



LAW RELATING TO DIVORCE BY MUTUAL CONSENT: CONTEMPORARY DEVELOPMENTS

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Abstract

Contemporary law is silent on the justification of living separate of the parties to the marriage by agreement to live apart. Till the final decree for the dissolution is not passed by a court of competent jurisdiction, the marriage remains intact. Only divorce puts an end to the marriage. Section 18 of the Hindu Adoption and Maintenance Act, 1956 permits the wife to live separate from the husband in certain cases but that too is not consensual. Requited consent to dissolve the marriage essentially presupposes a contract between the parties to end the matrimonial bond without any allegation on each other under statutory or personal laws applicable to the parties under judicial or non-judicial law applicable to them. Marriage is idealized as exclusive union of a male and female, which is eternal in nature and requires solemnisation and recognition by the society. Dissolution needs no solemnization and recognition by the society. Hindu marriages could be polygamous before 1955 but, were still eternal as, till that time, there was no concept of divorce among Hindus. Introduction of *laissez faire* principle affected this eternal aspect of Hindu marriage turning it into a civil contract in which parties could enter into marriage with their free consent and can dissolve the marriage with mutual consent. With the introduction of monogamy that essentially requires the marriage to be an exclusive union of a male with a female only to the exclusion of others, dissolution by mutual consent has become more meaningful and required when parties are not able to live together as husband and wife and matrimonial bond has broken down beyond repair though any of the party is not able to prove the guilt ground for the dissolution of marriage. In such circumstances refusal to grant dissolution of marriage will not serve any social or individual interest. Such an unrealistic approach ignoring the feeling of the parties where the parties have scant regard for each other feelings and emotions will stimulate negative institutions in the society as a whole and negative attitude in the individual like depression, suicidal tendencies, bigamy and live-in -relationships etc. Though mutual consent divorce is essentially a regulatory process for the dissolution whereby the court observes and satisfies itself that the consent of both the parties is without any coercion, fraud, undue influence and force. The knowledge that marriage could be dissolved mutually without much delay is leading to many hasty divorces. The Apex Court had wide discretion under article 142 of the Constitution of India in favour of justice to dissolve the marriage shrugging off the required mandatory period of six months between the first motion and second motion, where the marriage is causing unnecessary hardship to the parties and they have mutually agreed to dissolve the marriage. Presently non legal groups also equally participate in marital discord matters and consequential actions like dissolution of marriage, custody of children and maintenance etc.

I. INTRODUCTION

Divorce is the process of terminating a marriage or marital tie, according to the law governing the people in matter of dissolution of marriage as per the personal law applicable to

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them. Divorce laws vary considerably around the world specifically, in India different personal laws governs the institution of marriage and its dissolution. The recorded history of early Roman Civilization testifies that marriage and divorce were easy matters. Just as parties could come and live together as husband and wife by mutual consent and without any formalities, they could as easily and without any formalities separate from each other by mutual consent.¹ Mutual divorce or divorce by mutual consent means when the legally wedded husband and wife mutually agree to dissolve their marriage as they are not able to live together anymore and they jointly present a mutual divorce petition before the honourable court without putting forth any allegation against each other. Presently, divorce is a very general phenomenon in Indian society too wherein in the classical times divorce was rare and marriage was considered as an eternal union. India has a lower rate of divorce that is less than 1%, out of 1000 marriages only 13 results in divorce. The lower rate of divorce in India, in comparison with the rest of the world, owes to society norms and pressure leaning in favour of preservation of marriage.² The modern concept of marriage as a contract is an outcome of the lofty ideals of liberty and equality produced by industrial revolution. Industrial revolution developed the thought that all social and human relations are outcome of will and choice of individuals not the status. Presently, Indian and western law considers that the marriage to be effective must be based squarely on personal volition of parties, wherein the parties have free consent to enter into marriage and dissolve the marriage. The global divorce rate has increased up to 257.8% since 1960. Every year, world organisation record global divorce rated. Under Hindu Law, marriage is considered as a sacrament and an eternal union but the element of its being eternal was destroyed by Act with the introduction of the grounds of divorce. Divorce by mutual consent is recognised as a ground of dissolution of marriage under different statutory provisions as the section 13B of Hindu Marriage Act, 1955, section 28 of Special Marriage Act, 1954, section 32B of Parsi Marriage and Divorce Act, 1988, section 10A of Indian Divorce Act and Muslim personal law. These provisions incorporated the doctrine of discharge from marital obligations by mutual consent of the parties, considering mutatis mutandis the importance of the principles of contract for the dissolution of marriage. These provisions for divorce by mutual consent under all these Acts are identical. Classical Muslim law recognise divorce by mutual consent in two forms, *khul* and *mubbarat*. Literally the word *khul* means putting an end his right by the husband over his wife in exchange of something by way of an agreement and *mubbarat* is consensual divorce based on the contract between the parties to live separate on certain terms or without any condition.

II. INDIVIDUALISM AND DIVORCE

Society in general and marriage relationships in particular are growing more individualistic. Marriage is seen as a vehicle of personal fulfilments than an intimate or interdependent relationship. Presently, marriage has grown as less institutionalised and more individualistic forming interdependent partnerships. Spouses are more likely to have their separate bank accounts, more desire to live separate from each other, social groups, and option

¹ Paras Diwan, *Modern Hindu Law* 63 (Allahabad Law Agency, Allahabad, 2006).

² "India has the lowest divorce rate in the world: Countries with lowest and highest divorce rates", *Times of India*, Nov 20, 2018, available at: <https://www.indiatoday.in/education-today/gk-current-affairs/story/india-has-the-lowest-divorce-rate-in-the-world-1392407-2018-11-20> (last visited on June 30, 2019).

not to have children, less caring attitudes and affection, having separate family names and not considering their marriage as a permanent union. The purpose of such behavioural patterns in the contemporary world is to attain independence, personal freedom and identity independent of spouses. Mutual fidelity is considered as the basis of marriage, where for any reason mutual allegiance cannot be maintained, the parties must have freedom to dissolve their marriage bond instead of being left to be carried away leading to irreparable and irreversible consequences for the whole family. Termination of marital bond with mutual consent is recognised in almost all the countries of the world like Belgium, Sweden, Japan, Portugal, United Nations and large number of the Commonwealth and East European Countries as an uncomplicated and facile process of disbanding marital relationship. Mutual divorce has been criticized just because it makes divorce very easy and sometimes very difficult. Most countries have incorporated the provisions for the dissolution of marriage through mutual consent hedged with safeguards. It provides the opportunity to the parties to leave the relationship if and when desired along with fulfilling their individual goals and need of being in a relationship. Individual views and values on marriage institution and its dissolution have changed over time and the society no longer sees marriage as an eternal union.

III. STATUTORY REQUIREMENTS FOR MUTUAL DIVORCE

The Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 provide that a petition for divorce by mutual consent cannot be presented to the district court before a year of solemnization of marriage even in agreement with each other on the ground that the parties have been living separately, the parties are not being able to live together and that the parties have mutually agreed that the marriage should be dissolved. To protect the divorce from being perfunctory and impulsive, the cooling period of 6-18 months is provided in the statute wherein the parties can reflect on their decision to dissolve the marriage. Dissolution through mutual consent was introduced for Hindus by the Marriage Law (Amendment) Act, 1976, for Parsis by Parsi Marriage and Divorce Act, 2001,³ and in Divorce Act it was added by the Indian Divorce (Amendment) Act, 2001⁴ whereas the provision exists since beginning in the Special Marriage Act, 1954.⁵

The basic requirements for the presentation of petition by mutual consent are:

- i. The husband and wife have been living apart for a period of one year or more.
- ii. Parties to dissolution are not able to live together.
- iii. The parties have mutually agreed to dissolve the marriage.

13B. Divorce by mutual consent under the Hindu Marriage Act

(1) According to the provisions of this Act, a joint petition for dissolution of marriage by a decree of divorce must be presented to the district court by both, husband and wife to a valid marriage, such marriage may have been solemnised before or after the passing of the Hindu Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living apart for a period of one year or more, that they are not willing to live together and

³ The Parsi Marriage and Divorce Act, 2001, s. 32B.

⁴ The Indian Divorce (Amendment) Act, 2001, s. 10A.

⁵ The Special Marriage Act, 1954, s. 28.

that they have mutually agreed that the marriage should be dissolved as their temperaments are not compatible with each other.

(2) Second motion after the first motion later than six months after the date of the presentation of the petition mentioned in sub-section (1) and not after eighteen months of the said date, if the implore is not withdrawn in the meantime, the court shall, after hearing the parties, and after making such inquiry as it thinks fit, on being satisfied that a marriage has been duly solemnised and that the averments in the petition are factual, pass a decree of annulment declaring the marriage to be dissolved with the effect from the date of the decree.⁶

While granting required consent divorce, the court is mandatorily expected to conduct a judicial enquiry on many aspects so that the divorce should not be turned out to be a hasty decision. The dissolution of marriage by mutual consent could be of a marriage which is otherwise a valid marriage conforming the personal law governing the parties. The status of marriage valid, void or voidable is of immense importance before deciding on the issue of the relief sought for. Section 14 of Hindu Marriage Act, 1955 provides that court is not competent to entertain any petition divorce by a decree of divorce unless one year has passed since the solemnisation of marriage. The basic purpose of the legislature seems to give time to the parties to adjust with each other. Marriage is an important institution in any individual's life, and therefore before getting the marriage dissolved by mutual consent, parties must be given some reasonable time to reflect on their move to dissolve their marriage. Law is in favour of preservation of marriage, therefore different statutes provides for some period of togetherness before separation in order to file the petition for disbanding of marital tie permanently with mutual consent. Section 14 is general provision applicable to all kinds of divorce whether by mutual consent or otherwise providing for a period of one year since the solemnization of marriage whereas section 13B of Hindu Marriage Act, 1955 is talking about a period of one year "living separately" immediately preceding the presentation of the petition. The expression living autonomously connotes not living like husband and wife though under one roof. It has no indication towards the place of living. The parties may be living under the same roof and yet they may not be living as spouses of each other. The parties should have no pining to perform their marital obligations⁷ towards each other.

Mutual consent for the purpose of dissolution of marriage should continue till the presentation of the second petition in continuity of the first petition after 6 months but before a period of 18 months. Section 13B furnishes for a period of minimum six months after the first motion being moved, if in the event the parties changed their minds during the specified time period. Hence, after the first motion and the presentation of the final petition for mutual break up, the parties obligatory wait for a period of six months before the second wave can be moved, and at that point of time, if the parties have made up their minds that they would be not capable to live together, the Court, after making such inquiry, as it may believe essential, grant a decree of divorce pronouncing the nuptials to be dissolved with consequence from the date of the decree. There is no hesitation in concluding that the legislature had in its insight had stipulated a cooling period of six months from the date of filing of a petition for mutual consent till such divorce is actually granted, with the intent that it would save the institution of

⁶ Ins. by Act 68 of 1976 (w.e.f. 27-5-1976).

⁷ *Sureshta Devi v. Om Prakash*, AIR 1992 SC1904.

marriage⁸. Both of the parties may withdraw his/her assent at any time earlier than the transient of the decree even after the running out of 18 months from the date of filing of opening petition⁹. The long period of six to eighteen months is given in divorce by mutual consent as to give occasion and chance prospect to the parties to reflect on their moves and seek suggestions from their friends and own flesh and blood. The Court ought to be satisfied about the bona fides and concurrence of both the parties. If there is no consent at the time of probe, the Court gets no authority to pass the divorce decree. If the Court is held to have passed the decree solely based on initial petition, it negates the whole idea of mutuality. There can be no one-sided withdrawal of assent. It was held, that if the consent of the wife was acquired by fraud and wife was not prepared to give consent, there may possibly be unilateral withdrawal of consent¹⁰. The parties must be living separately for a period of at least one year and must resolve towards ending the marriage. The parties must not be performing their conjugal obligations; physical separation is not the only criteria to assess abandonment. It is the total denial of performing obligations of married state. In *Smruti Pahariya v. Sanjay Pahariya*,¹¹ the Supreme Court held that the consent cannot be presumed by the nonattendance in the court of one spouse at the conclusion of 6 months nippy off period in mutual consent divorce petition. It also opined that Court cannot imagine consent of a party only because both the parties are signatories to the first motion under 13B of the Act.

IV. JUDICIAL ATTITUDE

In *Amardeep Singh v. Harveen Kaur*,¹² the question crop up for the deliberation of the court in this appeal is whether the minimum period of six months specified under sec 13B of Hindu Marriage Act, 1955 in a divorce proceeding divorce on the basis of mutual consent is mandatory or directory that can be unperturbed in some extraordinary state of affairs?. The Court held that where a party has already acted on the consent terms and conditions either wholly or in part to his/her detriment, the other party cannot be allowed to dissent from the consent given in the first motion. In *Nikhil Kumar v. Rupali Kumar*,¹³ the Supreme Court waived 6 months statutory period using its power given under article 142 of the Constitution of India and the marriage was dissolved to do complete justice. In *Manish Goel v. Rohini Goel*,¹⁴ a bench of two Judges of SC held that authority of this Court under article 142 of Constitution could not be used to waive the legal period of six months for filing the second motion under section 13B as doing so will be passing an order will be exploitation of constitutional provisions. In *Supreme Court Bar Assn. v. Union of India*¹⁵, the Constitution Bench of Supreme Court held under article 142, Apex Court cannot altogether ignore the substantive provisions of a statute and pass orders with reference to an issue which can be settled only through a mechanism prescribed in another statute. The Court observed that the power under article 142 can be exercised in cases where the court found the marriage to be

⁸*Devinder Singh Narula v. Meenakshi Nagia*, AIR 2012 (SC)2890.

⁹*Hitesh Bhatnagar v. Deepa Bhatnagar*, AIR 2011 SC 1637.

¹⁰AIR 1992 SC 1904.

¹¹2009 (8) SCR 631.

¹²Civil Appeal No. 11158 OF 2017 (Arising out of Special Leave Petition (Civil) No. 20184 of 2017).

¹³(2016) 13 SCC 383.

¹⁴(2010) 4 SCC 393.

¹⁵(1998) 4 SCC 409.

totally impracticable, emotionally scary, beyond retrieve and conked out irretrievably. This power can be work out only to put an end to useless litigations and to save the parties from further anguish.¹⁶

V. CONCLUSION

Under the customary Hindu Law, as it stands before the statutory law on the dissolution, marriage is an eternal union and can be dissolved by death only. Statutory provisions of different personal laws authorized the court to disband the marriage on different statutory grounds. The object of the provisions to dissolve the marriage which is otherwise once and for all broken down is to enable the parties to re-establish themselves as per accessible options. Forcible perpetuation of matrimonial status does not serve the purpose and six months cooling period is a safeguard against hurried decision to breaking the tie. The purpose of six months cooling period is not to prolong the agony of parties or to perpetuate a purposeless marriage. Though every effort needs to be made by the court to save the marriage, and if there is no probability of reunion, and there are curative chances, the court should not be toothless in granting the parties a better option. Whether a provision is mandatory or directory, language alone is not crucial; regard should be there to the context, subject matter and purpose of the provision.¹⁷

The supremacy under article 142 of the Constitution has been used by the Supreme Court in a number of cases even after the judgement of *Manish Goel*.¹⁸ The Court in *Amardeep Singh*¹⁹ was of the viewpoint that since *Manish Goel* lays the binding law and in absence of contrary decision by a larger bench; power under article 142 of the Constitution cannot be exploited contrary to statutory provisions especially when Apex Court is approached only for the purpose of waiver of the statutory period only. It was submitted by the *amicus curiae*'s Shri Abhishek Kaushik, Vrinda Bhandari and Mukunda Rao that the period enshrined in the section 13B is directory and cannot be waived by the Apex Court, except in extraordinary circumstances. Section 13B (1) relates to sway of the court and the petition is maintainable only if the parties are living singly for a period of one year before filing the motion and that are willing to live separate from each other and have agreed that the marriage should be dissolved. Section 13B (2) is technical guiding the process and the discretion to waive the period is considered looking into interest of justice.

The Court in this case laid down the guidelines to be followed while waiving the statutory period of six months as follows

- i. The statutory period of minimum six months specified in section 13B (2), after the statutory period of separation of parties for one year under section 13B (1) is already over before the first joint motion itself by the parties.
- ii. Courts should make all efforts to reunite the parties. All efforts for mediation/conciliation of parties including efforts in terms of order XXXIIA, rule 3 of CPC under section 23(2) of the Act and section 9 of the Family Courts Acts to reunite

¹⁶*Poonam v. Sumit Tanwar* (2010) 4 SCC 460.

¹⁷*Kailash v. Nanhku* (2005) 4 SCC 480.

¹⁸*Supra* note 14.

¹⁹*Supra* note 12.

the parties have failed and there is no probability of success in that direction by any supplementary efforts.

- iii. The parties have finally settled their issues including alimony, custody of the child or any other imminent issues between the parties related to the dissolution.
- iv. The Court is of the view that waiting period will only prolong their agony.
- v. The waiver application for waiving 6 months' time period can be filed within a week after the first motion praying for waiver with reasons thereof.

The decree for dissolution under section 13B is open to revision under section 115 of Code of Civil Procedure.