

PRE-MARITAL SEX, AS IN RELATION WITH NATURE OF MARRIAGES: A CRITICAL STUDY OF THE INDIAN PERSONAL LAW

Written by Sudarshan Satalkar

2nd Year BA LLB Student, Symbiosis Law School, Hyderabad

ABSTRACT

The idea of pre-marital sex is still considered as a taboo amongst the majority of the people in the Indian society; the social stigma related to pre-marital sex makes it necessary for the law to afford protection to the people who are engaged in this. The position of personal law with regard to this issue is vague and thus is many times an issue for heated debate. This paper shall be analysing as to the exact position of law with regard to pre-marital sex and how the courts have interpreted the concept of marriage and the rights of the parties when there is no valid marriage involved. The various personal laws of the land have dealt with the idea of pre-marital sex differently and thus it is essential to ascertain the exact position of the various individual personal laws. It is also very important to know that pre-marital sex also involves the act of live in relationship which shall also be analysed in detail. The paper also aims at analysing the distinction as far as the position of law is concerned with regard to pre-marital sex when there is no live in relationship involved.

The method of study that is used in the paper is doctrinal in nature with emphasis of both primary as well as secondary data. The paper aims to provide a new perspective with regard to the idea of pre-marital sex and also find solutions to the existing socio legal problems regarding this issue.

Keywords: Pre-marital sex, Maintenance, Gender equality, Personal law, legitimacy.

THE CONCEPT OF MARRIAGE AND PRE-MARITAL SEX UNDER VARIOUS PERSONAL LAWS

Hindu Law on the concept of marriage and Pre-marital sex

The idea of marriage can trace its origin back to the beginning of civilised society itself, when it comes to Indian mythology; there is a belief that Svetakanu son of the sage Uddalak was the first man who introduced the system of marriage¹. The idea of marriage with regard to the Hindu personal law is that marriage is not just required for the purpose of procreation or for the purpose of legalising a sexual relationship; Hindus from the very beginning have regarded the idea of marriage as a 'sacrament'. 'Marriage is an essential Sanskar for all Hindus. Every Hindu is enjoined to marry, to enter the *Grihasta-ashram*².' It is without a doubt that the idea of marriage is a sacred one, but one has to wonder as to what the idea of pre-marital sex as per Hindu traditions. Like many other concepts in the Hindu tradition, the idea of sex is not an evil thing in and of itself, however it is stated that the act of sex without the intention of procreation and only for the purposes of self-gratification is considered as an evil sin³. Therefore, one can ascertain as far as traditional Hindu law is concerned the idea of pre-marital sex was forbidden, however it will be important to note what modern Hindu Law says about pre-marital sex. There is no express provision which prohibits the act of engaging in pre-marital sex. According to the law of the land the act of engaging in pre-marital is not illegal; here the case of *S. Khushboo v. Kanniammal and Anr*⁴ is a very important authority in this issue, Here the SC has held that, live-in relationship is not an offence. Therefore, according to modern Indian law, the act of engaging in pre-marital sex or sex without marriage is not an offence.

Concept of marriage and pre-marital sex in Mommedian law

The idea of pre-marital sex is completely forbidden as far as mommedian personal law is concerned. Here the concept of pre-marital sex (fornication) is considered as one of the four types of unlawful intercourse (Zina). The Hedaya says "The intercourse of a man with a woman who is not his wife is unlawful and prohibited absolutely"⁵ The idea of a marriage is not a

¹ Mahabharat, Adiparva, I, 122, 147

² 'Concept of Marriage and Divorce under Personal Laws in India' Available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/54472/8/08_chapter%201.pdf (last visited: 21/08/2017)

³ Hinduism and Premarital Relationships by V. Jayaram, Available at: http://www.hinduwebsite.com/hinduism/h_premarital.asp (last visited: 21/08/2017)

⁴ 2010 (4) SCALE 462

⁵ Charles Himilton, The Hedaya: Commentary on the Islamic Laws, 25 (1989). *Referenced under Supra 2*

‘sacrament’ as it is in Hindu law but it is a civil contract. In the case of *Anis Begum v. Mohammad Istafa*⁶ here in this case the CJ Shah Suleman held that a Muslim marriage is both a religious sacrament as well as a civil contract. Therefore one can easily state that the concept of a marriage in Islamic Jurisprudence is quite different from Hindu law.

Concept of marriage and Pre-marital sex under Christian and Parsi Law

The idea of pre marital sex is also considered to be a sin when the religious texts of the Christians are taken into account; the social stigma that is attached with the act of pre-marital intercourse is the same as far as all religious backgrounds are concerned. However the act of engaging in pre material sex is not an offence as it has been cited in the above cited case of the Tamil actress. The concept of a Christian marriage is that of a ‘changeless union’. Christian marriage has been portrayed as a "secular reality" which has turned into a "saving mystery." Indeed, in the "new creation" in which the couple live, marriage has gained another reason. Other than being for "shared help" and "reproduction of youngsters"⁷, This is how the idea of marriage is viewed with regard to Christian law.

Parsi Law has a certain different connotation when it comes to the idea of marriage wherein the act of marrying is governed by a codified law⁸. Here the regard for a marriage is that of a civil contract which is the same as that of muslim and Christian law. There is no concept of pre-marital sex with in any of the codified legislations of the Parsi personal law which makes any kind of mention of pre-marital sex and thus the position of continues to be vague in this regard.

POSITION OF LAW IN INDIA WITH REGARD TO PRE-MARITAL SEX

The position of law with regard to pre-marital sex in India is still not completely clear, the idea of considering pre-marital sex as an acceptable practice is still a relatively new concept and the courts have had a variety of opinions with regard to this phenomenon. The SC has held that just because the society has termed the act to be immoral it cannot be considered as an illegal

⁶ (1993) 55 APP 743

⁷ ‘Concept of Marriage and Divorce under Personal Laws in India’ Available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/54472/8/08_chapter%201.pdf (last visited: 21/08/2017)

⁸ Parsi Marriage and Divorce (Amendment) Act, 1988. The Act: The Gazette of India, Part II, S.1. Exty No. 6 (29-3-1988)

act⁹. The SC in its judgement observed that "*Notions of social morality are inherently subjective and criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy*"¹⁰," from the above authority it can be well established that there exists no bar in law as far as pre-marital sex is concerned. However, it must be noted that there still exists a lot of social stigma as far as pre-marital sex is concerned. The people (especially women) who have pre-marital relations are generally ostracised and are considered as immoral beings by the society. One of the new aspects that our current Indian society is going to be dealing with is the idea of a live-in relationship. The position of law with regard to live in relationship is given by the courts in various judgements.

The position of law with regard to live in relationship

Live-in relation i.e. cohabitation is an arrangement whereby two people decide to live together on a long-term or permanent basis in an emotionally and/or sexually intimate relationship¹¹. There is no specific provision under any of the personal law which either recognises or prohibits live in relationships, since there is no recognition in the laws about the act of live in relationships the question of the rights of parties becomes a peculiar one. The first presumption that is made by law is that, unless proven otherwise if a man and a woman cohabit together they shall be considered as husband and wife. This was laid down by the SC in the case of *Badri Prasad v. Dy. Director of Consolidation*¹² wherein the SC has held that live in relationships were considered as a valid form of marriage. This positive attitude towards live in relationships can also be seen in yet another recent SC judgement wherein the bench consisting of M. Katju and T.S. Thakur has decided that a 'relationship in the nature of marriage' is akin to a common law marriage. The SC then gave the principles that are required for a common law marriage, the principles are as follows. a) The couple must hold themselves out to society as being akin to spouses b) They must be of legal age to marry c) They must be otherwise qualified to enter into a legal marriage, including being unmarried d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a

⁹ *Supra* at 4

¹⁰ Except adultery, consensual sex no offence, says SC written by Dhananjay Mahapatra Available at <http://timesofindia.indiatimes.com/india/Except-adultery-consensual-sex-no-offence-says-SC/articleshow/5873672.cms> (last visited on 22/08/2017)

¹¹ LIVE IN RELATIONSHIP AND ITS IMPACT ON INDIAN TRADITIONAL SOCIETY A CRITICAL SOCIO- LEGAL STUDY, Written by: RAJIB BHATTACHARYYA; INTERNATIONAL JOURNAL OF MULTIDISCIPLINARY ADVANCED RESEARCH TRENDS ISSN: 2349-7408 VOLUME II, ISSUE 2(4), DECEMBER 2015. Available at: <http://ijmart.in/PreviousIssues/Dec%202015/25.pdf> (last visited on 22/08/2017)

¹² AIR 1978 SC 1557

significant period of time¹³. However, the picture has not always been this clear cut when it comes the court's interpretation of the live-in relationships. Here a decision of the Delhi HC has to be taken into account, here the Delhi HC has termed live in relationship as a casual relationship which creates no obligation on the part of the parties. In the judgement Justice S.N. Dhingra observed that '*There are no legal strings attached to this relationship nor does this relationship create any legal-bond between the partners*¹⁴' therefore it can be easily assumed that there is an absence of consensus about the rights of the parties with regard to live in relations.

RIGHTS OF THE PARTIES WITH REGARD TO PRE-MARITAL SEX

When the parties solemnise their marriage, there arise certain rights which are bestowed upon both the husband as well as the wife, however the major question that one needs to consider is, what are the rights of the parties when there is no solemnising of the marriage agreement and what are the protections provided to both the parties (especially women) when there is no protection of marriage? In order to understand the idea of the rights of the parties in the absence of marriage we first need to understand what marital rights available to women the following are the rights that are available to a wife

- a) Right to Streedhan
- b) Right of residence
- c) Right to a committed relationship
- d) Right to live with dignity and self-respect
- e) Right to maintenance
- f) Right to child maintenance¹⁵

But these are the rights that are available to a married woman, the question arises is whether these rights extend to women who are engaged in pre-marital relationships and are in live in

¹³D. Velusamy v. D. Patchaiammal, Criminal Appeal Nos. 2028-2029 of 2010 arising out of Special Leave Petition (Crl.) Nos.2273-2274/2010 decided on Oct 21, 2010

¹⁴ Alok Kumar v. State Crl.M.C.No. 299/2009

¹⁵ 6 Rights of Wives in India and Why It Is Important to Know About Them; Available at <https://www.thebetterindia.com/60229/rights-of-a-wife-in-india-lawrato/> (last visited: 22/08/2017)

relations? If the above stated judgement of the Delhi HC is taken into consideration then the answer will be in the negative¹⁶

Here the court has stated that live in relationship are what one might call a 'walk in walk out' arrangement and thus there are no legal obligations created on either of the parties. However as far the rights of the parties are concerned the judgement of the Madras HC is a controversial one, regarding Pre-marital sex. Here in this case Justice Karnan has held that '*If any couple, subject to their attaining the mandatory age of freedom, indulge in sexual gratification, then that would be considered as valid marriage and they could be termed as "husband and wife", as a result of their choice of freedom*¹⁷'. Here the court has held that the mere act of sexual intercourse can be deemed as enough to consider the parties as 'Husband and wife' while on the face of it this decision might seem as peculiar however Justice Karnan gave his clarification about his decision "If a bachelor aged 21 years or above and a spinster aged 18 years or above had pre-marital sex, with intention to marry and subsequent to this the man deserts the woman, the victim woman can approach a civil forum for remedy after producing necessary substantial evidence to grant her social status as wife¹⁸". Here the scope of the definition of the term wife was widened in this particular case, therefore if this authority is taken into consideration there is no distinction between a couple which has solemnised its marriage and a couple which is engaged in pre-marital sex as far as the rights of the women are concerned.

The definition of the term of 'wife' has always been interpreted in such a manner as to provide a positive presumption in favour of the woman, in most of the cases whenever there is a sexual relationship between a man and a woman it is always presumed that they are married according to the norms of common law marriage unless it is proven otherwise. This presumption of marriage rule is generally used in accordance with the Indian rule of evidence¹⁹, this was laid down by the SC in the case of *A. Dinohamy v. W.L.Blahamy*²⁰. Therefore when the facts of the case are in a doubt there has to be a positive interpretation of the law in favour of the woman and she has to give the status of a wife and thereby given all the marital rights.

Rights of Women when there is no marriage

¹⁶ *Supra* at 14

¹⁷ Pre-marital Sex and Marriage written by P Rajendran; Available at <http://newcenturyindianlaw.blogspot.in/2013/06/premarital-sex-and-marriage.html> (last visited on 22/08/2017)

¹⁸ *Ibid* at pg 2

¹⁹ Indian Evidence Act, 1872 ,S.114 -Court may presume existence of certain facts. —The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the

²⁰ AIR 1927 P.C. 185

The major question that needs to be analysed is whether the parties (especially the woman) have any right when they are engaged in pre-marital sexual intercourse, the major point of contention with pre-marital sex comes with the question of the legitimacy of the children when they are born through the act of pre-marital sex.

This issue can be broadly classified into two categories

- a) The legitimacy of children when there is no live-in relationship
- b) The legitimacy of children when there is a live-in relationship

As far as the legitimacy of the children is concerned, whenever there is no live-in relationship or any sort of relationship that resembles the act of marriage, the child born out of such an intercourse shall be deemed as illegitimate, however there are certain rights that are given to the child even in these cases, for example a Hindu child is entitled to maintenance till he attains the age of majority²¹. However, there are no rights that are available to the woman in case she has engaged in the act of pre-marital sexual intercourse and there is no legal relationship resembling the relationship of a common law marriage.

The rights of a woman in case of a live-in relationship however is quite different, in most of the cases the woman shall be considered as a 'wife' for all intents and purposes. Here the same principle was laid down in the case of *Revansiddappa and Anr v. Mallikarjun and Ors*²². Here in this case the children born out of a live-in relationship has to viewed independently of the relationship of the parents and thus is entitled to all the rights that are available to a child born out of a valid marriage.

The rights of the women in live in relationship were also protected in the case of *Virendra Chanmuniya vs. Chanmuniya Kumar Singh Kushwaha and Anr*²³ where the SC overruled the decision of the high court and declared that a woman who is in a live in relationship is also entitled to maintenance as per Sec 125 of the Cr.P.C²⁴.

RECOMMENDATIONS

²¹ What Are The Rights of Illegitimate Children Under Hindu Law, Written by: Nimisha Srivastava; Available at: <https://blog.ipleaders.in/rights-illegitimate-children-hindu-law> (last visited 23/08/2017)

²² Civil Appeal No. of 2011, Arising out of Special Leave Petition (C) No.12639/09 , 2011(2)UJ 1342(S.C.)

²³ MANU/SC/0807/2010

With the changing social atmosphere, it is necessary for the law to change with it as well, as far the law is concerned there is a significant vacuum with regard to the laws regarding pre-marital sex and live in relationship, there have been several committees and commissions set up in order to analyse the existing laws and suggest changes in order to better protect the interest of women who are engaged in pre-marital sex and live in relationships. In June 2008 the national commission for Women recommended the ministry for women and child development suggested to include live in female partners for the right of maintenance under Section 125 of Cr.P.C²⁵. Apart from the recommendation made by the ministry a similar recommendation was also made by the Malimath Committee which was accepted by the Maharashtra government²⁶. There have been several recommendations made in order to include women who are in live in relationships within the ambit of the definition of the word wife. However there have been no recommendations made with regard to the rights of the women who are engaged in pre-marital sex without being in a live in arrangement. Steps have been taken in this direction with the judgement of the Madras HC in this regard²⁷ however this is only a small step towards achieving protection of the laws for women in general. The most important recommendation that this particular paper would try to make here is that there should be legal recognition of Pre-marital sex as a legal relationship in order to protect the interests of the women who sometimes through no fault of theirs are subjected to a lot of hardships and suffering because of the desertion of the male partners, who according to the current law have no obligation towards their partner either legal or moral basis and that is the reason why it is recommended that the act of pre-marital sex may be considered as a binding relationship between the parties, so that the woman is not handicapped with regard to her option of judicial redressal.

CONCLUSION

The Idea of sexual intercourse before marriage or sexual intercourse without marriage is a fairly new one in our conservative society. This paper has tried to analyse as to what exactly is the

²⁵ LIVE IN RELATIONSHIP AND ITS IMPACT ON INDIAN TRADITIONAL SOCIETY A CRITICAL SOCIO- LEGAL STUDY, Written by: RAJIB BHATTACHARYYA; INTERNATIONAL JOURNAL OF MULTIDISCIPLINARY ADVANCED RESEARCH TRENDS ISSN: 2349-7408 VOLUME II, ISSUE 2(4), DECEMBER 2015. Available at: <http://ijmart.in/PreviousIssues/Dec%202015/25.pdf> (last visited on 22/08/2017)

²⁶ *Ibid* at pg no 10

²⁷ *Supra* at 17

socio legal consequence of engaging in pre-marital sex, it is a very complicated issue with the position of law also not being certain, as it has been analysed in the paper, the position of law regarding pre-marital sex is a vague and unclear one, on the one hand the courts have sometimes said that there is a legal relationship which is created among the parties when pre-marital sex takes place, on the other hand there have been decisions which have stated that there exist absolutely no legal obligations on the part of any of the parties when it comes to the act of pre-marital sex, the legitimacy of the children is also an important question that has been addressed in this particular paper and whether the children who are born out of pre-marital sex, in particular, children born out of live in relationships have the rights that every legitimate child has, the courts here have been much more coherent in this regard where they have stated that the child born out of non-marital relations shall also be considered as legitimate when it comes to certain aspects. It is time for us as a nation to realise that the people who are engaged in consensual pre-marital sex are well within their rights to do so and thus it is the responsibility of the law makers of the country to provide protection to the parties (particularly women) of such relations, this is how pre-marital sex can be analysed in relation to Indian personal law.