

Divorce by Mutual Consent

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ABSTRACT

Hindu marriage joins two individuals for life, so that they can pursue dharma i.e. duty, artha i.e. possessions, kama i.e. physical desires, and moksha i.e. ultimate spiritual release together. This union of two individuals as husband and wife is recognized by law in India. Problem occurs when the two are not able to live with each other. In that case the ultimate result is divorce. In this paper an attempt has been made to discuss the divorce by mutual consent in detail.

1. Introduction

Marriage between two persons is a sacred relationship that is not limited to this life alone. It extends across seven or more lives, during which the couple help each other progress spiritually. The adage that marriages are made in heaven is very much true in case of Hinduism. Two souls come together and marry because their karmas are intertwined and they have to resolve many things together upon earth in order to ensure their mutual salvation. The relationship between a couple is essentially a relationship of the souls. Hindus consider marriage as a sacred relationship, between two souls, not just two bodies. Marriage is meant for the continuation of family and practice of dharma. In Hindu tradition, there is no concept as divorce. Once married, a couple are wedded for life. Divorce is a modern practice introduced into Hindu society through the Hindu Marriage Act in India.⁽⁷⁾

1. Divorce by mutual consent as the name suggests, means when both Husband and wife agree amicably amongst themselves that they cannot live together anymore and that the best solution is to Divorce, without putting forth any allegations against each other, in the court of law, than such a Divorce petition presented jointly before the honourably court, is known as mutual consent Divorce. It is the quickest form of divorce in India.

2. Requirements to be complied with for a Mutual Divorce are

Firstly the parties have been living separately for a period not less than one year. It is doubtful whether it was intended by the legislators that the parties have lived separately by mutual consent or by force of circumstances or situation. But it does not seem necessary for the court to go into that matter provided the condition of separate living under the same roof of matrimonial home or in separate residence by the parties is satisfied. Unless the consent of any of the parties to such petition is vitiated by coercion, fraud or undue influence, the court ought not travel beyond the statutory condition of its jurisdiction. Secondly the parties have failed for any reason whatsoever to live together. In other words, no reconciliation or adjustment is possible between them. thirdly the parties have freely consented to the agreement of dissolution of marriage.

Fourthly the parties are at liberty to withdraw the petition. It seems that the petition may be withdrawn even at the instance of one party in course of six months from the date of presentation of the petition. But when a joint motion is taken by the parties after the lapse of six months but before the expiry of eighteen months from the date of presentation of the petition for making inquiry, the unilateral right of a party to withdraw the petition appears to be barred.⁽⁸⁾

3. Process of Mutual Divorce

In all there are two court appearances in a mutual divorce. Firstly A joint petition signed by both parties is filed in the concerned family court. The mutual consent divorce petition should contain a joint statement by both the partners, that due to their irreconcilable differences, they can no longer stay together and should be granted a divorce. This statement also has the agreement to split the assets, custody of children, etc. Secondly In the first motion statement of both parties are recorded and then signed on paper before the Hon'ble Court. Thirdly The 6 month period is given for reconciliation, (the hon'ble court gives a chance to the couple to change their mind) Fourthly 6 months after the first motion or at the end of the reconcile period if both parties still don't agree to come together. Then the parties may appear for the second motion for the final hearing. If the second motion is not made within the period of 18 months, then the court is not bound to pass a decree of divorce by mutual consent. Besides, from the language of the section, as well as the settled law, it is clear that one of the parties may withdraw their consent at any time before the passing of the decree. The most important requirement for a grant of divorce by mutual consent is free consent of both the parties. In other words, unless there is a complete agreement between husband and wife for the dissolution of the marriage and unless the court is completely satisfied, it cannot grant a decree for divorce by mutual consent. Finally Divorce decree will be granted as the Hon'ble Court may deem fit.

Advantage of Mutual Consent Divorce -Divorce By Mutual consent saves time, money and energy for both the spouses, leaves no room for unnecessary quarrel and most importantly avoids washing your dirty linen in public. With the increasing number of Divorce applications being filed and the demand for

quick divorce increasing, Mutual consent divorce is the best option.

Mutual Consent Divorce between Hindu Couple is governed by The Hindu Marriage Act, 1955, under Section 13B, Which states that- 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, 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.

Secondly 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 18 months after the said date, if the petition is not withdrawn in the meantime, the court shall on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of decree.⁽⁸⁾

The Court had opined that a spouse, who gives an undertaking to the court to abide by the consent given in the First motion for dissolution of marriage under Section 13B (1) of the Act and for moving a Second motion petition, cannot be permitted to resile from such an undertaking on the basis of an agreement arrived at between the parties and any attempt to resile therefrom would amount to a breach of the undertaking accepted by the court and therefore, attract contempt proceedings.^(1&2)

Recourse to contempt proceedings against the respondent/wife by the appellant/husband was taken on a grievance that despite a mutual consent recorded before the Family Court to dissolve their marriage, the wife was not cooperating with the husband. Further, in the case suo moto contempt proceedings were initiated by the learned Family Court against the husband for non-compliance of the consent order. The Division Bench held that such an order of initiating suo moto contempt proceedings neglects the mutuality aspect provided for under Section 13B of the Act and once the parties were unable to or did not wish to proceed with the agreement for mutual consent divorce, then the only recourse was to restore the original divorce petition.⁽³⁾

Every effort must be made by the Courts to sustain the institution of marriage. That if a contract between the spouses recording the terms of settlement runs against the public policy, then it must be treated as void ab initio and unenforceable in law and in those circumstances, contempt proceedings cannot be resorted to.⁽⁴⁾

"The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory

only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.' " 'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory."⁽⁵⁾

Where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2), it can do so after considering four factors .firstly the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself. secondly all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts. thirdly the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties. fourthly the waiting period will only prolong their agony. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court. the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation. in conducting such proceedings the Court can also use the medium of video conferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are unable to appear in person for any just and valid reason as may satisfy the Court, to advance the interest of justice.⁽⁶⁾

4. Conclusion

The foundation of sound marriage is mutual care, love, and respect for each other and when the foundation is shaken and conciliation between parties is not possible then it would not be in the interest of parties to continue their marriage and suffer. Judgement of **Amardeep Singh V/S Harveen Kaur** should be followed in letter and spirit while granting divorce by mutual consent.

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