



RISE OF DIVORCE IN INDIA

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ABSTRACT

Marriage is an institution where two individual entities came together to form a union. In Hindu mythology there is seven lives (saat janam) of every person in which he/she promised to remain with the same person throughout these seven lives. Even according to 'Hadith' by performing nikah a person makes himself/herself complete and purifies his/her Iman. Due to these social and religious beliefs India is one of the countries in the world having minimum number of divorce cases. But as our society grows from time to time our law also transforms, hence, we have been provided various grounds for dissolution of marriage. In this research paper we are going to study the grounds for dissolution of marriage and the comparison between Hindu Marriage Act, 1955 and Dissolution of Muslim Marriage Act, 1939.

INTRODUCTION

Divorce defined in section 13 of Hindu Marriage Act, 1955 (here in after called as HMA). There are 3 ways to dissolve marriage which are-

1. In the case of void marriage, it can be dissolved by Decree of nullity under section 11.

2. In the case of voidable marriage, it can be Annulled by Decree of Nullity under section 12.
3. If marriage is valid, then it can be dissolved by Divorce under section 13.

In this we will Discuss about Divorce and its different grounds on which divorce can be seek. Divorce means to end the conjugal relationship by way of law. It is the process of dissolution of marital relationships.

Concept of Divorce in India

Even though Divorce is not so popular in India but still we can find its evidence in the Arthashastra of Chanakya but that is a legal and political document not a religious scripture. Now divorce has become an acceptable part of modern society. For Hindus divorce is governed by Hindu Marriage Act, 1955 and for Muslims it is governed by Dissolution of Marriage Act, 1939. Under Hindu Marriage Act, Bigamy is one of the grounds where marriage becomes void ab initio and it also gives right to the wife from former marriage to take divorce, but the same is not true for the Muslim law because restricted polygamy is allowed under it. However, polygamy is restricted for all Indians except Muslims in 1956.

In Muslim law some grounds are defined which can only be exercised by husband for example, talaq-e-sunnat, talaq-e-tafwiz. Whereas, under Hindu law some grounds are provided which can only be exercise by wife for example, sodomy, bestiality.

Under Hindu law, a person can remarry after the decree of divorce or if appeal allowed then after the expiration of the period



allowed. In case if appeal is made then after its final disposal the person can remarry. But in case of Muslim law the lady has to observe the period of iddat before remarriage. Basically, iddat period is observed to avoid any complications regarding paternity of the child.

There is a concept of dower in Muslim law which is payable on demand or at the time of divorce or death, no such concept is present in Hindu law.

Theories of Divorce

There are 3 theories of Divorce which are-

1. Fault Based Theory which is recognized in HMA also known as Guilt theory .It is essential that there is the fault of one party and other party is innocent, this theory provides the right of divorce to the innocent party. However it depends upon the innocent party that whether it wants to exercise this right or forgive the party for its fault.

Theory of Recrimination- According to this theory when both the parties commit matrimonial offence then the right of divorce doesn't provide to any of the parties.

2. Consent Theory under which marriage can be dissolved by parties mutually under section 13B of HMA. Under this theory condition precedent is that parties must mutually agree for divorce. This theory is added by Amendment Act of 1976.

3. Breakdown Theory of Marriage (Irretrievable breakdown of Marriage) which is not recognized in HMA only Supreme Court (herein after called S.C.).¹ It is also defined as the failure of marital obligations.

GROUND S for divorce under Hindu Marriage Act, 1955

There are many grounds to seek Divorce in HMA which are as follows-

- Adultery
 - Cruelty
 - Desertion
 - Conversion
 - Unsoundness of mind
 - Leprosy [omitted by 2019 Amendment Act]
 - Venerable disease in communicable form
 - Renouncement of world
 - Person not heard for the period of 7 years ²
- Now we will discuss each ground one by one in legal context.
- ADULTERY- Adultery is one of the grounds of divorce which is given in section 13(1) (i) HMA. In this person had voluntary sexual intercourse with any person other than his/her spouse after the marriage. One of the main ingredients in this that it should be voluntary because if it is involuntary it considered as Rape. Adultery is now not a crime under Indian Penal Code, but a ground of Divorce as held in Joseph Shine v. Union of India³.

In this a petition can lie at the instance of Husband or Wife if the other party after solemnization of marriage committed even a single act of adultery with the person of any

¹ Bhattacharjee, Dr. (2013). Void and Voidable Marriage under Hindu Marriage Act, 1955, and Divorce. SSRN Electronic Journal. 10.2139/ssrn.2238537.

² Section 13 Hindu Marriage Act, 1955

³ (2019) 3 SCC 39, AIR 2018 SC 4898



sex because S.C. recognized the voluntary sexual intercourse between same sex couples in Navtej Singh Johar v. Union of India⁴ case.

- **CRUELTY-** This is given in Section 13 (1)(ia) of HMA. In this ground respondent has treated the petitioner with cruelty. Cruelty can be mental or physical or financial. Cruelty has inseparable nexus with human conduct or human behavior it differs from person to person depending upon upbringing, level of sensitivity, education, family, social status, custom, religious belief, etc. In civil law cruelty differs from cruelty in criminal law.

In cruelty burden proof lies upon the petitioner, petitioner has to prove the circumstances and in the light of circumstances court has to examine the possibilities and then court decide whether there was cruelty or not. The court will examine according to circumstances of cruelty whether circumstances cause reasonable apprehension in the mind of petitioner that it would be harmful and injurious to the physical or mental health of petitioner. Generally, cruelty does not consist of single isolated out but consists in most cases of the series of acts spread over a period of time. The above was explained in the landmark judgement of Dastane v. Dastane⁵. In case of Ravi Kumar v. Zulmi Devi⁶ the court observed that in matrimonial relationships cruelty would mean absence of mutual respect and understanding between the spouses which sour the relationship and often lead to various outburst of behavior which can be termed as cruelty it defies any definition and its categories are never closed.

In the case of XXX V. XXX⁷ court discussed whether marital rape can be considered as a ground for Divorce under mental cruelty or not. The Court has said that the Indian Penal Laws does not deal with marital rape but the same can be considered as a ground of Divorce under cruelty. Marital rape occurs when Husband is under notion that body of wife owes to him. Treating the wife's body as something owing to Husband and committing sexual act is marital rape. The right to respect his/her physical and mental integrity or violation of bodily integrity and therefore any disrespect or violation of bodily integrity is a violation of Individual Autonomy.

DESERTION- This is given in section 13(1) (b) of HMA. In this the other party has deserted the petitioner for a continuous period of not less than 2 years immediately prior to the presentation of petition. Whenever the continuous period breaks fresh period starts. Desertion means permanently for sacking it is a continuous act. Desertion is of 2 types-

1. Actual Desertion- Not defined in HMA. In this party actually left the matrimonial home that is left himself without any reason.
2. Vertual Desertion- In this party by himself did not leave the matrimonial home rather circumstances are so created that the party has to leave.

According to Halsbury's law of England, in its essence desertion means the intentional permanent for sacking and abundant of one spouse by other without the other's consent and without reasonable clause. It is a total repudiation of obligation of marriage.

⁴ AIR 2018 SC 4321; [W. P. \(Crl.\) No. 76 of 2016](#)

⁵ AIR 1975 SC 1534.

⁶ I (2006) DMC 210

⁷ WP(C).No.29209 OF 2020(A)



Desertion is not a withdrawal from a place but also from the state of things for what the law seeks to enforce is the recognition and discharge of common obligations of the marriage state that is matrimonial home.

The person who actually withdraws from Cohabitation is not necessarily deserting spouse that is Desertion is a continuing offence.

In the case of Bipin Chandra V. Prabhawati⁸ (1957 S.C.) the court considered the issue of desertion and observed that the essential conditions for the offence of desertion so far as deserting spouse is concerned are-

1. Intention to bring cohabitation permanently to an end i.e.

- a. Animus deserendi
- b. Factum of separation

2. And as regards the deserted spouse the essential elements are

- a. Absence of consent
- b. Absence of conduct giving reasonable cause to the spouse to leave matrimonial home to form necessary intention.

Desertion is a matter of inference to be drawn from facts and circumstances of each case.

- **CONVERSION**-This is given in section 13(1)(ii). In this the respondent ceased to be a Hindu that is converted to another religion. By conversion only marriage does not dissolve automatically marriage continue to exist, but it gives right to other party for Divorce by filing in court.

- **UN SOUNDNESS OF MIND**-This is defined in section 13(1)(iii). In this the respondent is of incurable unsoundness. The petitioner can claim divorce where there is supervening unsoundness of mind and mental disorder of nature mentioned in the explanation of section 13(1)(iii). It is not necessary that it should be present at the time of solemnization of marriage, but it should be present before filing of petition. The mental disorder should be such which mitigates against continuance of marriage⁹. The test to see the degree of unsoundness of mind or incapacity of mind was given in the case of Whysall V. Whysall (1959) which states that the practical test of degree is to be found in phrase incapable of managing himself and his affairs including problems of married life. The Burden of Proof is on the unsound mind of respondent and also that unsoundness is incurable is on the petitioner and the petitioner has to prove the same.

- **LEPROSY**-Given in section 13(1)(iv) which says person has suffering from a virulent and incurable form of leprosy, but it was omitted by 2019 Amendment Act.

- **VENERABLE DISEASE IN COMMUNICABLE FORM**- This is given in section 13(1)(v). In this the respondent is suffering from such venerable disease which will communicate to other person also. In this there is always the chance of communication with the other spouse and there is danger to life for another spouse. The Diseases which are not curable and such dangerous that there are more likely the chances of death in any form such as AIDS etc. Corona also a communicable disease but somehow it is

⁸ 1957 AIR 176

⁹ Deb, Shakti. (2012). A Critical Analysis of Child Marriage Law in India with Special Reference to

Hindu Law. SSRN Electronic Journal. 10.2139/ssrn.1998189.



curable. Is corona a ground of Divorce? Up till Now it is not. The reason behind this is that the marriage bond between spouses should not be so strong that it endangers their health. While deciding the case, the court may also consider the duration of the illness, the severity of the disease, and the possibility of cure.

- **RENOUNCEMENT OF WORLD-** This is given in section 13(1)(vi). In this respondent has renounced the world by entering any religious order. If the respondent renounces the world, then petitioner gets the right to file for Divorce petition. Renouncement means to go away from the matrimonial obligations and accept the religious affair like a Sahu or Baba who only spend their life for religion and nothing to do with matrimonial obligations. The acceptance of religious world consider person civilly dead, and this way of life is absolute and irrevocable.

In the case of Sital Das V. Sant Ram,¹⁰ the S.C. held that performance of some rites and ceremonies is essential to enter into a religious order.

- **PERSON NOT HEARD FOR 7 YEARS-** This is given in section 13 (1)(vii). in this respondent has not been heard alive for 7 years Under Section 108¹¹ that person is presumed to be dead that is Judicial Death Under Section 13(1)(vii) the petitioner will get right to file for Divorce if the respondent has not been heard of for the period of 7 years or more by petitioner or those who would have naturally heard of him. This is based on presumption of section 108 Indian Evidence Act in which states the fact that if a person (Respondent) is absent for 7 years from the life of another person (Petitioner) who would

have been in normal circumstances heard of him, if he had been alive, in that circumstances it is the sufficient evidence for presumption of death and on same bases dissolution of marriage may be granted to the petitioner.

The object of this rule is not to establish whether the respondent was dead or alive, but the point of fact is that the day on which the decree is passed the fact that whether he is dead or alive is a ground for taking action under section 13(1)(vii). Therefore, Divorce granted under this is valid and effective even if it is subsequently transpiring that respondent was alive when decree was passed.

Grounds on which only wife can seek Divorce

1. Before commencement of the Hindu Marriage Act 1955, if Husband was married and both spouses are living at time of presentation of petition and that Husband after this Act again get marry and wife come to know about that then she can file petition for Divorce because after HMA 1955 monogamy is the rule.
2. In section 13(2)(ii) wife gets right to Divorce if she gets to know that Husband has been guilty of rape, sodomy or bestiality. This clause is embedded on the object that person should respect women's dignity, no wife wants that her Husband is of a character who did not respect other women's dignity, and no one wants to live with a person of bad character.
3. In section 13(2)(iii) the right given to wife for Divorce if she is getting maintenance from

¹⁰ Civil Appeal No. 67 of 1953

¹¹ Indian Evidence Act , 1832



the Husband by a Decree of court under section 18 of Hindu Adoptions and Maintenance Act 1956 or in section 125 crpc and she was living apart from Husband and since passing of Decree or order, cohabitation not been resumed for one year or upwards.

4. Section 13(2)(iv) provides that the marriage of a minor girl has been solemnized before the age of 15 years then she has right of repudiation of marriage till she attains the age of 18 years however it would be immaterial whether marriage is consummated or not before she attained the age of 15 years. The object behind this is that at age she was not so mature that she could take such decisions, and this would be considered as forceful marriage and given right to repudiate the marriage.

Grounds of Divorce under Muslim Law

Dissolution of Muslim Marriage Act, 1939

Conditions for valid talaq

- Capacity – Sound mind, Puberty
- Free Consent
- Oral or in writing

Dissolution of marriage can be divided on the basis of

- ◊ By Husband – Talaq, Ila, Zihar

Talaq can be further divided into talaq-ul-sunnat and talaq-ul-biddat

- By Wife- Talaq-e-Tafwiz
- Mutual Consent- Khula, Mubarat
- Under dissolution of Marriage Act – Lian, Fask

Talaq-ul-sunnat is further divided between Ahasan and Hasan. Ahasan is revocable before iddat period .it is considered as most proper form of divorce. One can pronounce this only during tuhr period.

Ahasan is pronounced 3 times during successive tuhrs. On third declaration talaq

becomes irrevocable and marriage dissolves. It is called as proper form of talaq.

Ila (vow of continence)- husband swears on god not to have sexual intercourse with his wife and observe 4 months continence on this marriage dissolves. And it is an irrevocable divorce.

Zihar- If husband compares his wife to any female within prohibited degrees then wife got a right to refuse to sexual intercourse. Upon expiry of 4 month zihar completed .

Talaq by wife (talaq-e-tafwiz)- this is a delegated divorce, where husband delegated power to wife to divorce.

Divorce by Mutual Consent-Khula (divorce by purchase) wife after divorce without consideration to husband accept divorce .

Mubarat- Offer from either party, this divorce is irrevocable

Impact of Divorce

➤ On Spouse

- Increase in health issues
- Loss of faith in relationship
- Society's discrimination
- Loss of financial stability
- Feeling of guilt
- Differences with friends and family

➤ On Children

- Bad academic performance
- Health issues
- Effect on mental health
- Intense sadness
- Trouble with relationship
- Depression
- More prone to substance abuse
- Anxiety



➤ On Family

Mother Child relationship got affected
Father Child relationship got affected
Sibling relationship
Grandparent grandchild relationship

CONCLUSION- In Hindu law, marriage is considered as a sacrament. Family is one of the important aspects, thus many people had better aware of the significance of relationship in family we are living in a dynamic society, it changes from time to time. People gets aware about their rights, social status, there individual autonomy, they recognizance that they have other way if their rights are violated one such right is Divorce. This is also a reason why Divorce cases are rising in India today for the early disposal of such cases Family Courts are established in each District.

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