

CONCEPT OF DIVORCE WITH REFERENCE TO HINDU, MUSLIM , CHRISTIAN AND SPECIAL MARRIAGE ACT

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ABSTRACT:

India is a secular country and a wide number of religions are freely practised. The major religions practised include Hinduism, Islam and Christianity. People solemnise marriages in accordance with religious rituals and ceremonies, which are mostly codified by statutory personal laws. Therefore, the matrimonial laws in India, including laws on marriage, divorce and other connected issues, are essentially governed by the personal laws of the parties depending on their religion:

- Hindu: Hindu Marriage Act 1955.
- Muslim: Muslim marriage is a contract under Muslim law.
- Christian: Indian Christian Marriage Act 1872 and the Divorce Act 1869.
- Parsi: Parsi Marriage and Divorce Act 1936.

In addition, the Special Marriage Act 1954 applies to all persons of all religions. This is a civil legislation and parties from all religions, caste or community can elect to marry under it. A divorce would then be governed by the Special Marriage Act 1954. All these laws apply throughout India (except for in Jammu and Kashmir, and Goa). Welfare of children. Personal laws governing marriage contain provisions to ensure the welfare of children born in wedlock. There is a general law, the Guardian and Wards Act 1890, which applies to all communities. The Guardian and Wards Act 1890 is a complete code defining the rights and liabilities of guardians

and wards. It applies to minor children of any caste and creed. However, while approving and declaring a person as a minor's guardian, the court will also consider the minor's personal law. The Guardian and Wards Act 1890 aims to protect the minor child's person and property. The economic rights of deserted, separated and divorced Indian women are extremely limited in the home. Though their numbers are steadily growing, they have no right to marital property in India even after many years of marriage, a right recognised for decades in many countries. Thus, on separation or divorce, an Indian wife partner has no right to the assets and property acquired by the parties during the course of the marriage. Women's non-financial, and sometimes even financial contribution, in building up the home and being the primary caregiver to children and the elderly, is made invisible by the law and not seen as work of any value. If the marriage breaks down, the woman is left property-less and asset-less unless she has bought property in her name. Women's organisations and groups have demanded a law to give all Indian women equal right in marital property regardless of which spouse has paid for it, but this demand has been ignored. In the meanwhile, Indian women, under various personal laws can only approach the court for 'maintenance', that is, spousal and child support. Women of all communities are similarly situated as far as this right is concerned. Hindu, Christian, Parsi and women married under the civil law (The Special Marriage Act) can ask for interim and permanent maintenance as an ancillary relief in a petition for divorce, judicial separation or 'restitution of conjugal rights'. This paper deals about the various grounds for divorce under various customs in India.

Keywords: *Divorce, Dissolution of marriage, Hindu law, Muslim divorce law, Talaq.*

INTRODUCTION:

India is a home to different cultures and religions, and the personal law applicable to each religion is different as the customs and practices of every religion are different. Personal law as the words itself suggest, is a set of laws that are applicable to personal issues of people, like succession, adoption, inheritance and marriage. Divorce is the termination of marriage and dissolution of matrimonial rights and duties. Divorce maybe common among all religions and cultures, but the law relating to divorce is not the same in India. This is because the concept of marriage is different among different religions, for Hindus it's a sacrament and for a very long time divorce was an unknown concept for Hindus. For Muslims, marriage is a contract. Divorce is the legal dissolution of marriage. A divorce is among the most traumatic misfortunes for any couple. The entire process of divorce that starts from coping up with emotional ups and downs to

contesting for the long awaited divorce decree for several months is definitely a tough affair to get through. Before opting for a divorce one should be aware of the fact that a divorce procedure in India extends for almost a year and in some special cases of disputes the procedure may continue for years. Since India is a land of varied religious communities having their own marriage laws, the divorce procedure too varies, according to the community of the couple seeking divorce. All Hindus as well as Buddhists, Sikhs and Jains can seek divorce under the Hindu Marriage Act 1955. The Muslim, Christian and Parsi communities, on the other hand, have their own laws governing marriage and divorce.(Dr.Lakshmi T and Rajeshkumar S , 2018.) Spouses belonging to different communities and castes can seek divorce under the Special Marriage Act, 1956. There is also the Foreign Marriage Act 1969, governing divorce laws in marriages where either partner belongs to another nationality. With the advancement of time and social awareness, several acts have been passed by the government to make the present day divorce procedure in India more progressive with respect to gender affairs and related sensitive issues. Divorce laws in India are broadly categorised into ‘Divorce by Mutual Consent’, ‘Contested Divorce’, ‘Void Marriages’, here is a detailed overview about each of them.(Desai & Kusum 2011). This paper aims to analyse the various grounds for the divorce, its difficulty and analysis. This paper also aims to look after the difference of methods and grounds on which a divorce can be sought under various legislations.

HYPOTHESIS:

ALTERNATE HYPOTHESIS: The concept of divorce in Hindu, Muslim, Christian and Special marriage act achieves the same purpose.

RESEARCH METHODOLOGY:

The research methodology used by the researcher here is doctrinal form of study. The researcher has used the secondary sources like books and articles written by famous authors and eminent Jurists.

DIVORCE WITH MUTUAL CONSENT:

Under Section 13-B of the Hindu Marriage Act, 1955, the parties can seek divorce by mutual consent by filing a petition before the court. Mutual consent means that both the parties agree for peaceful separation. Mutual Consent Divorce is a simple way of coming out of the marriage and dissolve it legally. Important requirement is the mutual consent of the husband & wife. There are two aspects on which Husband & Wife have to reach to consensus.(Agrawal 2010) One is the alimony or maintenance issues. As per Law there is no minimum or maximum limit of maintenance. It could be any figure or no figure. Next important consideration is the Child Custody. This can also be worked out effectively between the parties. Child Custody in Mutual Consent Divorce can be shared or joint or exclusive depending upon the understanding of the spouses. Certain common questions about divorce with mutual consent have been answered below:

When can the divorce by mutual consent be filed?

The parties intending to dissolve marriage are required to wait for at least one year from the date of marriage. They have to show that they have(Trishala A , Lakshmi T and Rajeshkumar S, 2018) been living separately for a period of one year or more before the presentation of the petition for divorce and that during this period of separation they have not been able to live together as husband and wife(Szirmai 1953).

Where to file the divorce petition?

In the family court of the city / district where both the partners lived together for the last time, which was their matrimonial home.

How to file divorce petition by mutual consent? What happens in the court?

The divorce petition is in the form of affidavit, which is to be submitted to the family court. After the filing of the petition and recording the statement of both the parties, the court generally adjourns the matter for a period of 6 months. After six months the parties have to present themselves again in the court for making a second motion confirming the mutual consent filed earlier. It is only after this second motion that a decree of the divorce is granted by the court.

Can any one party withdraw the mutual consent petition after filing in the court? What will happen by that?

During this period of 6 months when the petition is pending in the court, any of the partner is fully entitled to withdraw the mutual consent by filing an application before the court stating that

he/she does not wish to seek divorce by mutual consent. In such circumstances, the court grants no divorce decree.

What can the other partner do under such circumstances?

There is no option available to the other party to such circumstances except to file a normal petition for divorce under the provisions of the Section 13 of the Hindu Marriage Act, 1950. In such a situation divorce can be granted only on certain specified grounds like cruelty; desertion; voluntary sexual inter-course with another person; the other spouse being of unsound mind; conversion of religion by the other spouse; Leprosy; venereal disease; a spouse having renounced the world or being missing for a period of more than 7 years.(Szirmai 1953; Wasoff 2005)

Can the spouse consent for remarriage without getting divorce from existing partner?

Remarriage without getting divorce is a punishable offence with seven years' imprisonment. If either of the spouses is not heard for a long time, should the divorce be applied? If there is proof of the absence of spouse without any information to the other spouse about his whereabouts for a continuous seven years period, a petition should be filed in this regard in the court.

When the divorced persons can remarry?

Depending on the nature of decree, after the expiry of three months from the date of decree if no notice of appeal is received by the person re marrying from the other person.(Szirmai 1953; Wasoff 2005; MacKenna 1967)

What are the costs involved in getting divorce by mutual consent?

If you hire an advocate, it will be somewhere from Rs25, 000 to Rs75, 000. But if you get the documentation done by us and file on your own without a lawyer, the cost will be very very low. You will not have any problem in filing your petition with our guidance, and you will save a lot of money.

How much time does the whole process take from filing the mutual consent petition in the court till the passing of the decree (judgment) by the court?

It takes from six months to one year from the date of filing of the petition. It varies from case to case & place to place.

CONTESTED DIVORCE:

In case of a contested divorce, there are specific grounds on which the petition can be made. It isn't as if a husband or wife can simply ask for a divorce without stating a reason. The reasons for divorce are as follows, though some are not applicable to all religions.(Cody-Rydzewski n.d.)

Cruelty:

Cruelty may be physical or mental cruelty. According to the Hindu Divorce Laws in India, if one spouse has a reasonable apprehension in the mind that the other spouse's conduct is likely to be injurious or harmful, then there is sufficient ground for obtaining divorce due to cruelty by the spouse.(Colas n.d.)

Adultery:

In India, a man that commits adultery (i.e. has consensual sexual intercourse outside of marriage) can be charged with a criminal offence. The wife may, of course, file for divorce as a civil remedy. If, on the other hand, a wife commits adultery, she cannot be charged with a criminal offence, though the husband can seek prosecution of the adulterer male for adultery.(Dommaraju 2016)

Desertion:

One spouse deserting the other without reasonable cause (cruelty, for example) is reason for divorce. However, the spouse who abandons the other should intend to desert and there should be proof of it. As per Hindu laws, the desertion should have lasted at least two continuous years. Christians, however, will not be able to file a divorce petition solely for this reason.(Dommaraju 2016; Musetto 1982)

Conversion:

Divorce can be sought by a spouse if the other spouse converts to another religion. This reason does not require any time to have passed before divorce can be filed.

Mental Disorder:

If the spouse is incapable of performing the normal duties required in a marriage on account of mental illness, divorce can be sought. If the mental illness is to such an extent that the normal duties of married life cannot be performed.

Communicable Disease:

If the spouse suffers from a communicable disease, such as HIV/AIDS, syphilis, gonorrhoea or a virulent and incurable form of leprosy, the Hindu Divorce Laws in India say that the other party can obtain a divorce.

Renunciation of the World:

If the spouse renounces his/her married life and opts for sanyasa, the aggrieved spouse may obtain a divorce.

Presumption of Death:

If the spouse has not been heard of as being alive for a period of at least seven years, by such individuals who would have heard about such spouse, if he or she were alive, then the spouse who is alive can obtain a judicial decree of divorce. A few common questions about divorce without mutual consent have been answered:

What are the various steps involved in seeking a contested divorce?

With a contested divorce, spouses will have to go through numerous steps before the divorce is finalised, including:

- prepare, file and serve (deliver) the divorce petition (legal paperwork asking for the divorce and stating the grounds for the breakdown of the marriage)
- respond to the petition
- interview and hire an attorney
- engage in “divorce discovery” – the information gathering process, which involves various legal procedures to get information from your spouse and third-party witnesses (e.g., written questions, subpoenas, and depositions)
- pre-trial legal motions and hearings
- settlement proposals and negotiations between attorneys if settlement fails, prepare for trial complete a court trial Appeal, if you dispute the trial judge’s decision(s). During the settlement phase, spouses are often unable to resolve issues. Although the divorce judge may encourage spouses to work things out, when that doesn’t happen the next step is divorce court.(Anon n.d.)

During trial, both spouses present witnesses, and their lawyers cross-examine the witnesses and present closing arguments. After trial is over, the court will issue a final order memorialising all of the judge's decisions, and finalise the divorce.

What are the various documents required to file petition for a contested divorce?

1. Address proof of husband
2. Address proof of wife
3. Marriage certificate
4. Four passport size photographs of marriage of husband and wife
5. Evidence proving spouses are living separately since more than a year
6. Evidence relating to the failed attempts of reconciliation
7. Income tax statements for the last 2-3 years
8. Details of profession and present remuneration
9. Information relating to family background
10. Details of properties and other assets owned by the petitioner

What is the cost involved in getting a contested divorce?

Lawyers tend to charge fees for appearing in court and doing any other work. Depending on how intensely it is fought, therefore, a divorce may cost anywhere from the low ten thousands to lakhs of rupees.

What are different constraints regarding the alimony?

The right of maintenance extends to any person economically dependent on the marriage. This will include, therefore, either spouse, dependent children or even indigent parents. The claim of either spouse (though, in the vast majority of cases, it is the wife), however, depends on the husband having sufficient means. When deciding how much alimony is to be paid, the courts will take into account the earning potential of the husband, his ability to regenerate his fortune (in case, say, the property is given to the wife) and his liabilities. In case either spouse is unable to pay for the divorce, these expenses would also be paid by the spouse that does have an income. (Musetto 1982)

Various constraints determining the alimony are:

- The age of the person entitled to receive the alimony.
- The earnings and current financial status of the spouse entitled to pay the alimony.

- The failing health or a medical condition of one of the spouses who is going to receive the alimony may act in favour of him or her. They can claim a larger alimony on the basis of their failing health.
- The spouse that retains custody of the child would be entitled to either pay lesser alimony or be entitled to a greater amount while the child is a minor.

What are the provisions relating to child custody?

Courts usually agree to the decision of the parents in a mutual consent divorce, the courts are expected to see to the best interest of the child. In a contested divorce, the courts will examine the ability of the mother or father to be a parent to the child, for example. Money is not usually a matter that is considered. Non-working mothers are regularly given custody of their children, but fathers are expected to provide financial support.

VOID MARRIAGES:

Following are the grounds which shall render a marriage void or the court shall deem it to be illegal are:

Bigamy:

None of the parties to the marriage shall have a spouse living in the time of their marriage. If either of them has a spouse alive from an earlier marriage, their subsequent marriage is no marriage in the eyes of law. It is void ab initio and non-existent. (India & Kulkarni 1955)

Persons falling within degrees of prohibited relationships:

Lineal ascendants are to be seen from both sides, i.e. from the father's side as well as from the mother's side. So both the father and mother are lineal ascendants fall in degrees of prohibited relationships.

Sapinda relations:

Sapinda relations can be illustrated as under:

Suppose A is a boy. Now if he is considered as one generation, relatives falling in four more generations upwards from him from the side of his father shall be his Sapinda relations. Therefore, A's father, A's grand-father, A's great grand-father and the father of A's great grand-father shall all be A's Sapinda relations. But on the mother's side, this chain is to extend to only three generations which include A. Therefore, A's mother and A's maternal grand-mother only shall be A's Sapinda relations from the mother's side, A himself being one generation. Marriages made up of such relationships are void.

A few common questions about void marriages have been answered below:

What are the provisions relating to maintenance of the wife?

Another significant question that now arises is whether the wife whose marriage is void under section 11 of the Act can claim maintenance from her husband of that void marriage. The Supreme Court has held that where a marriage is void, wife cannot claim maintenance under sec. 488. However it is a generally accepted rule that even in such cases, the wife is entitled to maintenance under sec. 18 of the Hindu Adoptions and Maintenance Act and also under section 24 of the Hindu Marriage Act. (Beri 1989)

Are the children born from void marriages legitimate?

Hindu Marriage Act 1955 confers legitimacy upon the children born out of void marriages. It provides as under:

Hence the clear effect of section 16 is that if a child is born out of a wedlock which is subsequently declared to be null and void, that child will not be considered illegitimate but he shall be considered legitimate despite the marriage being illegal from its inception. The section provides a cushion to the children of void marriages and prevents them from being penalised.

CONCLUSION AND SUGGESTIONS:

Though law of divorce have many forms the final achievement is one that is obtaining divorce, but it takes different forms in different religions and statutes. Divorce laws vary considerably around the world but in most countries it requires the sanction of a court or other authority in a legal process. Where monogamy is law, divorce allows each former partner to marry another; where polygyny is legal but polyandry is not legal, divorce allows the woman to marry another. Divorce refers to the often messy and painful end of a marriage. For better or for worse, divorce is a very common event these days. Almost everyone has been touched by it, either by going through it themselves as a spouse or a child's divorce, or knowing someone who has gone through it as a spouse.

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