken down irretrievably or beyond the possibility of repair. These two breakdown grounds are available to the wife alone, and not to the husband, as judicial divorce at the instance of the husband is still not recognized in Muslim law of

modern India the judicial legislation has its own limits; so has the judicial
valour.