



**DELHI LAW ACADEMY**

**HINDU MARRIAGE ACT**

**BIGAMY : VOID & PUNISHABLE**

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## HINDU MARRIAGE ACT 1955

### What is the Territorial Extent of the Hindu Marriage Act?

(1)

#### Section 1 : Original provision:

- This Act extends to the whole of India
  - **except** the State of Jammu and Kashmir

#### The current position

- The Hindu Marriage Act now extends to the whole of India **including** Jammu and Kashmir and Ladakh.
- This is so because the Jammu and Kashmir Reorganisation Act 2019 has deleted the exception in respect of Jammu and Kashmir by entry 35 of the Fifth Schedule.

(2)

- This Act applies **also**
  - to Hindus **domiciled in India**
  - who are **outside India**

The Hindu Marriage Act thus has extra-territorial operation in respect of Hindus **domiciled in India.**

#### Extra-territorial operation...

##### Question:

- Can a law made by Parliament have extra-territorial operation?

##### Ans:

- Yes.

This is possible because of a special provision in clause (2) of Article 245 of our Constitution.



## Article 245 (2)

- No law made by Parliament shall be deemed to be invalid
  - on the ground that it would have **extra-territorial operation**

Since the Hindu Marriage Act applies **also** to Hindus **domiciled in India** who are **outside India**, we need to know what is a domicile and who are the Hindus domiciled in India.

### What is domicile?

- As per definition given in Craignish v. Craignish, that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom.
- The two constituent elements:
  - a residence of a particular kind and
  - an intention of a particular kind

### The two types of domicile:

- **Domicile of origin:** The law assigns what is called a domicile of origin to every person at his birth
- **domicile of choice:** The domicile of origin prevails until a new domicile has been acquired, known as the domicile of choice

Source: Central Bank of India v. Ram Narain [1955 SC]

It is a well-established proposition that a person may have no home but he cannot be without a domicile

### What is required to be established for proof of a change of domicile?

- It is to be shown that the person has voluntarily fixed the **habitation** of himself and his family in the new country, not for a mere special or temporary purpose but with a **present intention** of making it his permanent home.



## Which persons are domiciled in India?

(1)

- If a person was born in India and has not acquired any other domicile, then he is domiciled in India.

(2)

- If he was not born in India but has acquired domicile of India as his domicile of choice, then also he is domiciled in India.

Question:

- Will provisions of HMA be applicable to a Hindu by religion, living in London?

Ans:

- Yes, if he is domiciled in India.
- No, if he is not.

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## CONDITIONS OF MARRIAGE

Section 5

- A marriage may be **solemnized** between any **two Hindus**
- if :
  - neither party has a spouse living at the time of marriage
  - .....

## Solemnization of a Hindu Marriage

Section 7

- A Hindu marriage may be **solemnized**
  - with *customary rites and ceremonies* of **either** party

**NOTE:**

- The word “**solemnize**” means
  - to celebrate the marriage with proper ceremonies and in due form



## NULL AND VOID MARRIAGE

### Section 11

- Any marriage solemnised under this Act
  - shall be **null and void**
- **if**
  - either party has a spouse living at the time of marriage

## PUNISHMENT OF BIGAMY

### Section 17

- Any marriage between **two Hindus solemnized** under this Act
  - **is void**
- if at the date of marriage
  - either party had a husband or wife living
- Sections 494 and 495 of IPC shall apply accordingly

### NOTE:

- Sections 11 and 17 of HMA correspond to Sections 43 and 44 of the Special Marriage Act.

### Section 43 SMA

- Every person who, being at the time married
  - procures a marriage of himself or herself to be solemnized under this Act
  - shall be deemed to have committed an offence u/s 494 IPC and
  - the marriage so solemnized shall be void

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## Questions:

- When a Hindu man, married under Hindu law, converts to Islam and thereafter marries a Muslim girl under the Muslim Personal Law without having the first marriage dissolved, would this marriage under the Muslim Personal Law be illegal?
- Whether the apostate husband would be guilty of an offence u/s 494 of the Indian Penal Code?

## Ans by the Supreme Court:

- These questions were answered by the Supreme Court in Sarla Mudgal v. Union of India in 1995 as under:
- The second marriage is invalid and the apostate husband would be guilty of an offence u/s 494 IPC.

## Reasons:

- Parties who have solemnised a marriage under the Hindu Marriage Act remain married even when the husband embraces Islam in pursuit of other wife.
- A second marriage by an apostate under the shelter of conversion to Islam would be a marriage **in violation** of HMA by which he would continue to be governed so far as his first marriage under the Act is concerned.
- The second marriage of an apostate would, therefore, be **illegal** marriage qua his wife who married him under the Act and continues to be Hindu.
- Conversion to Islam and marrying again would not, by itself, dissolve the Hindu marriage under the Act.
- The second marriage by a convert would therefore be in **violation of the Act** and as such void in terms of Section 494 IPC.

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## A Critique of this judgment by DLA .....

(1)

### **How was the second marriage void?**

- The second marriage was contracted by a Muslim man with a Muslim woman under the Muslim personal law.
- How can such a marriage be void under the HMA? The Validity or otherwise of this marriage has to be seen under the Muslim personal law and not under the HMA.
- For a marriage to be void u/s 11 or u/s 17 of HMA, it must be a marriage **between two Hindus**. How can a marriage between two Muslims be void under these sections of HMA? Plain and simple.
- Do we need the Supreme Court to tell us that the validity of a marriage between two Muslims contracted under the Muslim personal law is to be tested under the provisions of the HMA? How can it ever be so? Provisions of the HMA are not at all applicable to Muslims.
- Section 17 HMA declares a marriage between **two Hindus solemnized** under the HMA as **void.....**
- The second marriage under consideration was neither between two Hindus, nor was it solemnized under the HMA. Then, how does section 17 apply to such marriage?
- No doubt, the objective which the learned judges had in their minds was laudable, but these Hon'ble judges were sitting in a court of law and not in Parliament. It is for the Parliament to make laws; not for the courts of law.

(2)

### How was the Muslim man liable to punishment under section 494 IPC?

#### Reasons given by the Supreme Court....

- The expression "void" u/s 494 IPC has been used in a wider sense.



- A marriage which is in violation of **any provision of law** would be void in terms of the expression used u/s 494 IPC.

## The Critique by DLA ..... continued....

- How can a marriage in violation of **any provision of law** be void in terms of section 494 IPC? Not at all.
- Let us have a re-look at section 494 IPC:
  - Whoever having a husband or wife living, marries
    - in any case in which such marriage **is void by reason of** its taking place during the life of such husband or wife
  - shall be punished with imprisonment of upto *seven years* and fine
- Plainly, section 494 IPC applies only to such marriage which is void because of only one reason: section 494 applies only if the marriage is void **by reason of** its taking place during the life of the earlier husband or wife; and **not for any other reason**.
- A marriage could be void for so many other reasons: even under HMA it could be void for the reason that the parties were sapindas of each other or the parties were within degrees of prohibited relationship. Section 494 IPC is certainly not applicable to a marriage which is void for these reasons.

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The Supreme Court gave two more reasons for applying section 494 IPC to such second marriage by a Muslim man:

(1)

- The second marriage of a Hindu husband after embracing Islam being **violative of justice, equity and good conscience** would be void on that ground also and attract the provisions of Section 494 IPC.



(2)

- The second marriage after conversion to Islam would be **in violation of the rules of natural justice** and as such would be void.

### **The Critique by DLA ..... continued....**

- Can section 494 IPC apply to a marriage which is void for the reason that it is violative of **justice, equity and good conscience**, even if it is assumed without conceding that a marriage under Muslim Personal Law could be declared void for such reason?
- Can section 494 IPC apply to a marriage which is void for the reason that it is violative of **the rules of natural justice**?
- It is indeed lamentable that the Supreme Court says so! Even at the cost of repetition, it needs to be pointed out again and again that section 494 IPC applies only to such marriage which is void because of only one reason: the **reason of its taking place during the life of the earlier husband or wife**; and not for any other reason.

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### **One more judgment from the Supreme Court on section 17 HMA:**

**Lily Thomas v. Union of India** [2000 SC]

Reasons given by the Supreme Court:

- If a marriage takes place in spite of the fact that a party to that marriage had a spouse living is described as void u/s 17 of HMA under which an offence of bigamy has been **created**.
- This offence **has been created** by reference.
- By providing in Section 17 that provisions of sections 494 would be applicable to such a marriage, the legislature has bodily lifted the provisions of sections 494 IPC and placed them in section 17 of HMA.



## The Critique by DLA..... continued....

### Question:

- Is the offence of bigamy **created** by section 17 HMA?

### Ans. by DLA:

- No, it is created by section 494 IPC.

### Question

- Will a marriage rendered void by section 11 HMA not be caught within the mischief of section 494 IPC without resorting to section 17 HMA?

### Ans. by DLA:

- Yes. Section 17 is not needed for applicability of section 494 IPC to a marriage rendered void by section 11 HMA for the reason of the first spouse living.

### Question

- What is the effect if section 17 HMA is not there? Is section 17 HMA necessary for applicability of section 494 IPC to such marriage?

### Ans. by DLA:

- Section 17 HMA is superfluous. First part of section 17 is just a repeat of section 11. Second part is a repeat of section 494 IPC. Section 494 IPC is applicable to a void marriage **by its own force**; it stands on its own legs; it does not need the crutches of section 17 HMA.

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## **When a second marriage even under the HMA is not punishable u/s 494**

### Facts of the case...

- Bhaurao Lokhande was married to complainant Indubai in about 1956.
- He married Kamlabai in February 1962, during the lifetime of Indubai.

### Contentions by Bhaurao:

- Essential ceremonies for a valid marriage were not performed during the proceedings which took place when Bhaurao Lokhande and Kamlabai married each other.
- In law it was necessary for the prosecution to establish that the alleged second marriage of Bhaurao Lokhande with Kamlabai in 1962 had been duly performed in accordance with the religious rites applicable to the form of marriage gone through.

### **Law laid down by the Supreme Court in this case...**

- If the marriage which took place between Bhaurao and Kamlabai in February 1962 cannot be said to be “solemnized”, that marriage will not be void by virtue of Section 17 of the Act and Section 494 IPC will not apply to such parties to the marriage as had a spouse living.
- It is therefore essential, for the purpose of Section 17 of the Act, that the marriage to which Section 494 IPC applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form.
- Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make them ceremonies prescribed by law or approved by any established custom.

### **Application of law to the facts of this case...**

- The second marriage in this case was not performed in accordance with the essential requirements for a valid marriage under Hindu law.



- Therefore, the marriage between Bhaurao and Kamlabai does not come within the expression “solemnized marriage” occurring in Section 17 of the Act and consequently does not come within the mischief of Section 494 IPC even though the first wife of Bhaurao was living when he married Kamlabai in February 1962.

Source: Bhaurao Shankar Lokhande v. State of Maharashtra [1965 SC]

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### Comparison between Bhaurao Lokhande’s case and Sarla Mudgal’s case:

- In Bhaurao Lokhande’s case the Supreme Court held that section 494 IPC was not applicable even in a case where the second marriage was solemnized under the HMA itself, on the ground that all the ceremonies prescribed under section 7 HMA were not performed.
- In sharp contrast, in Sarla Mudgal’s case, the same Supreme Court applied section 494 IPC even in a case where the second marriage was contracted under the Muslim Personal Law. It was not a marriage between two Hindus. It was not solemnized under section 7 HMA. **Not one** ceremony prescribed under section 7 HMA was performed, what to say of **all**.

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