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Overview On Indian Legal Divorce Procedure In Hindus

Dr. Govind Pandey
PhD, LLM, LLB

Advocate, High Court of Madhya Pradesh, Jabalpur, MP, India

*For Correspondence: 1128, Infront of Power House, Near 90 Quarters, Sanjivinai Nagar, Garha, Jabalpur, M.P.- 482003

Abstract

“Divorce” is described as a legal dissolution of the marital union between a man and a woman. In “The Indian Divorce Act”, the separation is granted by the Court of Law after receiving a petition from either husband or wife. “Juridical Separation” means the legal separation between husband and wife, granted by the court on a petition from either husband or wife or both. Divorce is followed by different steps, viz. granting alimony or maintenance, child custody and child visitation, distribution of property and distribution of debts. When the couples agree to divorce, the court will consider a divorce with mutual consent as per the Indian Divorce Act. With regard to property, the couples must decide who gets which part of the property (both movable and immovable property). However, there is no minimum or maximum limit of money support in alimony or maintenance issues. Child custody in mutual consent divorce can also be shared or exclusively of jointly depending upon the understanding of spouses. In view of this, the present article highlights the Indian Legal Divorce Procedure with special reference to the Hindu religion according to “The Indian Divorce Act”.

Keywords: Divorce, Legal (Law), Indian Divorce Act, Court of Law, Marriage.

(1) Introduction-

In Indian legal system, the divorce rules and procedure differs according to the religion or community of the husband and wife. The Hindu, Buddh, Sikh and Jain religions / communities are governed by the Hindu Marriage Act, 1955; while Muslims are governed by the Dissolution of Muslim Marriages Act, 1939; Parsis by the Parsi Marriage and Divorce Act, 1936; and Christians are governed by the Indian Divorce Act, 1869. However, the civil and inter-community marriages have the Special Marriage Act, 1956. The State of Jammu and Kashmir is excluded from this divorce Act, although the residents domiciled in other states but residing in Jammu and Kashmir can get the benefits of these provisions and rules. A Christian couple can get the divorce with mutual consent (no-fault divorce or mutual divorce), or either spouse may file for divorce without the consent of the other (fault divorce) according to the Indian Divorce Act.

In “The Indian Divorce Act”, the separation is granted by the Court of Law after receiving a petition from either husband or wife. “Juridical Separation” means the legal separation between husband and wife, granted by the court on a petition from either husband or wife or both. Divorce is followed by different steps, viz. granting alimony or maintenance, child custody and child visitation, distribution of property and distribution of debts. The procedure is for filing a divorce in India is normally regulated by the provision of “Code of Civil Procedure”, 1908. The High court may verify the cases for confirmation of a decree for dissolution of the marriage.

(2) Types of Divorce-

(a) Divorce through mutual consent: If the husband and wife both are agree for taking divorce, the Court of Law will consider the divorce case on the basis of mutual consent according to Section 10A of Indian Divorce Act, 1869. This section of the Act states that the couple will be separated for at least two years, provided that the couples have not been living as husband and wife during this period. If the couples desire separation for over a year, they should be able to prove that they have not been able to live together. There are three aspects regarding which the couples have to reach a consensus, viz. alimony or maintenance issues, custody of child and property rights. In these matters, they need to agree mutually. In case of “Alimony” or “Maintenance”, there is no minimum or maximum limit of support as per the Divorce Law. “Child Custody” in the mutual consent divorce can also be shared or joint or exclusive depending upon the understanding of the spouses. In case of the “Property Rights”, the couples must decide who gets which part of the property (both movable and immovable property), and the bank accounts also everything must be divided. The duration of divorce by mutual consent may vary from 6 to 18 months, depending on the decision of the Court of Law.

(b) Divorce without mutual consent (Dissolution of marriage): As per the Indian Divorce Act, either husband or wife can file the petition for dissolution of marriage. Every petition should contain as distinctly as the nature of case permits, the facts on which the claim to have such marriage dissolved is founded. The conditions when they can file the petition are as below:

(i) Petition by husband- Any husband can present a petition to the District Court or the High Court, praying that his marriage needs to be dissolved on the ground that his wife has been guilty of adultery since the solemnization of marriage. As per the Act, such marriage might be solemnized according to the Christian Marriage Act.

(ii) Petition by wife- Any wife can present a petition to the District Court or the High Court for dissolution of marriage. The wife can file such petition under any of the following grounds-

- If husband went through a form of marriage with another woman.
- If husband has been guilty of incestuous adultery since the solemnization of marriage.
- In case of bigamy with adultery.
- In case of marriage with another woman with adultery.
- In case of rape, sodomy or bestiality.
- In case of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et toro*.
- In case of adultery coupled with desertion, without reasonable excuse for two years or more.
- If husband has exchanged his profession of Christianity for the profession of some other religion.

(c) Dismissal of petition- Court of Law can dismiss the divorce petition on certain grounds. However, when the District Court dismisses such petition, the petitioner can file a similar petition before the High Court. The District Court can dismiss the divorce

petition on the following reasons-

- In case of evidence for any petition is not satisfied by the court or the petitioner’s case has not been proved.
- If the court is not satisfied that the alleged adultery has been committed, find that the petitioner has, during the marriage, been accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of.
- If the petition is prosecuted in collusion with either of the respondents named in the petition.

(3) Procedure for Filing a Divorce-

The procedure is for filing a divorce in India is normally regulated by the provision of “Code of Civil Procedure”, 1908. The procedure for taking divorce is initiated by filing a petition, which is followed by affidavits from both the husband and wife in the District Court. The petition must have the following details:

- Name of the parties;
- Status and domicile of the parties;
- Date and place of marriage;

- A principal permanent place where the parties cohabit;
- Place where the parties last resided together;
- Names of the children of the marriage (if any) with the date of birth;
- The ground of seeking divorce or separation;
- The facts and details by which the petitioner seeks the relief;
- That the parties are not deceiving the court by collaborating;
- The averments made are verified after 6 months couple has to re-appear in the front of court after filing a second motion petition for mutual consent divorce;
- After hearing from both the husband and wife, if the judge is satisfied that all essential grounds are filing the recruitments and meeting the needs of divorce, the couple grants a mutual divorce decree; and
- Custody of child, alimony to wife and litigation expenses will be considered on issuing a decree for divorce.

The following documents have to be furnished for filing a divorce in India according to the Indian Divorce Act, 1869-

- Address proof of husband;
- Address proof of wife;
- Marriage certificate;
- Four passport size photographs of the marriage;
- Evidence for proving that the spouses are living separately since more than one year;
- Evidence of the failed attempts of reconciliation;
- Income tax statement for the last two years;
- Details of the profession and present remuneration;
- Information relating to family background; and
- Details of property and other assets owned by the petitioner.

(4) Decree by the Court of Law on Marriage-

(a) Decree for dissolving marriage: In case the court is satisfied and the evidence of a case of petitioner has been proved, the court will pronounce a decree declaring such marriage to be dissolved. As per the Act, the court will not be bound to pronounce such decree for the reasons give below-

- If it finds that the petitioner has been guilty of adultery;
- If the petitioner has been guilty of unreasonable delay in presenting or prosecuting such petition;
- In case of cruelty towards the other party to the marriage;
- In case of having deserted or willfully separated himself or herself from the other party before the adultery complained and without reasonable excuse; and
- In case of such willful neglect or misconduct towards other party as has conducted to the adultery.

(b) Confirmation of decree for dissolution: Every decree for dissolution of marriage made by a District Judge or court will be subject to confirmation by the High Court.

(c) Verification by High Court: The High Court will verify the cases for confirmation of a decree for dissolution of the marriage. If a court composed of three Judges, the opinion of the majority will prevail or in case of a court composed of two Judges, the opinion of the Senior Judge will be taken. If the High Court needs for further enquiry or additional evidence, may direct such enquiry to be made or evidence to be taken. The result of the enquiry and the additional evidence will be certified to the High Court by the District Judge, and the High Court will make an order confirming the decree for dissolution of marriage.

(d) Petition for decree of nullity: Any husband or wife can present a petition to the District Court or the High Court, praying that his or her marriage may be declared as null and void. Decree of nullity shall be made on any of the following reasons-

- The respondent was essential at the time of the marriage and at the time of the institution of the suit;
- The couples are within the prohibited degrees of consanguinity or affinity;
- In case of either party was a lunatic or idiot at the time of the marriage; and

- In case the former husband or wife of either party was living at the time of the solemnization, and marriage with such husband or wife was then in force.
- Nothing in this section will affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.

(e) Confirmation of decree of nullity by High Court: Nothing in the above section of the Act shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud. Every decree of nullity of a marriage made by the District Judge shall be subject to the confirmation by the High Court.

(5) Juridical Separation-

“Juridical Separation” is the legal separation between the husband and wife, granted by the court on a petition from either the husband or wife or both. In judicial separation, the marital tie between the husband and wife continues to exist, and neither of them enjoys the freedom to be re-married. The husband or wife can obtain a decree of judicial separation on the ground of adultery or cruelty or desertion without reasonable excuse for two years or more, and such decree will have the effect of divorce under the Indian Divorce Act.

The petition (application) for juridical separation can be applied on the ground of adultery or cruelty or desertion without reasonable excuse for two years or more. Either husband or wife can make application for judicial separation on any one of the grounds as stated above by petition to the District Court or the High Court; and the court, on being satisfied with the truth of the statements made in such petition will grant judicial decree separation, accordingly.

(6) Separated Wife-

In case of a judicial separation under the Indian Divorce Act, the wife will whilst so separated, be considered as an unmarried woman for contract, and wrongs and injuries, and suing and being sued in any civil proceedings; and her husband will not be liable in respect of any contract, act or costs entered or incurred by her during the separation. In every case of a juridical separation under this Act, the wife will be considered as unmarried from the date of the decree, and while the separation continues. The separated wife will be considered as unmarried concerning the property of every description which she acquires. The property held by the separated wife can be disposed of by her in all respects as an unmarried woman.

(7) Alimony or Maintenance, Property Settlements and Child Custody- Divorce is followed by three different steps, viz. granting of alimony or maintenance, child custody and child visitation, and distribution of property and distribution of debts.

(a) Alimony: When two people are married, they must support each other. As per the “Code of Criminal Procedure”, 1973, the right of maintenance extends to any person economically dependent on the marriage. This will include, spouse, dependent children and even indigent parents. The alimony claim of either spouse (although in the majority of cases, it is the wife) depends on whether the husband has sufficient means. While deciding that the alimony is to be paid, the courts will take into account the earning potential of the husband, his ability to regenerate his fortune (property is given to the wife) and his liabilities. In some cases, the court can make an order to the husband for payment to the wife of monthly or weekly sums for her maintenance and support. The most important factor that influences the alimony is that the amount of alimony depends upon the length of marriage in a contested divorce. The divorce after a decade of marriage entitles the spouse to life-long alimony. The other important factors that need to be considered are- age of person who is entitled to receive the alimony; economic condition or earnings potential of the person who shall pay the alimony; health of spouse because bad health or bad medical condition of one of the spouses who is going to

receive the alimony may act in favour of him or her, so ill person can claim larger alimony by his or her bad health condition; and the spouse who retains custody of a child would be entitled to either pay lesser alimony or be entitled to a greater amount while the child is a minor.

(b) Property settlements: As per the Indian Divorce Act, if a person is married, irrespective of the fact that a divorce petition has been filed, that person has the right to occupy the property. In case that person is looking after children, the case is much stronger, while the property may be granted to one or the other spouse in the divorce settlement. Both the wife and husband have the right to remain on the property until the decree from the court.

(c) Child custody: The courts will usually agree to the decision of the parents in a mutual consent divorce; the court will be expected to check the best interest of the child. In case of a contested divorce, the court will examine the ability of the father or mother be a parent to the child, as stated above, non-working mothers are regularly given custody of their children, but fathers are expected to provide financial support.

(8) References-

Code of Civil Procedure, 1908.

Code of Criminal Procedure, 1973

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