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Adultery - A Symptom of a Broken Marriage and a Reason to Divorce

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Adultery is an extramarital affair, having sex with married women believing it to be the wife or spouse of another man. Adultery means having a quasi-permanent union with a person other than the legally authorized person. The scanner came into a light number of times but proved to be valid as per Section 497, IPC introduces adultery "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery"¹. The section criminalizes a man to be liable for adultery, proving the law to be an anti-man or pro-women giving leverage to women for not being charge with the offence but deep inside it is anti-women in a great ostensible way alleged to be disgracing the sanctity of marital relations. But in the latest case judged by Justice Deepak Mishra, declared Section 497 unconstitutional by decriminalizing adultery, not punishable but a ground for divorce. Being recognized as a ground for divorce and judicial separation, requires submission of corroborative circumstantial evidence, in order to support the claim of adultery. Increased instances of adultery have raised a number of questions relating to the sanctity and intimacy of a marital relation, build of trust, moral and social issues, etc.

Keywords: *sexual intercourse, corroborative, circumstantial evidence, sanctity.*

¹ Indian Penal Code 1860, s 497

INTRODUCTION

The Hindu Marriage Act, 1955 seems to be conservative but the Special Marriage Act, 1954 does not. The Special Marriage act side by side supplemented both the theories of divorce, consent theory of divorce, and guilt theory of divorce. It contained eight guilt grounds for divorce. The guilt theory of divorce stipulates that divorce can be obtained when one party is guilty of a matrimonial offence specified by law and the other party being innocent. The notion of common law behind divorce law was to punish the party guilty in matrimonial relations and providing divorce as a form of punishment, it is necessary for one party to be guilty and the other to be purely innocent. Following this notion of English law the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955² lays down Adultery as a ground for divorce.

To get a divorce under Section 13 of the Hindu Marriage Act of 1955, the petitioner must prove the presence of the phrase "is living in adultery" in the old section 13(I) of the Act (i). It will not be enough to show that the accused was cohabiting in adultery at some point in the past but is still doing so or has separated from such a life for a significant period of time prior to the filing of the petition. It must be a continuous path of adultery as opposed to one or two transgressions of virtue. To file an application under old section 13 sub clause 1, it must be demonstrated that the spouse living an adulterous life was so closely related to the filing of the petition from the point of the propinquity of time that it could be reasonably inferred that the petitioner had a fair ground to believe that the respondent was living in adultery at the time the petition was filed. Section 488(4) of the Code of Criminal Procedure (old) and section 125(4) of the Code of Criminal Procedure both use the phrase "is living in adultery" (new). It demonstrates that a single lapse in virtue, even if genuine, is insufficient to constitute adultery; the accused must be in a continuous relationship with someone until the application is filed. The legislation aims to remove or distinguish coincident living from non-congruent living by using the phrase "is living in adultery." To be found responsible for adultery, the accused must have been cohabiting with someone other than their spouse for a period of time. Illicit

² Amendment Act 1976, s 13(1) (i), (ia), (ib)

conception, living as a concubine or mistress, and living as a concubine or mistress do not constitute adultery, but rather a quasi-permanent relationship with an adulterous deed.

Even a single act of discretionary, sexual act by either party to the marriage with any person other than his or her spouse will constitute a ground for divorce for the other spouse after the commencement of the Marriage Laws Amendment Act (1976), but the old law does not mention an isolated act of adultery sufficient to attract the provisions of s 13(1) I of the act, but a ground for judicial severance for the other spouse.

Instances in which the plea of adultery has been upheld by the court:

- a) Absence of wife from her home for an extended period of time and discovery in the company of a stranger to her husband's family without reasonable or any explanation.
- b) Presence of unrelated or unusual person alone with wife in her bedroom after midnight in real physical juxtaposition
- c) Evidence of post-suit adultery is admissible to prove and explain other evidence given to show the character and quality of the previous act
- d) Paramour's letters revealing facts of an illicit relationship
- e) Admission of adultery by wife via letter
- f) Testimony of dissatisfied spouses single occurrence of a wife's consensual sexual intercourse with someone other than her husband is sufficient.
- g) If the woman had divorced her husband and was living with her parents. The husband's claim that she got pregnant there without his knowledge, the wife's claim that the husband used to go to her parent's home and spend overnights and cohabit with her, and the wife's failure to cross-examine her parents or any other witness in support of her claim. There will be no tampering with the divorce decision issued against the wife.

WHY FAILED AS A GROUND FOR DIVORCE?

Though being a ground for divorce, the past years' statistics and evidence elaborate it to being a weak foundation for seeking a divorce. In order to prove adultery in a case, direct evidence

is difficult to get, one has to rely on circumstantial evidences, sufficiently in inferring the charge of adultery. The burden to prove the commitment of adultery is on the person claiming the allegation, the prosecution. The standard proof in proceedings under the Act being initially of a civil nature is by the predominance of, probabilities and not by proving it beyond reasonable doubt. The established ill reputation of the husband or of the lewd company he keeps or if he knows the address of the prostitute and was seen with a doubtful woman, do not suffice for adultery. "Adulterer, as a general rule is proved by conjectural evidences based on evidences such as:

- I. Circumstantial evidence
- II. Evidence of non-access and the birth of children
- III. Contracting venereal disease
- IV. Visit the house of ill repute people
- V. Admissions made in previous proceedings
- VI. Confessions and admissions of the parties where mere suspicion is not sufficient."

There must be the presence of clear circumstances amounting to proof that opportunities could be used as or availed such as the association of parties was clear to presume adultery might have taken place, as a result of opportunity for its occurrence. It is well represented in the case law, *Sulekha Bairagi vs Prof. Kamala Kanta Bairagi*³, that the decisions of such cases are based on facts and nature. There need not be similarity, as the decision is not based on a merit basis.

In order to prove adultery strong evidences are required. Sexual intercourse does not mean sexual talks or discussions, kissing or foreplay, etc. Adultery for divorce requires penetration as a vital part, howsoever transient it may be, no need for full penetration. The act must be voluntary, without any force or crime like rape, etc. The burden of proof is on the prosecution which requires direct or circumstantial evidences proofs, whereas to get direct proof is very difficult to even after the advent of all possible means, as sexual activity is an inmate's private conduct, taken place privately with full secrecy. It requires circumstantial evidences leading to the conclusion of the adulterous activity. The proof required in a civil case of Divorce or

³ *Sulekha Bairagi v Prof. Kamala Kanta Bairagi* AIR 1980 Cal 370

Adultery than the criminal case of Adultery is not as strong as a criminal case, hence it does not requires proof beyond reasonable doubts. But to prove adultery for divorce requires fulfillment of circumstantial evidences such as the presence of two people in a hotel room, who are not so related to spend time in close confined walls, their time of checking in and out of the hotel in addition to the time duration both were present in the hotel room. Thus, residing in the same room or similar to that other than the spouse raises high suspense of adultery. The alleging of adultery in an abusive or lewd relationship requires more strict and deep proof. *“In the leading case of Dr. Ashok Kumar Aggarwal v. Smt. Anju Raje⁴, the court held that the mere suspicion of the husband cannot amount to proof of adultery if the husband has not seen the wife in the company of any male member, nor he could name anyone, in such case the decree of divorce cannot be granted.”*

However, suspicion based on unembellished allegations such as those that spouse developed intimacy with colleagues or relatives and making of several phone calls or chat messages on text or what's app cannot be termed as sufficient to prove adultery from the side of other spouses. It was clearly found in the case of *R v J* in 2018, where a decree for divorce was rejected by stating that it cannot be said that a spouse is having an illicit relationship if he has a soft corner for any of his relatives or helps him in difficult times, out of care and love towards the family. Further, in the cases of *Dennis v Dennis⁵* it was held that mere intimacy cannot amount to adultery, sexual activity must have taken place. In presence of any suspicious chat messages or calls, it must be accompanied with CDRs preserved in court, to prove beyond these discussions; they have been residing at various places. If the adulterer has travelled with a spouse or has been found in a company of spouse in a dwelling unit, can further add credence to the charge. In such circumstances, one must not waste the opportunity of creating a witness or digital proof or calling the police. The allegations of Adultery must be clearly spelled out stating the name, events, time, and place where, when, and with whom the adultery has been done.

In a pertinent way, Adultery can be proved using the below evidences such as:

⁴ *Dr Ashok Kumar Aggarwal v Smt. Anju Raje* AIR 2010 P & H 442

⁵ *Dennis v Dennis* [1955]

- Circumstantial evidence concluding that the spouse and adulterer spent some time within confined walls
- Evidence of non-access to spouse (wife) who is pregnant or given birth to a child.
- Contracting of venereal disease by the spouse
- Evidences of visiting of brothels by the husband
- Recordings of admission, the testimony of witnesses corroborated with circumstantial evidences.
- Compromising chats, emails, letters, etc.

Instances where the decree of Adultery has been rejected by the courts include:

- a) “The presence of wife in a hotel or restaurant cabin where the hooks and braces of blouse of the wife are unhooked and the co-respondent holding the breasts in his hands not suffice to prove adultery.
- b) No inference of adultery can be drawn where the wife is seen going on a scooter with someone or talking with someone other than the husband.
- c) No corroboration to prove adultery if the wife is present in a room with the door though shut but unbolt at 10.p.m. with the presence of a mother of husband and five grown up children in the house.
- d) Mere facts that some male relation writes a letter to the wife do not necessarily prove the presence of an illicit relationship between the person and wife.
- e) The wife became pregnant after the husband has gone under vasectomy relation, without proof that the operation was successful.
- f) Serious doubts may be raised as to the allegation of adultery of wife when the husband makes no such allegation in the notice for divorce prior to the filing of the suit.
- g) Filing of the divorce petition by husband after 8 years of marriage after he came to know that his wife has committed adultery and has not explained the delay in the undue delay.
- h) The mere presence of an Adulterer in the bedroom of parties cannot presume adultery.
- i) Masturbation of co-respondent by wife does not amount to adultery.

- j) Assertions of husband that he way wife talking to someone in three occasions in a daytime without any physical contact, are not sufficient.”

In some of the cases mentioned above the circumstances may amount to an inference of adultery but due to lack of corroborative circumstantial evidences against the accused or concluding the direct presence of an illicit relationship between the parties, fails to establish and prove the charge of adultery. To support one's claims of adultery requires deep proof of conversations, relations, or some evidences presenting the accused in a compromising position with someone else than a spouse. Collection of these evidences demands deep and unbiased investigation in addition to the assemblage of evidences, such as videos, recordings, message chats, text messages, continuous visiting and meeting of suspect parties, etc. In the case of *G. Padmini vs G. Sivananda Babu*,⁶ the court rejected the plea of divorce on grounds of adultery in lack of corroborative evidences and witnesses to prove the claim of adultery. The court dismissed the petition of divorce seeking adultery saying that delaying in charge of adultery does not prove charge or grounds to be tenable. Thus the husband's condonation of adultery, of wife with prior knowledge, disentitles him to the decree of divorce, even if such condonation is for the sake of the dignity of the family.

A THREAT TO THE RIGHT TO PRIVACY

Indian Constitution under Article 21 provides the Right to privacy, ensuring one to live with dignity and integrity with interference or threat to his security. Right to life includes living with dignity and respect; it denies openness or revealing of such information or facts endangering the right to life or privacy. But the alleging cases of adultery require corroborative circumstantial evidences to held someone liable under the charge of adultery. The evidences demand intense chat, messages, photos, and videos of offending parties in order to maintain the suit against them. This raises the question of one's privacy and secrecy. The undertaking of a physical act is a private activity, usually takes place in a confined room, in presence of the only parties. Especially for women, it is about her character and dignity, it would be very offensive and repulsive for her to be public or open about it in a courtroom. The

⁶ *G Padmini v G Sivananda Babu* AIR 2000 ALD 258

evidences, photos, videos, chat messages, etc tends public her personal feelings and emotions threatening her dignity and integrity. It might amount to Character assassination for her. It would also portray her wrong image in society and to ill minded people, seeming them an opportunity to ill treat her. This might create a problem for her in near future, not only for her but for children also, treating them as illicit and sometimes illegitimate. Raising questions on her character and her position in society, she may be asked for ill favors rising out of mischievous minds and habits.

CONCLUSION

In India marriage has been considered as a sacred bond not only uniting two bodies but also two souls. Both the spouses are liable towards each other to the same extent. It is the duty of each to be loyal, respective, and dutiful towards each other, based on pillars of love and trust, which is the most pious and strongest union of two. Indian culture and traditions term it as a bond for seven sages, ruining it amounts to sin, and no matters what one has to maintain its sacrament and piousness. But the increasing cases of adultery compel to doubt the sanctity of marriage, the trust, and honesty associated with it. In addition to the union of sexes or bodies, sexual intercourse involves emotions and feelings vested and associated with the spouse. The increased instances of adultery seem to raise a question on moral values pertaining to the piousness of marriage, does it has the same emotions indulged as past or has also advanced with the growing times and arena. Marriage is as valuable since its emergence or not? It is a relation of soul or just for the sake of family and society? All these questions come into mind. The act of adultery not only abuses a bond of marriage but also greatly affects the families and especially children, it innate in them a sense of insecurity and sometimes hatred towards parents or any one of the parents. It is high time to understand the loophole in one's relation and try to secure it as soon as possible. Adultery is both morally and socially wrong, breaking one's trust and loyalty amounts to cheating and is unethical also against societal norms. There is a need to strengthen one's bond and relationship by building and securing trust and love in the family, securing the future of all.