

# MATRIMONIAL REMEDIES- PART 1



***BY SUMIT ATTRI  
ADVOCATE ON RECORD  
SUPREME COURT OF INDIA***

*email: [attrisumit@gmail.com](mailto:attrisumit@gmail.com)*

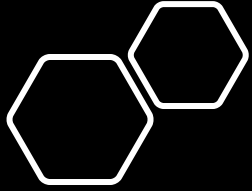
*[sumit.attri@cyrilshroff.com](mailto:sumit.attri@cyrilshroff.com)*

# AGENDA

MARRIAGE

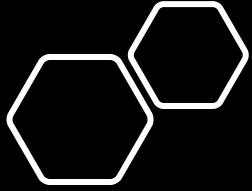
PROBLEMS IN MARRIAGE-  
AVAILABLE SOLUTIONS

BARS TO AVAIL  
MATRIMONIAL REMEDIES.



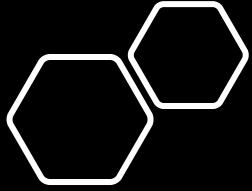
# INTRODUCTION

*Marriage establishes a legal relationship between husband and wife. It is also legally recognized to beget progeny. Under few laws marriage is sacrosanct and not regarded as a contract. However the modern nature of marriage is contractual and the idea of equality and liberty has developed.*



# PROBLEMS IN MARRIAGE- AVAILABLE SOLUTIONS

- Annulment of Marriage- Void and Voidable Marriages.
- Counselling.
- Alternative Dispute Resolution.
- Seeking Restitution of Conjugal Rights.
- Filing for Judicial Separation.
- Filing for Divorce- Contested and Mutual.



# BARS TO AVAIL MATRIMONIAL REMEDIES

Majority of bars of matrimonial relief are based on the maxim:

***“ONE WHO COMES TO EQUITY MUST COME WITH CLEAN HANDS”***

The bars to grant of matrimonial relief are:

- Doctrine of Strict Proof.
- Taking advantage of one's own wrong or disability.
- Accessory.
- Connivance.
- Condonation.
- Collusion.
- Improper Delay.
- Any other legal ground.

These bars contained in Section 23 of HMA, Sec 34 of Special Marriage Act, Sec 35 of Parsi Marriage and Divorce Act and Section 12&14 of the Divorce Act (for Christians). These bars however are not available under Muslim Laws.

# Section 23 of the Hindu Marriage Act 1955

- **23. Decree in proceedings.**-(1) In any proceeding under this Act, whether defended or not, if the Court is satisfied that-
  - (a) any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the grounds specified in sub-clause (a), subclause (b) and sub-clause (c) of clause (ii) of Section 5 is not any way taking advantage of his or her own wrong or disability for the purpose of such relief, and
  - (b) where the ground of the petition is the ground specified in clause (i) of subsection (1) of Section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground or the petition is cruelty the petitioner has not in any manner condoned the cruelty, and
  - (bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and
  - (c) the petition not being a petition presented under section 11 is not presented or prosecuted in collusion with the respondent, and
  - (d) there has not been any unnecessary or improper delay in instituting the proceeding, and
  - (e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly.
- (2) Before proceeding to grant any relief under this Act, it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties:  
  
Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii), of sub-section (1) of Section 13.
- (3) For the purpose of aiding the Court in bringing about such reconciliation, the court may, if the parties so desire or if the Court thinks it just and proper so to do adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the Court if the parties fail to name any person, with directions to report to the Court as to whether reconciliation can be and has been effected and the court shall in disposing of the proceeding have due regard to the report.
- (4) In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give a copy thereof free of cost to each of the parties.

# Section 34 of the Special Marriage Act 1954 (Inter Religion)

- **34. Duty of court in passing decrees.**—(1) In any proceeding under Chapter V or Chapter VI, whether defended or not, if the court is satisfied that,—

(a) any of the grounds for granting relief exists; and

(b) where the petition is founded on the ground specified in clause (a) of sub-section (1) of section 27, the petitioner has not in any manner been accessory to or connived at or condoned the act of sexual intercourse referred to therein, or, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty; and

(c) when divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence; and

(d) the petition is not presented or prosecuted in collusion with the respondent; and

(e) there has not been any unnecessary or improper delay in instituting the proceedings; and

(f) there is no other legal ground why the relief should not be granted; then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties:

[Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (c), clause (e), clause (f), clause (g) and clause (h) of subsection (1) of section 27.]

[(3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report.

(4) In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give a copy thereof free of cost to each of the parties.]

# Section 35 of Parsi Marriage & Divorce Act 1936.

- **35. Decrees in certain suits.**—In any suit under section 30, 31, 32, [32A] or 34, whether defended or not, if the Court be satisfied that any of the grounds set forth in those sections for granting relief exist, that none of the grounds therein set forth for withholding relief exist and that—
  - (a) the act or omission set forth in the plaint has not been condoned;
  - (b) the husband and wife are not colluding together;
  - (c) the plaintiff has not connived at or been accessory to the said act or omission;
  - (d) (save where a definite period of limitation is provided by this Act) there has been no unnecessary or improper delay in instituting the suit; and
  - (e) there is no other legal ground why relief should not be granted;then and in such case, but not otherwise, the Court shall decree such relief accordingly.



# Section 12 & 14 of Divorce Act. (For Christians)

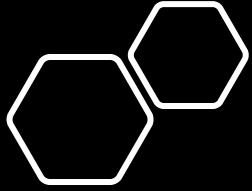
- **12. Court to be satisfied of absence of collusion.**

12. Court to be satisfied of absence of collusion.-Upon any such petition for the dissolution of a marriage, the Court shall satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or not the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery, or has condoned the same, and shall also enquire into any countercharge which may be made against the petitioner.

- **14. Power to Court to pronounce decree for dissolving marriage.-**

14. Power to Court to pronounce decree for dissolving marriage.-In case the Court is satisfied on the evidence that the case of the petitioner has been proved, and does not find that the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, the Court shall pronounce a decree declaring such marriage to be dissolved in the manner and subject to all the provisions and limitations in sections sixteen and seventeen made and declared:

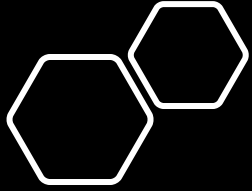
- Provided that the Court shall not be bound to pronounce such decree if it finds that the petitioner has, during the marriage, been guilty of adultery, or if the petitioner has, in the opinion of the Court, been
- guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct of or towards the other party as has conduced to the adultery.
- Condonation.-No adultery shall be deemed to have been condoned within the meaning of this Act unless where conjugal cohabitation has been resumed or continued.



# Doctrine of Strict Proof: (Burden and standard proof)

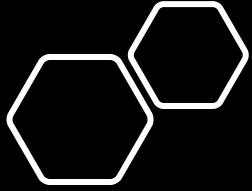
The doctrine of strict proof is recognized under all the matrimonial laws. The three situations which can arise in a matrimonial case just like any other ordinary civil law case proceedings:

- The defendant appears in the court of justice and admit the claims made by the plaintiff.
- The defendant appears in the court and contests the claims of the plaintiff.
- The defendant despite due service of summons do not appear before the family court. The proceedings in that case will be decided ex-parte i.e. only in presence of Petitioner.
- In a normal civil proceeding the Petitioner will establish its case by leading evidence when the Defendant appears and contests the case. However in matrimonial cases it is mandatory for the Petitioner to establish the case beyond all reasonable doubts in all the 3 situations even if the opposite party is not present.
- The Supreme Court in leading case of Dastane versus Dastane 1975 SCC (2) 326 held that the standard of proof need not be beyond all reasonable doubts. After this case Cruelty was made a ground for Divorce in 1976 which earlier was only a ground for judicial separation.



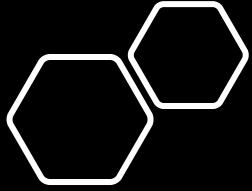
# Taking Advantage of once own wrong/ Disability

- This bar is enacted only in Section 23 (1)(a) of Hindu Marriage Act (“HMA”) and not in other personal laws. However the residuary clause in other personal laws may attract this bar in grant of matrimonial relief when the Petitioner takes advantage of his own wrong for seeking relief from the court.
- The wrong or disability should have a nexus with the guilt of the Respondent.
- This bar applies in seeking most of the matrimonial remedies.
- E.g. Wife was granted decree of judicial separation on account of adultery by husband. The husband continues to commit adultery and later files for divorce on the ground of cruelty by wife. Such a Petition cannot be allowed as the wrong of the husband has direct connection with the actions of wife.
- This bar is absolute. Related case Law at next slide.



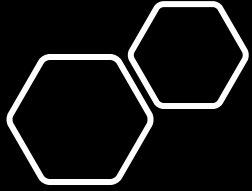
# FACE OFF- SECTION 13(1- A)AND SECTION 23(1)(A) OF HINDU MARRIAGE ACT

- Supreme Court in its judgment reported at (2001) 4SCC 125 titled Hirachand Srinivas vs Sunanda held that the spouse seeking Divorce cannot benefit from its own wrong in case of dissolution of marriage. Provisions of Section 13(1-A) does not abrogate provisions of Section 23 (1)(a) of the HMA.



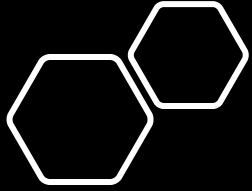
# Accessory

- Accessory basically means an act by a person in participating in the commission of an offence. The accessory has full knowledge of the offence.
- Under the Hindu Marriage Act, Special Marriage Act and Indian Divorce Act, when a petition is filed on the ground of Respondent's adultery accessory can be a bar to grant decree. Under Parsi law Accessory is a general bar and not limited to adultery.
- Eg: In case a husband allows third parties to have intercourse with his wife or keep a watch while his wife is having sex with third person he is an accessory and cannot be awarded decree of divorce if filed by him on the ground of adultery.
- There may have been instances of accessory however in India cases with respect to accessory have not been reported.
- Though adultery is no longer a criminal offence after 5 judges bench of Supreme Court declared section 497 IPC as unconstitutional. However it is still a civil wrong and is a ground for filing for divorce under various personal laws.



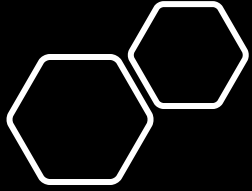
# Connivance

- Connivance as the terminology suggests is consenting to the commission of the offence. It is more like Accessory. However the basis difference is that in accessory there is active participation by the Petitioner in the offence by the Respondent while in connivance there is no such participation and mere knowledge and consent is there.
- To constitute connivance, express, or implied consent is necessary. There can be indirect consent by either party to commit an offence of adultery which can be made a ground for divorce.
- E.g: Either Husband/Wife agrees with the offer of other spouse to earn money by illicit intercourse, then the Petitioner is guilty of connivance and cannot be granted decree of divorce.
- If a couple invites a friend in their house and husband/wife willfully leaves the house to provide a chance to commit adultery by other spouse there is connivance and decree of divorce cannot be granted.
- It is a bar for matrimonial relief to the offence of adultery only under HMA, SMA and Divorce Act. Under Parsi law it is a general bar.



# Condonation

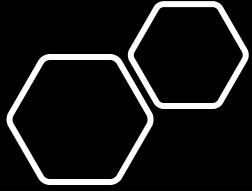
- Condonation means condoning a matrimonial offence committed by one spouse and intending to continue the matrimonial relations with the spouse. Once a matrimonial offence has been condoned by the Petitioner and cohabitation resumes with the Respondent, it amounts to condonation.
- Under HMA and SPA condonation applies to matrimonial relief of adultery and cruelty. Under the Divorce Act it applies to adultery only and under Parsi Marriage Act it is a general bar and applies to all matrimonial reliefs.
- In a leading case law of Dastane vs Dastane (1975)2SCC326 the court held that the husband has condoned the act of cruelty by wife and her subsequent conduct did not amount to revival of cruelty.
- In leading case of Hearn v. Hearn (1969) 2 ALL ER 417 the couple continued to cohabit for ten years after adultery of the respondent. Though after act of adultery there were no intimate relations between the couple the courts considered it as a case of condonation.
- It is to be noted that at times Petitioner stays with Respondent with an intention to give another chance to the marriage even after the matrimonial offence by the Respondent.



# Collusion

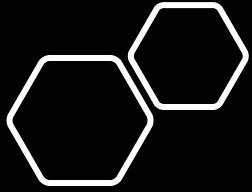
- Collusion means a situation when both husband and wife create a situation which creates a ground for divorce when actually it does not exist.
- Collusion is an act by the Petitioner and/or Respondent or their agents to do an act which misleads the court by deception, alteration, concoction, non disclosure of the material and actual facts, with a view to secure a decree of a matrimonial relief.
- Under Sec.23 (1) (c) of Hindu Marriage Act and Sec. 34 (1) (d) of Special Marriage Act collusion was a bar to all matrimonial reliefs. Now collusion has been abolished as a bar to relief of declaring marriage as null and void under Section 11 of the Hindu Marriage Act and remains for other matrimonial reliefs. U/s 35 (c) of Parsi Law is a bar to all matrimonial reliefs. U/s 13 and 14 of Divorce Act it is a bar to relief of dissolution of marriage.
- E.g: Husband taken another women to a hotel room (with knowledge of wife) and spends the night at hotel. Wife then uses the receipt to file for divorce on the ground of adultery.
- If the couple wants a divorce it can be filed by way of mutual consent. However in cases of mutual consent the consent must be free and not tainted by fraud, force or undue influence. In divorce by mutual consent also the court has to verify that there should not be any collusion.





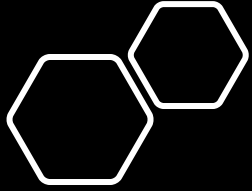
# Improper and unnecessary delay

- The Petitioner seeking a matrimonial relief should be filed within a reasonable time and there should not be improper and unnecessary delay in filing the Petition.
- Under Section 14 of the HMA the Petition seeking divorce cannot be filed within one year of marriage except. The delay however can be condoned if it is proved that the case is of exceptional hardships to the Petitioner or exceptional depravity on the part of the Respondent. The Petition for Annulment of marriage in cases of void and voidable marriages can be filed at the time when such act came to the knowledge of the Petitioner.
- U/s Sec.23 (1) (b) of HMA improper and unnecessary delay is a bar to relief in respect of all matrimonial causes. U/s 34 (1) (e) of SMA, U/s 35 (d) of Parsi Act and under Sec.14 of Divorce Act improper delay is only bar to the matrimonial relief of divorce.
- In a leading caselaw the wife filed suit after expiry of 16 years as she was waiting for settlement of her children. This was accepted as a reasonable explanation for belated filing of the Petition.



# Residuary and other legal grounds

- There are residuary clauses i.e. Section 23(1)(b) of the HMA, Section 34(1)(b) of the SMA and Section 35(e) of the Parsi Act which provide that there should not be any other legal ground for rejecting the Petition. The Divorce Act however do not provide for such a residuary clause. However the court has to be satisfied and sure that there is no legal bar in the grant of the decree for matrimonial reliefs.
- Any decree granted in contravention of the bars provided in the personal laws would be a nullity and is liable to be set aside by the appellate courts.



# CONCLUSION

Various personal laws provide solutions for a disturbed married life and either of the parties can apply for the matrimonial remedies applicable in their case. The institution of marriage is very complicated and delicate, as such, the courts have to be mindful before the grant of applicable matrimonial reliefs. As such the statute has provides bars in the grant of matrimonial remedies for Petitioners who have tried to take advantage of their own wrong, condoned act of their partner, colluded and/or connived with their partner, unnecessary delayed the filing of Petition and any other applicable bars under the statute.