

**Q.1 Describe conditions and procedure for registration of marriage under the special marriage act 1954 what are the consequences of such marriage**

**Ans. Introduction**

The Special Marriage Act deals with inter-caste and inter-religion marriages. Inter caste marriage is a marriage between people of two different castes. The days had gone by when people used to marry wherever their parents decided to blindly. The youth now have their own saying and choice and prefer to marry someone who is more compatible with them than marrying someone who belongs to their caste or religion. It is them who have to live for the whole of their life with their partner and therefore, caste or religion is not a matter of utmost consideration now at all. Love is a beautiful emotion, and something like caste or religion should not weigh it up. All religions are equal, and marriage shouldn't be a big deal among them. We are conferred on caste or religion by birth and not by choice, so why are people of the lower castes seen with shame and disdain? India is a diverse country, and it is a pity to see things like this happening here. The Special Marriage Act is, therefore, a special law enacted to provide for a unique form of marriage by registration wherein the parties to the marriage do not have to renounce their religion.

**Applicability**

This information is the most important for every Indian to know how they can use it. This Act includes Hindus, Muslims, Christians, Sikhs, Jains, and Buddhists marriages. This act applies to all Indian states, except Jammu & Kashmir. This Act applies not only to Indian citizens who belong to different castes and religions but also to Indian nationals who live abroad.

## Requirements

Since Indians believe in marriages with proper rituals, customs, and ceremonies that include pomp and show & extravagant celebrations, none of them is required by the Special Marriage Act. The fundamental requirement under this Act for a valid marriage is the consent of both parties to the marriage. If both parties to the marriage are willing to marry each other, that's enough; caste, religion, race, etc. can't act as a barrier to their union here. For marriage under this Act, the parties must file with the district's Marriage Registrar a notice stating their intention to marry each other in which at least one of the parties to the marriage has lived for at least 30 days prior to the date on which such notice is filed. After the expiry of 30 days from the date that such notice was published, the marriage is then said to be solemnized. But if any person related to the parties objects to this marriage and the registrar finds that it is a reasonable cause of objection, on such grounds he can cancel the marriage. For a valid marriage, the parties must also give their consent to the marriage before the marriage officer and three witnesses. These are the basic requirements for a valid marriage under the Special Marriage Act that every Indian must know about.

## Conditions for Marriage

For this special form of marriage, the conditions that must be followed are not very different from the requirements of other normal marriages that happen within the caste.

These are the conditions to qualify for a marriage under this Act:

1. The bridegroom must be at least 21, and at the time of the marriage, the bride must be at least 18 years of age. This is the minimum age limit respectively for a boy/girl to marry.

2. At the time of their marriage, both parties must be monogamous; i.e., they must be unmarried and at that time should not have any living spouse.
3. In order to be able to decide for themselves, the parties should be mentally fit, i.e., they must be sane at the time of marriage.
4. They should not be related to themselves through blood relationships; i.e. they should not be subjected to prohibited relationships that otherwise act as a ground for dissolving their marriage.



## Changes with the Emergence of Special Marriage Act in India

### Succession to the Property

Another important point that why every Indian should have knowledge of SMA (Special Marriage Act) is that the succession to the property of persons married under this act or any marriage registered under this act and that their children will be governed under the Indian Succession Act. But if the parties to the marriage belong to Hindu, Buddhist, Sikh, or Jain religions, then the Hindu Succession Act will govern the succession to their property.

In 2006, India's Supreme Court made it necessary to enrol all relational unions. A marriage can be registered in India either under the Hindu Marriage Act, 1955 or under the Special Marriage Act, 1954. The Hindu Marriage Act is relevant to Hindus, although the Special Marriage Act is suitable for all Indian residents regardless of their religion applicable to the Court marriage.

### Registration of Marriage under the Special Marriage Act in India

In India, all marriages can be registered either under their respective personal laws (Hindu Marriage Act, 1955/Muslim Marriage Act, 1954) or under the Special Marriage Act, 1954. A marriage under the Special Marriage Act, 1954

enables people from two distinct religious backgrounds to unite in the marriage bond. Unlike personal laws, the Special Marriage Act's applicability extends to all Indian citizens regardless of their religion. Although marriage laws allow only the registration of an already solemnized marriage under personal laws, the Special Marriage Act provides for both solemnizations and legal registration. The Special Marriage Act has designed a simple means of legally registering a marriage between two people of different religions, but even if both the concerned parties belong to the same religion, they may choose to register the marriage under this Act. This is a step-by-step procedure to apply in India for a Special Marriage Act.

#### Step-1: Eligibility Check

All the given eligibility criteria should meet before applying for the Special Marriage Act:



1. Both the intending parties must be Indian citizens.
2. At the time of the marriage, neither of the parties must have a living spouse. Where either or both of the parties have been involved in an earlier marriage, it is essential that the earlier marriage is dissolved legally before applying under this Act.
3. Both parties must be in a position to grant free and full consent to the marriage.
4. The intending parties shall adhere to the age limit laid down in this Act. At the time of applying for marriage, the female should be at least eighteen years old, and the male must have completed the age of twenty-one.
5. The Act prohibits marriage solemnization if the intending parties fall within the degree of prohibited relationships as per the customs governing any of the parties. The degrees of prohibited relationship vary from custom to custom. The Act's First Schedule provides for a comprehensive list of relationships that may be considered prohibited.

However, the rule is that it may be solemnized if a custom governing at least one of the parties allows marriage as intended.

#### Step-2: Reach out to the concerned Marriage Officer

The district jurisdiction may be invoked in which either of the two parties has a permanent residence (must live there for at least 30 days prior to the notice being submitted). To apply, reach the chosen district marriage officer (either the intending husband or the intending wife resides). The application should be written in accordance with the format set out in the Second Schedule. For reference, the format is also set out below:

#### NOTICE OF INTENDED MARRIAGE

To Marriage Officer for the .....District. We hereby give you notice that a marriage under the Special Marriage Act, 1954, is intended to be solemnized between us within three calendar months from the date hereof.

A, B. Unmarried

Widower

Divorcee

C.D. Unmarried

Widow

Divorcee

Witness our hands this .....day of  
.....19.

(S.d.) A.B. (S.d.) C.D.

### Step-3: Public Notice and Objections

Once such an application has been received by the marriage officer, duly signed by both parties, the officer shall then issue a thirty-day public notice to raise objections to the intended marriage if any. The objections generally relate to non-compliance with the conditions referred to in Section 4 of the Act (also referred to in Step 1). If the conditions are duly met and no such objections are raised, a marriage certificate should be entered in the Marriage Certificate Book. Here, both the intending parties and the witnesses are required to sign.

The marriage under this Act can be said to be duly solemnized and registered after having completed all of the above steps. Please note that you may also need certain documents along with three witnesses on the day of solemnization. An illustrative list has been provided here:

1. Proof of Age
2. Address Proof
3. Affidavit with regard to Marital Status
4. Non-Relationship between the parties within the degree of prohibition.
5. Passport size Photos.

### Notice of Proposed Marriage

Any couple wishing to make use of the fruits of this Act is required to issue a written notice to the district's "Marriage Officer" where for the last thirty days at least one of the parties to the marriage has resided. The marriage is usually scheduled to take place within three months from the date of issue of notice. The notice thus received will be published by displaying it in a noticeable place in the office of the Marriage Officer. A copy of the notice must also be attached to a "Marriage Notice Book" that anyone can inspect.

## Special Marriage Act 1954 Application Form

### Period of Objection

Any objections to marriage regarding age, consent capacity, incest, etc. may be addressed to the Marriage Officer within 30 days of the notice being published. The Marriage Officer is mandated to conduct an inquiry into its validity within a 30-day window period of time, during which the marriage can not be solemnized in case of any objections. If the marriage officer finds that the objection is valid and decides against the marriage of the parties concerned, the bride or groom may, within thirty days of such refusal, appeal to the district court. If all the objections concerned are dealt with, a declaration must be signed by the bride, groom, and any three witnesses in the presence of the Marriage Officer, who would then countersign it. The marriage will be solemnized upon the cessation of the objection period in the absence of any objections.

### Power of Enquiry

In receiving an objection, marriage officers are granted the following rights:

1. Summoning and enforcing witnesses' attendance.
2. Examining the witnesses on oath.
3. Demanding documents to produce.
4. Demanding the evidence on affidavits.
5. Issue of commissions for the witness scrutiny.

### Unreasonable Objections

If the marriage officer believes that the objection he/she has received is not reasonable and is not made in good faith, the person making the objection may

be on the receiving end of objective costs of up to Rs. 1,000. The sum received will be awarded to the parties of the proposed marriage for this purpose.

### Objections in Jammu & Kashmir

Any objections regarding a proposed marriage made in Jammu and Kashmir State will be addressed by the respective Marriage Officer to the Central Government. The Central Government inspects the case on its own conditions and communicates its decision to the Marriage Officer, who then implements the decision ordered by the governing body.

### Solemnization of Marriage

After clearing objections, the marriage may be solemnized at the expiry of 30 days, if any field. The notice is valid for 3 months. Before the marriage is solemnized, the parties and three witnesses should sign declarations in the prescribed form in the presence of the marriage officer.

In whatever form the parties may choose to adopt, marriage can be solemnized. The marriages can be solemnized either within a reasonable distance from the office of the marriage officer or at such other place as the parties may wish.

### Registration of Marriage Celebrated in Other Forms

Any marriage celebrated, with the exception of those solemnized in accordance with these provisions, may be registered by a marriage officer under Chapter III of the Act, subject to the condition that a marriage ceremony has been conducted for the parties under any of the Acts and that the couple has since led a marital life. Besides that, the conditions for the conduct of marriage specified in this Act shall apply.



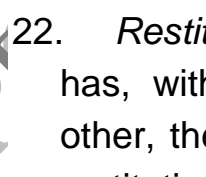
### Implications on Family Membership

Any member of an undivided family who professes the religion of Hinduism, Buddhism, Sikhism or Jainism would be forced to separate from such a family, i.e. a family member married under this Act would not be considered a part of the family hierarchy after the marriage proceedings under this Act were terminated.

### Restitution of Conjugal Rights

On marriage, it is the parties' primary duty to live together in order to fulfill their marital obligations. This right to cohabit with one another is called the 'consortium' right. Husband and wife have the right to each other's society, comfort, and affection. The origin of the action seems to lie in the husband's early concept of law having a quasi-proprietary right over the wife. It included the society of his wife as well as its services. The consortium notion presumed a distinct footing of mutuality with the passage of time. Conjugal rights can not be enforced by either party's actions, and by force, a husband can not seize his wife and detain her. If a spouse makes an infringement of this obligation without any justifiable cause, the other may go to court to restore his conjugal rights.

Section 22 of Chapter V of the Special Marriage Act, 1954, sets out the conditions under which a petition for restitution of conjugal rights would be based.

 22. *Restitution of conjugal rights* – When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply to petition to the district court for restitution of conjugal rights, and the court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation: Where a question arises as to whether there was a reasonable excuse for withdrawal from society, the burden of proving a reasonable excuse is on the person who withdrew from society.

The section's elements are as follows:

1. The respondent withdrew from the petitioner's society.
2. Without reasonable cause, the respondent has withdrawn.
3. The burden of proving a reasonable cause lies with the respondent.

In the district court, the petition is filed.

The court is satisfied with the truth of the statement, and there is no other reason to deny the relief.

### Corresponding Law

This section is consistent with Section 9 of the Hindu Marriage Act, 1955, Section 36 of the Parsi Marriage and Divorce Act, 1869, Section 32 of the Divorce Act, 1869, and Section 13 of the Matrimonial Causes Act, 1965.

### Withdrawal from Society

The word 'society' that occurs in the section means the same thing as consortium or cohabitation, i.e. living together as husband and wife in a place called 'matrimonial home'. It is therefore evident that withdrawal from the other's society would mean withdrawal from the matrimonial home by either spouse that would involve a total loss of consortium such as desertion. Society withdrawal involves two elements: animus and factum. This means that the withdrawing spouse intends to put an end to the cohabitation and, secondly, the mere intention of withdrawal would not amount to withdrawal unless it is combined with the factum of separation on the part of spouse's withdrawn.

## Cohabitation

Cohabitation does not necessarily mean that parties live together under the same roof, but there may be cohabitation states where they see each other as much as they can and yet are not separated.

Kay v. Kay, (1904), A man may cohabit with his wife even if he is away or on a visit or on business because it does not determine the conjugal relationship in any form.

G v. G, (1930), A husband can not be considered to have deserted his wife without reasonable cause because he is forced to live away from her because of his work in life.

## Matrimonial Home

Shastri law was based on the principles that the wife is bound to live with her husband and submit herself to his authority. This rule of law that gave the husband the right alone to set up a matrimonial home in preference to the wife was based on a custom that reflected the condition of the age in which the custom was practised. Moreover, the husband's right to establish a matrimonial home is not a law proposition; it is simply a proposition of ordinary good sense arising from the fact that the husband is usually the bread earner and has to live near to his work. It becomes quite natural in such circumstances that the husband should have the right to choose a matrimonial home. India's Constitution gives both sexes equal status, so both have equal rights to pursue their careers. Now the casting vote on the choice of the matrimonial home is not with the husband or wife, but it is a matter that has to be decided in a friendly manner between them.

## Case Reference

In several cases, the question as to what amounts to withdrawal from society came to our courts in an interesting way: does the refusal of the wife to give up her job in the husband's case amount to withdrawal from the husband's society? In several cases, the question came before the Punjab High Court for consideration and in the affirmative, it was answered. In the cases *Tirath Kaur v. Kirpal Singh* AIR 1964 Punj 28, *Gaya Prasad v. Bhagwati* AIR 1966 MP 212 (DB), and *Kailashwati v. Ayodhya Prakash* 1977 HLR 175, The courts held that the husband had the right to decide the matrimonial home and that the wife had to resign and live with him. The other view, which is contrary to this extreme opinion, as held in *S. Garg v. K. M. Garg*, AIR 1978 Del 296, is that the wife can not be prevented from taking up employment in the present social scenario and can not be forced to live in the same place where her husband lives. None of the parties shall have a casting vote, and the matter shall be settled by agreement between the parties, by process of giving and taking and by reasonable accommodation.

#### Without Reasonable Excuse

The burden of proving that he/she has withdrawn with a reasonable excuse would be on the respondent once the petitioner proves that the respondent has withdrawn from his/her society. A restitution petition will fail if the respondent is found to have withdrawn from the petitioner's society with a reasonable excuse to do so.

It will be a reasonable excuse or reasonable cause under the modern matrimonial law:

If there is a reason for this, the respondent may claim any matrimonial relief. So if the petitioner is found to have another wife (*Parkash v. Parmeshwari*, AIR 1987 P & H 37), is guilty of cruelty (*Bejoy v. Aloka*, AIR 1969 Cal 477), or is adulterous (*Laxmi Malik v. Mayadhar Malik*, AIR 2002 Ori. 5) the petition will fail.

If the petitioner is guilty of any matrimonial misconduct, then it is not sufficient to be the ground for matrimonial relief but sufficiently weighty and serious.

If the petitioner is guilty of such an act, omission or conduct that makes a living with him impossible for the respondent.

### Jurisdiction

The jurisdiction under the section to entertain a petition for restitution of conjugal rights rests with the district court. The District Court has been defined in S. 2(e) the Act. It means the principal civil court of original jurisdiction and a civil court of the city where such court exists. An aggrieved party may invoke the jurisdiction of a district court if any of the following qualifications are fulfilled:

1. The marriage has been solemnized within that court's local limits.
2. The husband and wife both live together within that court's local limits.
3. Both the husband and wife last lived together within that court's local limits.

**Q 2. Explain the object and salient features of special marriage act 1954**

Ans. THE SPECIAL MARRIAGE ACT, 1954  
ACT NO. 43 OF 1954

An Act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorce.

BE it enacted by Parliament in the Fifth Year of the Republic of India as follows:—

The Special Marriage Act, 1954, the Act No. 43 of 1954 is an act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorce. The act extends to the whole of India except the state of Jammu and Kashmir and applies also to the citizens of India domiciled in the territories to which this Act extends who are in the State of Jammu and Kashmir.

The Act received the assent of the President on 9th October, 1954 and came into force on 19 January, 1955

**Object and Salient Features :** The object and salient features of the special marriage Act are as follows:

**(1) Applicability of the Act :** The Act applies to the marriage of persons where both parties do not profess same faith or belong to different religions e.g. one is Hindu and other is a Muslim.

(ii) Even the parties to the marriage professing the same faith may also, if they so desire, marry under the provisions of this Act and not as per their own personal law.

(iii) The act also have extra territorial operation so as to permit marriage between citizens of India being solemnized outside India (in foreign countries) irrespective of the faith which either party to the marriage may profess.

**(2) Procedure of the marriage:** The procedure of the marriage and its requirements are given in the Act itself. The parties may observe any ceremonies for the solemnization of their marriage but the procedure prescribed is required to be completed before the marriage can be registered by the marriage officer under the act, and the marriage is not a valid marriage under the Act if the procedure prescribed is not allowed or there is some lapse.

**(3)Registration of marriage celebrated in other forms:** The act makes a provision permitting persons, already married under other forms of marriage, to register their marriage under the Act. The effect of such registration is to give legal recognition to the marriage performed in any form.

**(4) Appointment of marriage officers :** The act provides for the appointment of marriage officers for solemnizing and registering marriage under the Act or for the appointment of Diplomatic and consular officers as marriage officers for the benefit of Indian Citizens abroad.

**(5) Marriage within prohibited degrees of relationship in case of Applicability of custom:** Under the original Act, the marriage between two persons, being within the degrees of prohibited relationship was not permitted and no exception was recognised on the ground of custom or usage as provided under the Hindu Marriage Act, 1955. But by the Amending Act of 1963 a provision has been made providing for marriage between persons within the degrees of prohibited relationship if there is a well-recognised custom applicable to the parties where both the parties belong to the same religion or profess same faith and desire to marry under this Act.

**(6) Punishment for bigamy:** The Act prohibits bigamy and provides punishment of bigamy.

**(7) Matrimonial reliefs :** The provisions have been made in the Act for void and voidable marriages, nullity of marriage, divorce restitution of conjugal rights, judicial separation, alimony pendente-like, permanent alimony or maintenance and custody of children.

**(8) Divorce by Mutual Consent :** At first divorce by mutual consent was available only under this act which is now also available under the Hindu Marriage Act under the Amendment Act of 1976.

**(9) Certificate of Marriage:** When the certificate of marriage has been finally entered in the marriage certificate book, the marriage shall be deemed to be a marriage solemnized under this Act and the certificate of marriage is a conclusive proof of marriage.

**(10) Marriage Certificate Book, a public document :** Marriage certificate book under the act is a public document open for inspection by any es and copy thereof can be obtained.

**(11) Consequences of marriage:** The children born out of the marriage, lined under this Act shall be deemed to be legitimate children of their parents and will have no right of succession in any property of any person her than of their parents and succession to the property to issues and to the property of such issues shall be regulated by the Indian Succession Act, 1925. The marriage, of any person being member of undivided family, solemnized under this act, professing Hindu Buddhist, Sikh or Jain religion shall be deemed to effect his severance from such family.

**(12) Appeals from decrees and orders :** An appeal from decree and orders under the Act shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

**(13) Application of Code of Civil Procedure 1908 :** Subject to the other provisions contained in the Act and to such rules as the High Court may make in this behalf all proceedings under this Act shall be regulated, as far as may be by the code of Civil Procedure, 1908.

**(14) Provisions relating to expeditious trial and disposal of petitions :** By the Amending Act of 1976 special provisions have been made for the expeditious trial and disposal of petitions under the Act.

**(15) Correction of errors:** If there is any error in the form or substance of any entry in the marriage certificate book, such error may be corrected by the marriage officer within one month after the discovery of such error.

**(16) A Repealing Act :** This Act revises and replaces the Special Marriage Act, 1872



**Conditions of Eligibility for Special Marriage** The special marriage Act lays down some conditions on the parties to be eligible for the marriage. (Section 4 of the special marriage Act 1954) Section 4 of the Act provides for the conditions relating to solemnization of special marriages. A marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely: (a) neither party has a spouse living; (b) neither party-(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind, or (i) 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 (ii) has been subject to recurrent attacks of insanity (c) the male has completed the age of twenty-one years and the female, the age of eighteen years; (d) the parties are not within the degrees of prohibited relationship

**Procedure for registration of Marriage under special marriage Act**

The special marriage Act provides special provisions for the register Procedure for Registration of Marriage under of marriages celebrated in other forms and the parties to a marriage sole under any form, if they so desire, may get their marriage registered under provisions of this act and thus secure legal recognition to their mar sections 15 to 18 in chapter III of the Act deals with the provisions in connection. The provisions are as follows:

**(1) Registration of marriage celebrated in other forms, Section 15** Section 15 provides that any marriage celebrated whether before or after commencement of this Act, other than a marriage, solemnized under the Special Marriage Act, 1872, or under this Act, may be registered under this chapter by a marriage officer in the territories to which this Act extends if the following conditions are fulfilled namely:

- (i) a ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since,
- (ii) neither party has at the time of registration more than one spouse living.
- (iii) neither party is an idiot or a lunatic at the time of registration
- (iv) the parties have completed the age of twenty one (21) yes time of registration

(v) the parties are not within the degrees of prohibited relationship provided that if the marriage is celebrated before the commencement of this Act, this condition shall be subject to any law, custom or usage having the force of law governing each of them which permits of a marriage between the two, and

(vi) the parties have been residing within the district of the marriage,

officer for a period of not less than thirty days immediately preceding the

date on which the application is made to him for registration of marriage.

**(2) Procedure for registration, Section 16 :** Upon receipt of an application signed by both the parties to the marriage for the registration of the marriage under this chapter, the marriage officer shall give public notice in such manner as may be prescribed and after allowing a period of thirty days for objections and after hearing any objection received within that period, shall it satisfied that all the conditions mentioned in Section 15 are fulfilled, enter a certificate of the marriage. In the marriage certificate book in the form specified in the fifth schedule and such certificate shall be signed by the parties to the marriage and by three witnesses.

**(3) Appeals from order under Section 16-Section 17:** The provision of appeal has been laid down under section 17 as :-Any person aggrieved by any order of a marriage officer refusing to register a marriage under this chapter may, within thirty days from the date of the order, appeal against that order to the district court within the local limits of whose jurisdiction the marriage officer has his office, and the decision of the district court on such appeal shall be final, and the marriage officer to whom the application was made shall act in conformity with such decision.

**(4) Effect of registration under this chapter Section 18 :** When a certificate of marriage has been finally entered in the marriage certificate book under this chapter, the marriage shall, as from the date of such entry be deemed to be a marriage solemnized under this act, and all children born after the date of the ceremony of marriage (whose names shall also be entered in the marriage certificate book) shall in all respects be deemed to be and always to have been the legitimate children of their parents but such children shall have no rights in or to the property of any person other than their parents in any case where, but for

the passing of this Act, such children would have been incapable of possessing or acquiring any such rights by reason of their parents.

• **PRELIMINARY**

1. Short title, extent and commencement.

(1) This Act may be called the Special Marriage Act, 1954.

(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to citizens of India domiciled in the territories to which this Act extends who are 2[in the State of Jammu and Kashmir].

(3) It shall come into force on such date<sup>3</sup> as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.—In this Act, unless the context otherwise requires,—

(b) “degrees of prohibited relationship”—a man and any of the persons mentioned in Part I of the First Schedule and a woman and any of the persons mentioned in Part II of the said Schedule are within the degrees of prohibited relationship.

*Explanation I.*—Relationship includes,—

(a) relationship by half or uterine blood as well as by full blood;

(b) illegitimate blood relationship as well as legitimate;

(c) relationship by adoption as well as by blood;

and all terms of relationship in this Act shall be construed accordingly.

*Explanation II.*—“Full blood” and “half blood”—two persons are said to be related to each other by

full blood when they are descended from a common ancestor by the same wife and by half blood when

they are descended from a common ancestor but by different wives.

*Explanation III.*—“Uterine blood”—two persons are said to be related to each other by uterine blood

when they are descended from a common ancestress but by different husbands.

*Explanation IV.*—In *Explanations II* and *III*, “ancestor” includes the father and “ancestress” the mother;

(d) “district” in relation to a Marriage Officer, means the area for which he is appointed as such under sub-section (1) or sub-section (2) of section 3;  
6[(e) “district court” means, in any area for which there is a city civil court, that court, and in any other area, the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government by notification in the Official Gazette as having jurisdiction in respect of the matters dealt with in this Act;]  
(f) “prescribed” means prescribed by rules made under this Act;  
1[(g) “State Government”, in relation to a Union territory, means the administrator thereof.]

3. Marriage Officers.—(1) For the purposes of this Act, the State Government may, by, notification in the Official Gazette, appoint one or more Marriage Officers for the whole or any part of the State.  
2[(2) For the purposes of this Act, in its application to citizens of India domiciled in the territories to which this Act extends who are in the State of Jammu and Kashmir, the Central Government may, by notification in the Official Gazette, specify such officers of the Central Government as it may think fit to be the Marriage Officers for the State or any part thereof.]

### SOLEMNIZATION OF SPECIAL MARRIAGES

4. Conditions relating to solemnization of special marriages.—Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:—  
(a) neither party has a spouse living;  
3[(b) neither party—  
(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(ii) 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

(iii) has been subject to recurrent attacks of insanity 4\* \* \*;]

(c) the male has completed the age of twenty-one years and the female the age of eighteen years;

5[(d) the parties are not within the degrees of prohibited relationship:

Provided that where a custom governing at least one of the parties permits of a marriage between

them, such marriage may be solemnized, notwithstanding that they are within the degrees of

prohibited relationship; and]

6[(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are

citizens of India domiciled in the territories to which this Act extends].

7[*Explanation.*—In this section, “custom”, in relation to a person belonging to any tribe, community,

group or family, means any rule which the State Government may, by notification in the Official Gazette,

specify in this behalf as applicable to members of that tribe, community, group or family:

Provided that no such notification shall be issued in relation to the members of any tribe, community,

group or family, unless the State Government is satisfied—

(i) that such rule has been continuously and uniformly observed for a long time among those members;

(ii) that such rule is certain and not unreasonable or opposed to public policy; and

(iii) that such rule, if applicable only to a family, has not been discontinued by the family.]

5. Notice of intended marriage.—When a marriage is intended to be solemnized under this Act, the

parties to the marriage shall give notice thereof in writing in the form specified in the Second Schedule to

the Marriage Officer of the district in which at least one of the parties to the marriage has resided for a

period of not less than thirty days immediately preceding the date on which such notice is given.

6. Marriage Notice Book and publication.—(1) The Marriage Officer shall keep all notices given under section 5 with the records of his office and shall also forthwith enter a true copy of every such notice in a book prescribed for that purpose, to be called the Marriage Notice Book, and such book shall be open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same.

(2) The Marriage Officer shall cause every such notice to be published by affixing a copy thereof to some conspicuous place in his office.

(3) Where either of the parties to an intended marriage is not permanently residing within the local limits of the district of the Marriage Officer to whom the notice has been given under section 5, the Marriage Officer shall also cause a copy of such notice to be transmitted to the Marriage Officer of the district within whose limits such party is permanently residing, and that Marriage Officer shall thereupon cause a copy thereof to be affixed to some conspicuous place in his office.

7. Objection to marriage.—(1) Any person may, before the expiration of thirty days from the date on which any such notice has been published under sub-section (2) of section 6, object to the marriage on the ground that it would contravene one or more of the conditions specified in section 4.

(2) After the expiration of thirty days from the date on which notice of an intended marriage has been published under sub-section (2) of section 6, the marriage may be solemnized, unless it has been previously objected to under sub-section (1).

(3) The nature of the objection shall be recorded in writing by the Marriage Officer in the Marriage Notice Book, be read over and explained if necessary, to the person making the objection and shall be

signed by him or on his behalf.

8. Procedure on receipt of objection.—(1) If an objection is made under section 7 to an intended marriage, the Marriage Officer shall not solemnize the marriage until he has inquired into the matter of the objection and is satisfied that it ought not to prevent the solemnization of the marriage or the objection is withdrawn by the person making it; but the Marriage Officer shall not take more than thirty days from the date of the objection for the purpose of inquiring into the matter of the objection and arriving at a decision.

(2) If the Marriage Officer upholds the objection and refuses to solemnize the marriage, either party to the intended marriage may, within a period of thirty days from the date of such refusal, prefer an appeal to the district court within the local limits of whose jurisdiction the Marriage Officer has his office, and the decision of the district court on such appeal shall be final, and the Marriage Officer shall act in conformity with the decision of the court.

9. Powers of Marriage Officers in respect of inquiries.—(1) For the purpose of any inquiry under section 8, the Marriage Officer shall have all the powers vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit in respect of the following matters, namely:—

- (a) summoning and enforcing the attendance of witnesses and examining them on oath;
  - (b) discovery and inspection;
  - (c) compelling the production of documents;
  - (d) reception of evidence of affidavits; and
  - (e) issuing commissions for the examination of witnesses;
- and any proceeding before the Marriage Officer shall be deemed to be a judicial proceeding within the meaning of section 193 of the Indian Penal Code (45 of 1860).

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*Explanation.*—For the purpose of enforcing the attendance of any person to give evidence, the local limits of the jurisdiction of the Marriage Officer shall be the local limits of his district.

(2) If it appears to the Marriage Officer that the objection made to an intended marriage is not reasonable and has not been made in good faith he may impose on the person objecting costs by way of compensation not exceeding one thousand rupees and award the whole or any part thereof, to the parties to the intended marriage, and any order for costs so made may be executed in the same manner as a decree passed by the district court within the local limits of whose jurisdiction the Marriage Officer has his office.

10. Procedure on receipt of objection by Marriage Officer abroad.—Where an objection is made under section 7 to a Marriage Officer [in the State of Jammu and Kashmir in respect of an intended marriage in the State], and the Marriage Officer, after making such inquiry into the matter as he thinks fit, entertains a doubt in respect thereof, he shall not solemnize the marriage but shall transmit the record with such statement respecting the matter as he thinks fit to the Central Government, and the Central Government, after making such inquiry into the matter and after obtaining such advice as it thinks fit, shall give its decision thereon in writing to the Marriage Officer who shall act in conformity with the decision of the Central Government.

11. Declaration by parties and witnesses.—Before the marriage is solemnized the parties and three witnesses shall, in the presence of the Marriage Officer, sign a declaration in the form specified in the Third Schedule to this Act, and the declaration shall be countersigned by the Marriage Officer.



12. Place and form of solemnization.—(1) The marriage may be solemnized at the office of the Marriage Officer, or at such other place within a reasonable distance therefrom as the parties may desire, and upon such conditions and the payment of such additional fees as may be prescribed.

(2) The marriage may be solemnized in any form which the parties may choose to adopt:

Provided that it shall not be complete and binding on the parties unless each party says to the other in the presence of the Marriage Officer and the three witnesses and in any language understood by the parties,—“I, (A), take the (B), to be my lawful wife (or husband)”.

13. Certificate of marriage.—(1) When the marriage has been solemnized, the Marriage Officer shall enter a certificate thereof in the form specified in the Fourth Schedule in a book to be kept by him for that purpose and to be called the Marriage Certificate Book and such certificate shall be signed by the parties to the marriage and the three witnesses.

(2) On a certificate being entered in the Marriage Certificate Book by the Marriage Officer, the Certificate shall be deemed to be conclusive evidence of the fact that a marriage under this Act has been solemnized and that all formalities respecting the signatures of witnesses have been complied with.

14. New notice when marriage not solemnized within three months.—Whenever a marriage is not solemnized within three calendar months from the date on which notice thereof has been given to the Marriage Officer as required by section 5, or where an appeal has been filed under sub-section (2) of section 8, within three months from the date of the decision of the district court on such appeal or, where the record of a case has been transmitted to the Central Government under section 10, within three months

from the date of decision of the Central Government, the notice and all other proceedings arising therefrom shall be deemed to have lapsed, and no Marriage Officer shall solemnize the marriage until a new notice has been given in the manner laid down in this Act.

## REGISTRATION OF MARRIAGES CELEBRATED IN OTHER FORMS

15. Registration of marriages celebrated in other forms.—Any marriage celebrated, whether before or after the commencement of this Act, other than a marriage solemnized under the Special

1. Subs. by Act 33 of 1969, s. 29, for “outside the territories to which this Act extends in respect of an intended marriage outside the said territories” (w.e.f. 31-8-1969).

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Marriage Act, 1872 (3 of 1872), or under this Act, may be registered under this Chapter by a Marriage

Officer in the territories to which this Act extends if the following conditions are fulfilled, namely:—

(a) a ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since;

(b) neither party has at the time of registration more than one spouse living;

(c) neither party is an idiot or a lunatic at the time of registration;

(d) the parties have completed the age of twenty-one years at the time of registration;

(e) the parties are not within the degrees of prohibited relationship:

Provided that in the case of a marriage celebrated before the commencement of this Act, this

condition shall be subject to any law, custom or usage having the force of law governing each of them

which permits of a marriage between the two; and

(f) the parties have been residing within the district of the Marriage Officer for a period of not less

than thirty days immediately preceding the date on which the application is made to him for

registration of the marriage.

16. Procedure for registration.—Upon receipt of an application signed by both the parties to the marriage for the registration of their marriage under this Chapter the Marriage Officer shall give public notice thereof in such manner as may be prescribed and after allowing a period of thirty days for objections and after hearing any objection received within that period, shall, if satisfied that all the conditions mentioned in section 15 are fulfilled, enter a certificate of the marriage in the Marriage Certificate Book in the form specified in the Fifth Schedule, and such certificate shall be signed by the parties to the marriage and by three witnesses.

17. Appeals from orders under section 16.—Any person aggrieved by any order of a Marriage Officer refusing to register a marriage under this Chapter may, within thirty days from the date of the order, appeal against that order to the district court within the local limits of whose jurisdiction the Marriage Officer has his office, and the decision of the district court on such appeal shall be final, and the Marriage Officer to whom the application was made shall act in conformity with such decision.

18. Effect of registration of marriage under this Chapter.—Subject to the provisions contained in sub-section (2) of section 24, where a certificate of marriage has been finally entered in the Marriage Certificate Book under this Chapter, the marriage shall, as from the date of such entry, be deemed to be a marriage solemnized under this Act, and all children born after the date of the ceremony of marriage (whose names shall also be entered in the Marriage Certificate Book) shall in all respects be deemed to be and always to have been the legitimate children of their parents: Provided that nothing contained in this section shall be construed as conferring upon any such

children any rights in or to the property of any person other than their parents in any case where, but for the passing of this Act, such children would have been incapable of possessing or acquiring any such rights by reason of their not being the legitimate children of their parents.

### CONSEQUENCES OF MARRIAGE UNDER THIS ACT

19. Effect of marriage on member of undivided family.—The marriage solemnized under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jaina religions shall be deemed to effect his severance from such family.

20. Rights and disabilities not affected by Act.—Subject to the provisions of section 19, any person whose marriage is solemnized under this Act shall have the same rights and shall be subject to the same disabilities in regard to the right of succession to any property as a person to whom the Caste Disabilities Removal Act, 1850 (21 of 1850), applies.

21. Succession to property of parties married under Act.—Notwithstanding any restrictions contained in the Indian Succession Act, 1925 (39 of 1925), with respect to its application to members of certain communities, succession to the property or any person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purposes of this Act shall have effect as if Chapter III of Part V (Special Rules for Parsi Intestates) had been omitted therefrom.

21A. Special provision in certain cases.—Where the marriage is solemnized under this Act of any person who professes the Hindu, Buddhist, Sikh or Jaina religion with a person who professes the Hindu,

Buddhist, Sikh or Jaina religion, section 19 and section 21 shall not apply and so much of section 20 as creates a disability shall also not apply.]

## RESTITUTION OF CONJUGAL RIGHTS AND JUDICIAL SEPARATION

22. Restitution of conjugal rights.—When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the district court for restitution of conjugal rights, and the court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

2[*Explanation*.—Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of providing reasonable excuse shall be on the person who has withdrawn from the society.]

23. Judicial separation.—(1) A petition for judicial separation may be presented to the district court either by the husband or the wife,—

(a) on any of the grounds specified 3[in sub-section (1) 4[and sub-section (1A)] of section 27] on

which a petition for divorce might have been presented; or

(b) on the ground of failure to comply with a decree for restitution of conjugal rights;

and the court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.

(2) Where the court grants a decree for judicial separation, it shall be no longer obligatory for the

petitioner to cohabit with the respondent, but the court may, on the application by petition of either party

and on being satisfied of the truth of the statements made in such petition, rescind the decree if it

considers it just and reasonable to do so.

## NULLITY OF MARRIAGE AND DIVORCE

24. Void marriages.—(1) Any marriage solemnized under this Act shall be null and void 5[and may, on a petition presented by either party thereto against the other party, be so declared] by a decree of nullity if—

(i) any of the conditions specified in clauses (a), (b), (c) and (d) of section 4 has not been fulfilled; or

(ii) the respondent was impotent at the time of the marriage and at the time of the institution of the suit.

(2) Nothing contained in this section shall apply to any marriage deemed to be solemnized under this

Act within the meaning of section 18, but the registration of any such marriage under Chapter III may be

declared to be of no effect if the registration was in contravention of any of the conditions specified in

clauses (a) to (e) of section 15:

Provided that no such declaration shall be made in any case where an appeal has been preferred under section 17 and the decision of the district court has become final.

25. Voidable marriages.—Any marriage solemnized under this Act shall be voidable and may be annulled by a decree of nullity if,—

(i) the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or

(ii) the respondent was at the time of the marriage pregnant by some person other than the petitioner; or

(iii) the consent of either party to the marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872 (9 of 1872):

Provided that, in the case specified in clause (ii), the court shall not grant a decree unless it is satisfied,—

(a) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(b) that proceedings were instituted within a year from the date of the marriage; and

(c) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree:

Provided further that in the case specified in clause (iii), the court shall not grant a decree if,—

(a) proceedings have not been instituted within one year after the coercion had ceased or, as the case may be, the fraud had been discovered; or

(b) the petitioner has with his or her free consent lived with the other party to the marriage as

husband and wife after the coercion had ceased or, as the case may be, the fraud had been discovered.

26. Legitimacy of children of void and voidable marriages.—(1) Notwithstanding that a marriage

is null and void under section 24, any child of such marriage who would have been legitimate if the

marriage had been valid, shall be legitimate, whether such child is born before or after the commencement

of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is

granted in respect of that marriage under this Act and whether or not the marriage is held to be void

otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 25, any child

begotten or conceived before the decree is made, who would have been the legitimate child of the parties

to the marriage if at the date of the decree it has been dissolved instead of being annulled, shall be deemed

to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 25, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of not his being the legitimate child of his parents.]

27. Divorce.—2[(1)] Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court either by the husband or the wife on the ground that the respondent—

3[(a) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or  
(b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]

1. Subs. by Act 68 of 1976, s. 26, for section 26 (w.e.f. 27-5-1976).

2. Section 27 renumbered as sub-section (1) thereof by Act 29 of 1970, s. 3 (w.e.f. 12-8-1970).

3. Subs. by Act 68 of 1976, s. 27, for clauses (a) and (b).

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(c) is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code (45 of 1860);

(d) has since the solemnization of the marriage treated the petitioner with cruelty; or

2[(e) has been incurably of unsound mind, or has been suffering continuously or intermittently

from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

*Explanation.*—In this clause,—

(a) the expression “mental disorder” means mental illness, arrested or incomplete



development of mind, psychopathic disorder or any other disorder or disability of mind and

includes schizophrenia;

(b) the expression “psychopathic disorder” means a persistent disorder or disability of mind

(whether or not including sub-normality of intelligence) which results in abnormally aggressive

or seriously irresponsible conduct on the part of the respondent, and whether or not it requires or

is susceptible to medical treatment; or

(f) has been suffering from venereal disease in a communicable form; or]

(h) has not been heard of as being alive for a period of seven years or more by those persons who

would naturally have heard of the respondent if the respondent had been alive;

4\* \* \*

5[*Explanation.*—In this sub-section, the expression “desertion” means desertion of the petitioner by

the other party to the marriage without reasonable cause and without the consent or against the wish of

such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its

grammatical variations and cognate expressions shall be construed accordingly;]

8[(1A) A wife may also present a petition for divorce to the district court on the ground,—

(i) that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality;

(ii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of

1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or

under the corresponding section 488 of the Code of Criminal Procedure, 1898) (5 of 1898), a decree

or order, as the case may be, has been passed against the husband awarding maintenance to the wife

notwithstanding that she was living apart and that since the passing of such decree or order,

cohabitation between the parties has not been resumed for one year or upwards.]

1[(2) Subject to the provisions of this Act and to the rules made thereunder, either party to a marriage, whether solemnized before or after the commencement of the Special Marriage (Amendment) Act, 1970

(29 of 1970), may present a petition for divorce to the district court on the ground—

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a

period of one year or upwards after the passing of a decree for judicial separation in a proceeding to

which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a

period of one year or upwards after the passing of a decree for restitution of conjugal rights in a

proceeding to which they were parties.]

27A. Alternative relief in divorce proceedings.—In any proceeding under this Act, on a petition

for dissolution of marriage by a decree of divorce, except insofar as the petition is founded on the ground

mentioned in clause (h) of sub-section (1) of section 27, the court may, if it considers it just so to do

having regard to the circumstances of the case, pass instead a decree for judicial separation.]

28. Divorce by mutual consent.—(1) Subject to the provisions of this Act and to the rules made

thereunder, a petition for divorce may be presented to the district court by both the parties together on the

ground that they have been living separately for a period of one year or more, that they have not been able

to live together and that they have mutually agreed that the marriage should be dissolved.

(2) 3[On the motion of both the parties made not earlier than six months after the date of the

presentation of the petition referred to in sub-section (1) and not later than eighteen months] after the said date, if the petition is not withdrawn in the meantime, the district court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized under this Act, and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of the decree.

29. Restriction on petitions for divorce during first one year after marriage.—(1) No petition for

divorce shall be presented to the district court 4[unless at the date of the presentation of the petition one year has passed] since the date of entering the certificate of marriage in the Marriage Certificate Book:

Provided that the district court may, upon application being made to it, allow a petition to be

presented 5[before one year has passed] on the ground that the case is one of exceptional hardship

suffered by the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the district court at the hearing of the petition that the petitioner obtained leave to present the petition by any

misrepresentation or concealment of the nature of the case, the district court may, if it pronounces a

decree, do so subject to the condition that the decree shall not have effect until after the 6[expiry of one

year] from the date of the marriage or may dismiss the petition, without prejudice to any petition, which

may be brought after the 7[expiration of the said one year] upon the same, or substantially the same, facts

as those proved in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before

the 8[expiration of one year] from the date of the marriage, the district court shall have regard to the

interests of any children of the marriage, and to the question whether there is a reasonable probability of a

reconciliation between the parties before the expiration of the 9[said one year].

30. Remarriage of divorced persons.—Where a marriage has been dissolved by a decree of divorce, and either there is no right of appeal against the decree or if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed \* \* \* either party to the marriage may marry again.

### JURISDICTION AND PROCEDURE

31. Court to which petition should be made.—2[(1) Every petition under Chapter V or Chapter VI shall be presented to the district court within the local limits of whose original civil jurisdiction--

(i) the marriage was solemnized; or

(ii) the respondent, at the time of the presentation of the petition resides; or

(iii) the parties to the marriage last resided together; or

3[(iiia) in case the wife is the petitioner, where she is residing on the date of presentation of the petition; or]

(iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is at that time residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years by those who would naturally have heard of him if he were alive.]

(2) Without prejudice to any jurisdiction exercisable by the court under sub-section (1), the district court may, by virtue of this sub-section, entertain a petition by a wife domiciled in the territories to which this Act extends for nullity of marriage or for divorce if she is resident in the said territories and has been ordinarily resident therein for a period of three years immediately preceding the presentation of the petition and the husband is not resident in the said territories.

32. Contents and verification of petitions.—(1) Every petition under Chapter V or Chapter VI shall state, as distinctly as the nature of the case permits the facts on which the claim to relief is founded, and shall also state that there is no collusion between, the petitioner and the other party to the marriage.

(2) The statements contained in every such petition shall be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints, and may, at the hearing, be referred to as evidence.

33. Proceedings to be *in camera* and may not be printed or published.—(1) Every proceeding under this Act shall be conducted *in camera* and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees.]

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) 5[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:

1[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.]

2[(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.]

35. Relief for respondent in divorce and other proceedings.—In any proceeding for divorce or

judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought

on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief

under this Act on that ground, and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.]

36. *Alimony pendente lite*.—Where in any proceeding under Chapter V or Chapter VI it appears to the district court that the wife has no independent income sufficient for her support and the necessary expenses of the proceeding, it may, on the application of the wife, order the husband to pay to her the expenses of the proceeding, and weekly or monthly during the proceeding such sum as having regard to the husband's income, it may seem to the court to be reasonable. 4[Provided that the application for the payment of the expenses of the proceeding and such weekly or monthly sum during the proceeding under Chapter V or Chapter VI, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the husband.]

37. Permanent alimony and maintenance.—(1) Any court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support, if necessary, by a charge on the husband's property such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as, having regard to her own property, if any, her husband's property and ability 5[the conduct of the parties and other circumstances of the case], it may seem to the court to be just.

(2) If the district court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the court to be just.

(3) If the district court is satisfied that the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life, 1[it may, at the instance of the husband vary, modify or rescind any such order and in such manner as the court may deem just.]

38. Custody of children.—In any proceeding under Chapter V or Chapter VI the district court may, from time to time, pass such interim orders and make such provisions in the decree as it may seem to it to be just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes wherever possible, and may, after the decree, upon application by petition for the purpose, make, revoke, suspend or vary, from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending.  
2[Provided that the application with respect to the maintenance and education of the minor children, during the proceeding, under Chapter V or Chapter VI, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.]

39. Appeals from decrees and orders.—(1) All decrees made by the court in any proceeding under Chapter V or Chapter VI shall, subject to the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act, under section 37 or section 38 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such



appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a 4[period of ninety days] from the date of the decree or order.

39A. Enforcement of decrees and orders.—All decrees and orders made by the court in any proceeding under Chapter V or Chapter VI shall be enforced in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction for the time being are enforced.]

40. Application of Act 5 of 1908.—Subject to the other provisions contained in this Act, and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908 (5 of 1908).

40A. Power to transfer petitions in certain cases.—(1) Where—

(a) a petition under this Act has been presented to the district court having jurisdiction, by a party to the marriage praying for a decree for judicial separation under section 23 or for a decree of divorce under section 27, and

(b) another petition under this Act has been presented thereafter by the other party to the marriage praying for decree for judicial separation under section 23, or for decree of divorce under section 27

on any ground whether in the same district court, or in a different district court, in the same State or in

a different State, the petition shall be dealt with as specified in sub-section (2).

(2) In a case where sub-section (1) applies,—

(a) if the petitions are presented to the same district court, both the petitions shall be tried and

heard together by that district court;

(b) if the petitions are presented to different district courts, the petitions presented later shall be transferred to the district court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the district court in which the earlier petition was presented.

(3) In a case where clause (b) of sub-section (2) applies, the court or the Government, as the case may be, competent under the Code of Civil Procedure, 1908 (5 of 1908), to transfer any suit or proceeding from the district court in which the later petition has been presented to the district court in which the earlier petition is pending, shall exercise its powers to transfer such later petition as if it had been empowered so to do under the said Code.

40B. Special provisions relating to trial and disposal of petitions under the Act.—(1) The trial of a petition under this Act shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day, until its conclusions, unless the court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(2) Every petition under this Act shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of service of notice of the petition on the respondent.

(3) Every appeal under this Act shall be heard as expeditiously as possible, and endeavour shall be made to conclude the hearing within three months from the date of service of notice of appeal on the respondent.

40C. Documentary evidence.—Notwithstanding anything contained in any enactment to the contrary, no document shall be inadmissible in evidence in any proceeding at the trial of a petition under this Act on the ground that it is not duly stamped or registered.]

41. Power of High Court to make rules regulating procedure.—(1) The High Court shall, by notification in the Official Gazette, make such rules consistent with the provisions contained in this Act and the Code of Civil Procedure, 1908 (5 of 1908), as it may consider expedient for the purpose of carrying into effect the provisions of Chapters V, VI and VII.

(2) In particular, and without prejudice to the generality of the foregoing provision, such rules shall provide for,—

(a) the impleading by the petitioner of the adulterer as a co-respondent on a petition for divorce on the ground of adultery, and the circumstances in which the petitioner may be excused from doing so;

(b) the awarding of damages against any such co-respondent;

(c) the intervention in any proceeding under Chapter V or Chapter VI by any person not already a party thereto;

(d) the form and contents of petitions for nullity of marriage or for divorce and the payment of costs incurred by parties to such petitions; and

(e) any other matter for which no provision or no sufficient provision is made in this Act, and for which provision is made in the Indian Divorce Act, 1869 (4 of 1869).

Q 3. When and how can the right of pre-emption be claimed under Muslim law? Is pre-emption a weak right?

Ans. LAW OF PRE-EMPTION

#### 1. Introduction

The economy of a nation depends on the transfer of property. The transfer of property may be of two kinds. It may be either gratuitous or non-gratuitous. In the case of non-gratuitous transfer of property inter vivos Muslims are not governed in each case by their personal law. In certain matters Indian legislature has enacted legislation on various subjects which are applicable to Indians including Muslims. There are however still certain subjects where Muslims are governed by their own personal law. The law of pre-emption is one of them. Till

today, in most parts of the country Muslims are having the privilege to be governed by their own personal law of pre-emption.--

The right of pre-emption is a right arising from and relating to ownership of immovable property. In India, religion was not the bar for the application of the law. It was applied independently of the religious status of owners of land of immovable property. In most parts of India, the Muslim law of pre-emption, through passage of time, became the customary law of the local area. 2. Origin and Basis

The origin of Islamic law of pre-emption can be traced in the text of Islamic law. Sahih Muslim, an authoritative book on Muslim law says that the right of pre-emption exists in all joint properties, whether land, or house, or grave. It is not proper for him (owner) to sell till he has offered it to his coparcener (neighbour), who may take it or reject it, and if the vendor fails to do this, his coparcener has the preferential right to it until he is informed.,

AlMarghinani\* is another authority on Muslim law. According to this book : (i) a neighbour has a right, superior to that of stranger, in the lands adjacent to his own'; (ii) the right of shufa holds in a partner who has not divided off and taken separately his share; (iii) the neighbour of a house, and the neighbour of a land has superior right to

those lands and if he be absent, the seller must wait his return, provided, however, that they both participate in the same road.

The Muslim law of pre-emption was not recognised throughout the country. It was recognised only in northern part of India. In Southern part of the country it was not recognised. Pre-emption in village communities in British India had its origin in the Muslim law as to pre-emption, and was apparently unknown in India before the time of the Moghul Rulers. In the course of time custom of pre-emption grew up or were adopted

3. Definition ~ The term "pre-emption" is derived from a right which signifies conjunction that is the lands sold are conjoined to the land of the pre-emptor. In law, it signifies the becoming proprietor of lands sold for the price at which the purchaser has bought them although he may not consent to it. It is a power of possessing property which has been sold by paying a sum equal to that paid by the purchaser.

Under Shia law, pre-emption is defined as the legal title of one partner in joint property to the share of another partner (sharik) therein, in consequence of its transfer by sale. The right is limited to partners.)

According to Hedaya' the grand principle of Shufaa is conjunction of property and its object is to prevent the vexation arising from a disagreeable neighbour. The law of pre-emption may prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a coparcener or near neighbour. It may, however, be noted that it is not at all necessary that there must exist inconvenience. It is also not necessary that inconvenience must be proved before one can successfully claim pre-emption.

The right of pre-emption has been defined as a right of substitution. This right entitles the pre-emptor to stand in the shoes of the purchaser. Mulla says that the right of Shufaa or pre-emption is a right which the owner of an immovable property possesses to acquire by purchase of another immovable property which has been sold to another person. It is clear from the definition given by Mulla that there must be two persons who will be the owner of the two separate properties. Both the properties must be near each other and any one of them may be using another's property. There must be a sale of certain property, not his own. Under such circumstances, the pre-emptor has the right to be substituted for the purchaser.

#### 4. Classification of Pre-emption

The law of pre-emption can be divided into following two categories : (i) the primary and substantive right; (ii) the secondary or remedial right.

Conditions for claiming the right : The following conditions are necessary for claiming the preferential right of pre-emption. This right is personal and not attached to land.

(a) Available only to class I heirs.-Out of the co-heirs mentioned in the Act, Sub-section (1) of Section 22 grants the preferential right only to the heirs of class I of the schedule. Sub-section (1) of Section 22 says that after the commencement of this Act an interest in any immovable property or an interest in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in Class I of the Schedule and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred. This right cannot be enjoyed by heirs of class II, agnates, cognates or their descendants or transferees. It is apparent from the above that the right can be exercised only when one of co-heirs proposes to transfer his or her interest in the property or business inherited, that other co-heir is given a preferential right to acquire it, thereby given to her an opportunity to avoid any stranger becoming owner.

Prior agreement between the parties shall be the consideration for the transfer. Where there exists disagreement about the consideration the courts can determine the same. Sub-section (2) of Section 22 of the Hindu Succession Act, 1956, says that the consideration for which any interest in the property of the deceased may be transferred under this section shall in the absence of any agreement between the parties be determined by the court on application being made to it in this behalf and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(b) Preference to the highest offer.—Sub-section (3) of Section 22 of Hindu Succession Act says about the rule of preference between two or more offers made by two or more co-heirs entitled to claim preference. Between two or more such heirs, that whose offer is highest shall be preferred. In such cases, preference is not to be made on the

#### PERSONS ELIGIBLE TO ENJOY THE PRIVILEGE OF PRE-EMPTION

Under the Hanafi law, following three kinds of persons can claim the right of pre-emption :

(i) Shafi-i-Sharik (Co-sharer in the property); (ii) Shafi-i-Khalit (participation in various kinds of appendages or easements); and (iii) Shafi-i-jar (immediate neighbourhood or vicinage).

**Shafi-i-Sharik.**—In the case of Shafi-i-Sharik two or more persons may be using property simultaneously. They may be the owner of an undivided share in the property. The person holding the property must be the absolute owner of the property/It

**Shafi-i-Khalit.**—The ordinary meaning of this phrase is a participator in the appendages. This right includes right of way or right of discharge water. When the pre-emptor is only a neighbour of the house sold, along with the vendee they are both equally entitled to pre-empt the property and each one of them is entitled to an equal share of it. If however, the pre-emptor is not only a neighbour but is a participator in immunities and appendages, in other words, if he is a dominant owner having easement right over the house sold or is a servient owner in connection with the house sought to be pre-empted, he would have a preferential right to a person who is only an owner of the adjoining house.

**WHEN DOES THE RIGHT ARISE** The right of pre-emption arises only out of a valid, complete and bona fide sale or barter. There will be no right of pre-

emption if the property was transferred without consideration of law, such as gift, charity, waqf, inheritance, bequest and lease.

There is a difference between a sale under the Muslim law and the sale under the Indian law. The Indian courts were not always willing to treat all transactions under the Muslim law as sale. This line of approach adopted by the Indian judiciary gave rise to the divergence of judicial opinion.

One opinion was that in cases of pre-emption, the principles of Muslim law of sale shall be applicable. The other opinion was that in such cases, Indian law i.e. Transfer of Property Act, 1882, shall be applicable. In *Begam v. Mohammad Yakoob* it was said that the question whether a sale is complete must be determined by applying the principles of Muslim law where a complete sale has taken place according to Muslim law i.e. price has been paid and possession has been delivered, the parties can claim right of pre-emption. In such cases it is not necessary that the transaction must fulfil the requirement of Transfer of Property Act.)

**LEGAL POSITION OF TRANSACTIONS OTHER THAN SALE** As regards transactions other than sale, the legal position is as under :

- (i) Transfer in lieu of Mahr.-A Muslim husband may transfer the landed property to his wife in lieu of her unpaid dower. "Under such circumstances, it may be asked whether such a transaction will be sale or barter.

(ii) To claim pre-emption, claimant must allege and prove his ownership.-- Brief facts of the case are as follows. The respondents Rameshwar and RadheyShyam along with their father Kalyan Bux filed a suit for pre-emption against Ram Sukh and Abdul Shakoor. The plaintiffs claimed the right of pre-emption on the principle of Shafi-i-Khalitt.e., a common right in immunities and appendages. It was argued by the defendant that the plaintiffs were not the owners of the neighbouring shop. The plaintiffs had no easementary rights over the roof, the suit was barred by limitation. It was not proved by plaintiffs that they ever used the stairs for approaching the disputed roof in order to reach their own roof as of right. It was held in *Pyare Mohan v. Rameshwar* that for claiming the right of pre-emption the claimant must allege and prove his ownership of property. In such cases the provision of Sections 101-104 of the Evidence Act shall be applicable.

(iii) Subsequent trasalier of property will hit the right of pre-emption.Pre-emption is a right of substitution and not of re-purchase. The right of pre-emptor can not be defeated by subsequently transferring the property in favour of another person,



Tiv) Death of pre-emptor before decree will not entitle heirs to claim right. The right of pre-emption is a very weak right and can be defeated by defendant by all lawful means. Tyabji' says :

*\*Pre-emption is not favoured by the law, and any device may be adopted (which is not fraudulent or forbidden by any law for the time being in force) with the object of bringing the right of pre-emption from arising, or defeating the provisions of the law in favour of the pre-emptor: 27*

to) Gift.-No question of pre-emption will arise in the case of transfer of property by way of hiba, will, waqf and succession.'

It was held in an old case that in the case of mortgage, no right of pre-emption will arise unless it was foreclosed. >

vi) Exchange of property.—Where two owners of the property have exchanged the property with an option to cancel the transaction during the lifetime, has been held to be a conditional sale and, therefore, the parties cannot claim the right of pre-emption. The parties can however, claim right of pre-emption only if the exchange was converted into final sale." )in this case the question was whether conditional exchange will give right of pre-emption. It was said by Justice Sulaiman that under the Muslim law, so far as the right of pre-emption goes, sales and exchanges are treated on the same level. Therefore, even a conditional exchange with a reservation entitling either party to take back the property would not, just like a conditional sale, give rise to the right of pre-emption. Full proprietary rights necessary for claiming pre-emption

- The right of pre-emption is not available on the sale of leasehold, whether of house or land. A question has been raised as to what is the extent of Muslim law in the matter of pre-emption. It has been said that Muslim law recognises pre-emption only with respect to full proprietary rights and that it does not recognise pre-emption with respect to leasehold rights.

#### FORMALITIES FOR CLAIMING THE RIGHT OF PRE-EMPTION

For claiming the right of pre-emption, no particular formula is necessary. It is, however, necessary that the claim be unequivocally asserted. It is notable that the Muslim law relating to demand before filing a suit for pre-emption is of a highly technical nature.

CIRCUMSTANCES WHEN RIGHT OF PRE-EMPTION IS NOT LOST Under following circumstances, the right of pre-emption is not lost : (i) a pre-emptor can claim the right of pre-emption only after the completion of

sale. Mere proposal or negotiation will not entitle them to claim his right of pre-emption. Mere refusal on the part of the pre-emptor to purchase the property will not deprive him from the right to purchase the property;? (ii) the pre-emptor had previous notice of the sale, and he did not offer to purchase)

**EVASION OF THE RIGHT OF PRE-EMPTION** The ancient authorities are not agreed whether recourse can be had to devices for evading pre-emption. Modern writers are of the opinion that there is one way for evading the right of pre-emption. The vendor can evade the right of pre-emption. Mulla says that when it is apprehended that a claim for pre-emption may be advanced by a neighbour, the vendor may sell the whole of his property (excluding a portion) however, small,

### CONSTITUTIONAL VALIDITY OF THE RIGHT OF PRE-EMPTION

Although the law of pre-emption has not found favour with the courts and even the Supreme Court has said that it operates as a clog on the right of free transfer of property, even so, that would hardly be a ground for striking it down for before a law can be struck down, it has to be established that the law violates the provisions contained in Part III of the Constitution or those in any other part of the Constitution. It may be noted here that Mr. Verma has arrived to this conclusion on the basis that the Muslim Law of pre-emption would be void to the extent that it is violative of any provision of the Constitution.

It is notable here that before the advent of independence, the Hanafi Law relating to pre-emption of a participator in immunities and appendages and in respect of adjoining immovable property was recognised by Indian courts. After the advent of Indian Constitution the main question which was several times pressed before the court was whether the right of pre-emption by vicinage offends Article 19 (1) (f). There has been divergence of opinion between various High Courts on the question. The High Court of Rajasthan, Madhya Bharat, Hyderabad and the Judicial Commissioner of Vindhya Pradesh had taken the view that such a right of pre-emption offends Article 19 (1) (f) while the High Courts of Punjab and Nagpur had held otherwise. The High Court of Bombay in *Bhimrao v. Patilbua* and Allahabad and Patna High Courts had upheld the constitutional validity of pre-emption by all the three classes of persons mentioned above. In *Bhimrao's* case the following two questions were mainly discussed