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An Analytical Study of Divorce by Mutual Consent under Hindu Marriage Laws

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ABSTRACT

Marriage under the Hindu Law is considered to be a sacrament. According to Hindu Philosophy, Marriage is the beginning of a new phase of life as it marks the ending of the Brahmacharya i.e. the first phase of life and the beginning of the Grihastha phase i.e. the second phase of life. In the judgement of Koppiseti Subbharao v. State of Andhra Pradesh it was held that marriage is considered as the union of two souls. Thus, it can be said that marriages are a sacred alliance for life, and moreover it is not only just a union of two persons but also of two families.

In ancient times, marriage was considered to be a permanent bond. But with time this notion of marriage being a permanent bond has undergone a severe transformation. In the modern era of consumerism there are severe contradictions and differences that arise between parties which ultimately lead to bitterness. Dissolution of the bond of marriage has often been observed to be the end result of such a relationship. The provision of Divorce by Mutual Consent which was inserted by an amendment in the year 1976 and is contained laid down in Section 13B of the Hindu Marriage Act, 1955 has often been considered as a very good way to settle disputes between parties in a peaceful manner.

This articles aims to introspect this process of Divorce by Mutual Consent under the Hindu Marriage Act, 1955 and examine the process and conditions related to filing of such a divorce. It also aims to study the changes that have been incorporated in these sections with time.

I. INTRODUCTION

Divorce is popularly defined as the process of termination of marital union. Divorce is regarded as the best way to get rid of marital responsibilities, obligations and duties. It is the best way of negotiation if an inexplicable difference arises between the parties and to legally end the relationship of marriage.

Divorce is basically of two forms viz.

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1. A Contested Divorce
2. Divorce by mutual consent

A Contested Divorce is the one where one party alleges the other party on certain ground/grounds as specified under the law for which the party seeks Divorce. It can be said that in this form of Divorce one party seeks for the termination of the bond of marriage while the other party does not generally desire such termination. Thus, the party who seeks for the dissolution of marriage has to contest for such Divorce.

Section 13 of The Hindu Marriage Act, 1955 provides the following grounds for obtaining divorce by the parties to the marriage:

1. The other party has committed the offence of adultery
2. The party has been treated with Cruelty by the other party
3. Desertion for a period of not less than 2 years
4. Conversion to any other religion from Hinduism
5. Unsoundness of mind of the other party to such extent which is incurable
6. Suffering from Leprosy of a virulent form
7. Suffering from a venereal disease of a communicable form
8. Renouncement of world
9. The other party has not been heard of a continuous period of seven years or more by persons who would have naturally heard him.

It may also be mentioned in this context that more or less similar provisions of Contested Divorce have been laid down in *Section 27 of the Special Marriage Act, 1954*.

On the contrary, Divorce by Mutual Consent is the form of Divorce in which both the parties mutually agree to terminate their bond of marriage. The provisions relating to Divorce by Mutual Consent of the parties have been laid down in *Section 13B of the Hindu Marriage Act, 1955*. It must be stated in this context that this provision was not present in the original *Hindu Marriage Act, 1955*. After the enactment of this Act, it was often seen that the provisions laid down in *Section 13³* were being used to forcefully end marital ties without the consent of another party. Women were often being discriminated by their husband and were forcefully being divorced. Thus, in order to uplift the status of the women in the society, introduction of

³ The Hindu Marriage Act, 1955

a provision that validated divorce by mutual consent was a necessity. Hence, The Marriage Laws Amendment Act, 1976 led to the amendment of this Act and Section 13B⁴ was inserted. Section 13B(1)⁵ says, “*subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), 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.*”

Section 13B(2)⁶ explains that the parties must wait for at least a period of six months from the date they present the petition and before the ending of eighteen months from the date the petition is presented by the parties, they should make a step forward to the court. After going through the case, if the court thinks that all the facts presented are true then it can grant the petition for divorce.

It has to be stated in this context that this provision is retrospective as well as prospective from its commencement, which means that the parties whose marriage is solemnized before or after the amendment can seek the help of this provision in order to get a divorce.

It may be mentioned in this context that corollary provisions are also contained in Section 28 of the *Special Marriage Act, 1954* which lays down the provisions of Divorce by Mutual Consent for marriages solemnized under the *Special Marriage Act, 1954*. The *Indian Divorce Act, 1869* also contains the provision of divorce by mutual consent. According to this *Section 10A*⁷ parties may together mutually file a petition for divorce in the District Court. In order to do this, they must have lived separately for two years and must be unable to live together. In case parties do not withdraw this petition between 6 to 18 months, the court may dissolve their marriage.

II. PROCEDURE TO FILE A DIVORCE BY MUTUAL CONSENT.

A. PETITION TO FILE FOR A DIVORCE

The parties to the marriage file a joint petition for dissolution of marriage to seek a decree for divorce. The petition must be presented to the Family Court duly signed by both the parties. The spouses have to present the petition on the grounds that; they both are living separately for

⁴ Id. at 2

⁵ Id. at 3

⁶ Id. at 4

⁷ The Indian Divorce Act 1869

a period of one year and it is not possible for the parties to live together; and they have co-jointly decided to divorce, as mentioned in the act. Absence of any party allows any of their family members to file the same on his/her behalf.

The court gives the date for pleading after a period of six months but not more than eighteen months. This period between six months and eighteen months is known as the cooling-off period. If no action is taken on a given date or if the parties pull back the case then the petition stands cancelled. Place of a jurisdiction of the court can be the one where Couple last lived; or where their marriage was solemnized; or where wife is residing at present.

Some of the essential documents required in the above process are:

- a) *Birth certificates and family details.*
- b) *Details of income.*
- c) *Details of assets owned.*
- d) *Income tax returns filed for a period of three years.*

B. APPEARING BEFORE COURT AND INSPECTION OF THE PETITION

The parties have to be present with their respective lawyers who are representing them along with their documents on the date given by the Family Court. The court attempts to bring settlement between the parties in the first instance, so that they could drop the idea of getting a divorce. However, if no parties agree then the court will move further with the petition for divorce.

C. PASSING ORDERS FOR A RECORDING OF STATEMENTS ON OATH

The court after examining the petition if satisfied by it, then Court can order that the party's statement to be recorded on oath.

D. FIRST MOTION IS PASSED AND A PERIOD OF 6 MONTHS IS GIVEN BEFORE THE SECOND MOTION

The court passes an order on the first motion after the recording the statement. A time period of six months is granted to both the parties before the filing of the second motion and before the ending of eighteen months period from the date of such presentation in the Family Court, the second motion is filed.

E. SECOND MOTION AND THE FINAL HEARING OF PETITION

Once the parties decide to go ahead with the proceedings they appear for the second motion and record their statements before the Family Court. In the final hearing, the parties need to be

present in the court. However, the *Supreme Court* can waive off the period of six months given to the party if the court is satisfied with the settlement regarding the issues related to alimony, custody of the child or if the court is of the view that the waiting period will only extend the adversity of the parties.

F. FINAL DECREE OF DIVORCE

The court draws the conclusion from all the facts and statements presented in the petition considering the truth of the statements and that there is no scope of reconciliation between the parties passes the decree of divorce. The divorce becomes final once the decree of divorce is obtained by the court.

III. CONDITIONS NECESSARY FOR DIVORCE BY MUTUAL CONSENT

The provisions relating the conditions that are necessary for Divorce by mutual consent have been stated in *Section 13B (1) of the Hindu Marriage Act, 1955*. The conditions along with a brief discussion are stated as follows:-

A. THE PARTIES HAVE BEEN LIVING SEPARATELY FOR A PERIOD OF AT LEAST ONE YEAR

It may be stated in this context that the expression “have been living separately” does not necessarily mean physical separation or living separately free from marital obligations. In the landmark judgement of *Sureshta Devi v Om Prakash*⁸ the Supreme Court of India ruled out that, “*that the expression living separately connotes not living like husband and wife. It has no reference to the place of living. The parties may live under same roof by way of circumstances, and yet they may not be living as husband and wife. What seems to be important is that they have no desire to perform marital obligations and with that they have been living separately for a period of one year immediately preceding the presentation of the petition.*”

B. IT BECAME UNBEARABLE FOR THE PARTIES TO COHABIT AND HENCE COULD NOT LIVE TOGETHER

After establishing the first condition, it has to be established before the honourable Court that it is impossible for the parties to cohabit and Divorce needs to be granted for the greater good of both the parties and if the divorce is not granted, it would cause much more bitterness among the parties in future. In other words, there is no scope of reconciliation or

⁸ (1992) AIR SC 1904

adjustment between the parties.

The expression “*have not been able to live together*” in Section 13B(1) of the Hindu Marriage Act, 1955 seems to indicate the concept of broken down marriage so much so that there is no possibility of any reconciliation.⁹

C. THE PARTIES MUST HAVE MUTUALLY AGREED THAT THE MARRIAGE SHOULD BE DISSOLVED

After the previous conditions are fulfilled, it is necessary that both the parties must have mutually agreed to dissolve the marriage. It is also necessary that the consent of both that parties should be free i.e. the consent should not be obtained with coercion, undue influence, fraud or misrepresentation.

Moreover, it is mandatory that both the parties should be present during the procedure of the divorce. But in the judgement of *Ramola Mander v. Charanjit Singh Mander*¹⁰ the Court had said that if due to certain circumstances the parties are not available then, the trial court can grant the opportunity to be present for completing the procedure of dissolution of marriage.

D. THE WAITING PERIOD OF SIX MONTHS:

Section 13B (2) of the Hindu Marriage act mentions a time period of six months from the date of presentation the petition and before the ending of eighteen months after which they approach the court. This time frame is also known as the cooling-off period which is given so that the parties rethink about their decision and explore the possibility of settlement and cohabitation.

In the case of *Grandhi Venkata Chitti Abbal*¹¹ and it was held that the waiting period of six months is compulsory or else it will hinder an important aspect of the Section 13B(2) of the Hindu Marriage Act,1955. It was similar in the case of *Dinesh Kumar Shukla vs. Neeta*¹². However, the period can be reduced from six months on the discretion of the court. A different view was held in *Hitesh Narendra Doshi vs. Jesal Hitesh Joshi's case*¹³, the provision of six months was given for a specific purpose, which was that in the period of six months the parties can give time to each other, rethink their decision, introspect about it and reconcile.

⁹ (1992) AIR SC 1904

¹⁰ 2015 (3) Law Herald 2556.

¹¹ AIR 1999 AP 91

¹² AIR 2005 MP 106

¹³ 2003 (3) ALD 81

In the case of *Ashok Hurra v Rupa Ashok*¹⁴, it was held that the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months as mentioned in the act¹⁵, in exercise of its extraordinary powers under Article 142 of the Constitution. The doctrine of irretrievable break-down of marriage as a ground of divorce as per the recommendations of the 71st report of the Law Commission of India is not available to the High Court's as it is solely exercised by the Supreme Court under Article 142 of the Constitution.

In *Visalakshi v. Shivaraman Nair*¹⁶ and *Sreelatha v. Deepty Kumar*¹⁷; it was held that the waiting period as mentioned in the act can be waived depending upon the nature and circumstances of case.

E. WITHDRAWAL OF THE CONSENT BY THE PARTIES:

The parties to the marriage have to jointly file a divorce petition. The controversy arises when one party wants to unilaterally withdraw from it. There have been several contrasting judgments regarding this issue. The purpose of giving a time period of six months is given to allow parties to re-think their decision. However, if one of the parties decides to withdraw the petition, why should it not be allowed?

In *Jayashree Ramesh Londhe v Ramesh Bhikaji*¹⁸, the court held that no party could withdraw from it without the consent of both the parties, as the petition for mutual consent was filed jointly. In the case of *Nachhattar Singh v Harcharan Kaur*¹⁹ the court held that both the parties had voluntarily given consent to file the petition for dissolving the marriage by mutual consent, and to all other conditions mentioned in the Act been fulfilled. So, it will not be open to any of the parties to withdraw the consent.

However, we discover a contradiction in case of *Sureshta devi v Om Prakash*²⁰. In this case the court held that petition of divorce can be withdrawn unilaterally. The Court also said that it cannot pass a decree of divorce by mutual consent if one of the parties withdraws its consent. *"If the decree is solely based on the initial petition it negates the whole idea of mutuality and consent for divorce. Mutual consent to divorce is sine qua non for passing of the decree for divorce under Section 13-B. Mutual consent should continue till the decree of divorce is passed.*

¹⁴ AIR 1997 SC

¹⁵ Hindu Marriage Act, 1954

¹⁶ MFA No. 362 Of 1988 & Civil Miscellaneous Petition No. 1829 & 1830 Of 1991

¹⁷ AIR 1998 Ker 97

¹⁸ AIR 1984 Bom 302

¹⁹ AIR 1986 P&H

²⁰ AIR 1992 SC

It is a positive requirement for the Court to pass a decree of divorce. [280D, 281A.B] ²¹ as mentioned within the judgment.

In the recent case of *Anil Kumar Jain v Maya Jain*²² the Supreme Court held that the prevailing laws, parties filing the divorce petition had their consent at the time of filing which subsist till the second stage. In this stage, as the petition comes up for orders and a decree is finally passed and it upon the Supreme Court who is authorized to exercise the extraordinary powers under Article 142 of the Constitution to pass orders to complete justice to the parties.

The above judgments clearly show that circumstances and nature of the cases is a very important factor which changes the views of the court in deciding the cases. Article 142 of the Indian Constitution also adds to the power of the Supreme Court in granting divorce.

There have also been cases where the parties who have filed the petition have not turned up after the end of the 6 month period. It has often been argued whether the Court in such cases consider it as a withdrawal or not.

A case of such similar circumstances came up in the Rajasthan High Court. In the case of *Suman v Surendra Kumar*²³ the husband after filing a joint consent petition for divorce did not appear for hearings at the second stage. The family court held that a decree can be passed in the absence of any of the parties and mere silence by one party would not amount to withdrawal of the consent one party left the matter. On appeal it was held that as one party has left the matter conclusion had to be drawn in the favor of consent instead of the absence of consent.

IV. CUSTODY OF CHILDREN

In most cases it is observed that the children of such marriage is highly neglected during the process of divorce which very dangerous to the development of a child. And it is a known fact that the presence of both the parents is necessary for the child as both the parents play a very active role for the well-being of their child.

In the year 2000, the Bombay High Court while deciding the suit of *Sarita Sharma v Sushil Sharma*²⁴ approved that “*the welfare of the child should be given priority and every decision should be taken keeping in mind the welfare of the child.*”

This is the rule which is generally followed while deciding the custody of children whose parents

²¹ Id. at 19

²² AIR 2009 SC

²³ AIR 2003 Raj 155

²⁴ 2000 (3) SCC 14

have filed a petition for Divorce by mutual consent.

V. CONCLUSION

The introduction of divorce by mutual consent has been a remarkable one. It has been a great step towards the changing of the laws relating to laws regarding the family system in India. This process of divorce also saves a lot of time and money for both the spouses; moreover, it leaves no scope for unnecessary quarrel. It also provides for solving the disputes between parties in a very amicable manner. With the rising demand for a quick solution to every problem, the process of divorce by mutual consent is the best and fastest procedure to solve the marital problems between the spouses and terminate to the union.
