

ISSN: 2582-6433



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

[www.ijlra.com](http://www.ijlra.com)

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

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# **An Analysis On Divorce By Mutual consent under Different Religion**

Authored by – Shikta Jain<sup>1</sup>

## **Abstract**

India is a secular country where several religions are freely propagated. And therefore, all the matrimonial laws in India related to the solemnization of marriage, Divorce, and related issues are governed by their personal laws. Marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes. It has to be a mental, psychological and physical union. When two souls thus unite, a new soul comes into existence.

The experience of marriage may be divine or frightening in this modern era. In the early period, marriage was said to be a permanent bond, but this notion of permanency has undergone various transformations. The common objective of marriage among different religions remains the same: the fulfillment of marital duties and obligations. If the spouses realize they no longer want to fulfill their responsibilities and obligation and cannot live happily together, they undergo Divorce by mutual consent. These days people find the only solution to their problem is going for a divorce, even for an absurd argument that some discussion can solve.

The present study strives to analyze the concept of Divorce by mutual consent under Hindu Law, Muslim Law, Christian Law, and Parsi Law. And the essential conditions required for the same.

## **I. Introduction**

Divorce theory has two types: Fault theory and No fault theory. In the Fault theory, the couple makes some allegations against one another to seek Divorce. In contrast, in the No Fault theory, the couple, without making any allegation against one another, undergoes Divorce by mutual consent. The present study seeks to understand the concept of one of the Grounds of Divorce, or the No Fault theory, that is, Divorce by mutual consent, and the statutory provision regarding the same under different laws.

Divorce is the official termination of the marriage—a way to free oneself from marital

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duties and obligations. The meaning of Divorce may be the same in different religions, but the laws relating to the solemnization and dissolution of marriage are different. Various grounds have been set up by the courts to bring the marriage to an end. Divorce by mutual consent is one such ground and is considered one of the peaceful methods of ending the marriage, leaving no scope for quarrel among the parties. Just like the parties when they enter into a marriage institution mutually, there should be a ground for them to come out of that similarly.<sup>2</sup> In the modern generation, the no-fault divorce theory is gaining momentum because these days, couples are not willing to adjust with one another or give a chance to their marriage.

The study is conducted by referring to various Acts under which the couple solemnized their marriage. For instance, if the couple got married under Hindu Law, then the dissolution takes place as per the Hindu Marriage Act, 1955<sup>3</sup>. If marriage is solemnized under Christian Law, then Divorce Act, 1869<sup>4</sup> is referred. Marriages solemnized as per Muslim law can seek Divorce with the help of their own personal laws pertaining to Divorce. They can also dissolve their marriage as per the Dissolution of Marriage Act<sup>5</sup>, In the same way, the Parsi Marriage and Divorce Act<sup>6</sup>, 1936, governs the rights of dissolution of marriage of Parsis.

### **Dissolution of marriage by Mutual Consent under Hindu Law**

This section was not initially included in the Act but was annexed under the HMA, 1955, by the Marriage Law Amendment Act, 1976.

Section 13B of HMA, 1955 reads:

1) 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.

(2) 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 eighteen months

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<sup>2</sup> Paras Diwan, Modern Hindu Law 63 (Allahabad Law Agency, Allahabad, 2006)

<sup>3</sup> The Hindu Marriage Act, No. 25 of 1955, INDIA CODE (1993).

<sup>4</sup> The Divorce Act, No. 4 of 1869, INDIA CODE (1993)

<sup>5</sup> The Dissolution of Muslim Marriage Act, No. 8 of 1939, INDIA CODE (1993)

<sup>6</sup> The Parsi Marriage and Divorce Act, No. 3 of 1936, INDIA CODE (1993).

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 the decree.

## **Essential conditions for Divorce by mutual consent**

1. The parties must be living separately for at least one year.
2. It was difficult for the parties to cohabit, and they could no longer live together.
3. Parties should mutually agree to dissolve their marriage.

### **A. Parties living separately**

As mentioned under section 13B of HMA, 1955, the parties must live separately for a minimum of one year. It is apt to note that, here, the one year refers to the period immediately before filing such a petition. And it is not limited to the physical separation. In *Smt Sureshta Devi vs. Om Prakash*<sup>7</sup> the sc held that "the expression 'living separately' connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by the force of circumstances, yet they may not be living as husband and wife. The parties may live in different houses, yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations. With that attitude, they have been living separately for one year immediately preceding the presentation of the petition".

### **B. Not able to live together**

When the parties are not happy with each other, and it is difficult for them to cohabit, they undergo counseling and mediation. Still, if they don't want to continue their marriage, then, mutually, they could go for Divorce. This is the second requirement that has to be proved before the Court after establishing the first, and if the Divorce is not granted, they will be living a life of agony.

In *Raj Vinod vs Smt Durga Devi*<sup>8</sup> it was observed that since the couple had been living

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<sup>7</sup> Sureshta Devi v. Om Prakash, AIR 1992 SC 1904

<sup>8</sup> Raj Vinod vs. Smt Durga Devi, 2002 (47) ALR 572

separately for sixteen years, they reached a consensus that they could not live happily with each other, they jointly filed a petition for Divorce by mutual consent, and it was allowed.

In *Sureshta Devi v. Om Prakash*<sup>9</sup>, it was observed that the meaning behind "have not been able to live together" depicts a broken-down marriage wherein there is no hope of reconciliation among the spouses.

### **C. Mutually agree to dissolve the marriage.**

When the above discussed conditions are fulfilled, both parties must mutually agree to dissolve their marriage. The consent should not be obtained by fraud, coercion, or undue influence.

“Consent must mean true, voluntary consent, not so-called consent obtained by submission to force or threats or the like .....The point of time at which consent is relevant for the pronouncement of the decree is the date of the hearing of the petition.”<sup>10</sup>

The Karnataka High Court in *K. Krishnamurthy Rao vs. Kamalakshi* observed that it is to be proved that the parties have contested to Divorce, not under any force, fraud, coercion, or undue influence. And to take reasonable care and enquire whether by any unfair means did not take the consent of the weaker section. The duty of the Court increases when any of the parties is illiterate.

### **D. The waiting period of six months.**

Once the parties have filed a petition for mutual Divorce, a period of six months to eighteen months is provided to the parties before they can approach the Court, that is known as the waiting period or cooling off period, which is given under section 13B (2) of HMA, so that the parties reconsider their decision before taking the final step and could consult their friends and relative. There is a possibility of the parties incurring a second thoughts. After the said period further, if they find it impossible to stay together, the district judge grants the decree of Divorce.

There have been conflicting judgments concerning section 13B (2) of HMA, whether it

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<sup>9</sup> Sureshta Devi v. Om Prakash, AIR 1992 SC 1904

<sup>10</sup> Jackson, Joseph (ed.), Rayden's Law and Practice in Divorce and Family Matters in All Courts. London : Butterworths, 1974

should be read as mandatory or directory. In the decision of *Grandhi Venkata Chitti Abbai*<sup>11</sup>, the Court observed that if 13B (2) is made mandatory, then the very purpose of liberalizing Divorce by mutual consent will be more frustrated when the parties start living separately for a considerable time. In another case of *Dinesh Kumar Shukla vs. Neeta*<sup>12</sup> it was observed that the period of six months could be waived off at the discretion of the honorable Court.

*In the case of M. Krishna Preetha v/s Dr. Jayan*<sup>13</sup>, a very recent judgment where the Court held that the waiting period is mandatory and not merely a directory. The idea is to avoid the trauma of Divorce if possible. It gives the party liberty to reconsider their decision and to withdraw their petition. According to the Court, it was contended that this waiting period was unnecessary and discriminatory. But the Court dismissed this argument and remarked that after considering various cases, it has made it clear that the waiting period cannot be waived. Still, if it needs to be waived off, it can only be done by the apex court under Article 142 of the Constitution.

### **E. Withdrawal of the Divorce petition**

After the first motion is passed, the parties are given a suspension gap of six to eighteen months to reconsider their decision and to save their marriage before filing for the second motion. If the parties do not file a case within eighteen months for the second motion, then it is considered that they have revoked their Divorce by mutual consent.

#### **a. Can consent be unilaterally withdrawn?**

There is a controversy regarding the same when both parties have mutually decided to undergo Divorce. Then how can one party unilaterally withdraw from it? Also, the waiting period is given for the party to give their marriage another chance, and if one of the parties decides to withdraw from it, how can it not be allowed to?

*In Jayashree Ramesh Londhe v Ramesh Bhikaji*<sup>14</sup> The Court held that once a joint petition by mutual consent was filed, no party could withdraw from it without the

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<sup>11</sup> Grandhi Venkata Chitti Abbai, AIR 1999 AP 91

<sup>12</sup> Dinesh kumar Shukla vs Neeta, AIR 2005 MP 106

<sup>13</sup> M. Krishna Preetha v/s Dr. Jayan AIR 2010 Ker 157

<sup>14</sup> Jayashree Ramesh Londhe v. Ramesh Bhikaji, AIR 1984 Bom 302

parties' **permission**. In a similar case, *Harcharan Kaur v. Nachhattar Singh*<sup>15</sup>, the Court held that "If both the parties had voluntarily consented to file the petition for dissolving the marriage by mutual consent and all other conditions mentioned in sub-section (1) of section 13-B of the Act are fulfilled, it will not be open to a party to withdraw the consent."

However, in the case of *Sureshta Devi vs. Om Prakash*, the Court observed that if one party withdraws their consent from filing the second motion, then the Court cannot grant a decree under section 13B of HMA.

In the judgment of *Anil Kumar Jain v Maya Jain*<sup>16</sup>, it was held that the consent given by both parties mutually to grant a decree for Divorce during the first motion should continue till the second motion is finally passed. And the apex court has discretion under Article 142 of the Constitution to do complete justice to the party.

Also, it is pertinent to note that Mere silence cannot be taken to amount to withdrawal of consent.<sup>17</sup>

## **II. Dissolution of marriage by mutual agreement under Muslim Law**

Divorce by mutual consent was introduced after the implementation of the Dissolution Of Muslim Marriage Act, 1939. Here some consideration needs to be passed from the wife to the husband, and in this way, it is more of a purchased divorce. Once the husband gives his consent, it results in an irrevocable divorce. Marriage dissolution can occur at any time when the spouses feel they cannot live together anymore, and there is no scope for reconciliation between them. There are two ways to get a divorce under Muslim Law – Khula and Mubarat.

### ***Khula***

Under this form, the wife consideration to her husband about her separation from the union of marriage. In the case of *Moonshe Bazul Raheem v. Luteefut oon Nissa*, where their lordships of the Privy Council observed: "A divorce by Khula is a divorce with the consent and at the instance of the wife, in which she gives or agrees to give consideration to the husband for her

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<sup>15</sup> *Harcharan Kaur v. Nachhattar Singh*, AIR 1988 P&H 27.

<sup>16</sup> *Anil Kumar Jain v. Maya Jain*, AIR 2010 SC 229.

<sup>17</sup> *Suman v Surendra Kumar*, AIR 2003 Raj 155

release from the marriage tie. In such a case, the terms of the bargain are a matter of arrangement between the husband and the wife, may as the consideration release her dower and other rights, or make any other agreement for the benefit of the husband". However, there is no particular way how Khula's offer will be accepted. It may be oral or in writing.

The husband has no power to cancel the 'khul' on the grounds that the consideration has not been paid. The consideration can be anything. Usually, it is mahr, the whole or part of it.<sup>18</sup>.

#### **Essentials for valid Khula:**

1. The consent should be free. The offer for Khula should be made voluntarily.
2. The wife should offer Khula, and the husband should accept the same.
3. The wife may pay compensation to the husband, and it may be money or property.

#### **Mubarat**

In this, both parties desire a divorce, and they cannot live together anymore and decide to dissolve their marriage mutually. There is no need to pay any compensation to the other party as both are happy to get rid of each other. The offer of Mubarat may proceed from any of the parties, but once it is accepted, it is irrevocable. The provisions of Mubarat as per the Muslim law are similar to the provisions of Section 13B of the Hindu Marriage Act, 1955, and Section 28 of the Special Marriage Act, 1954.

#### **Essentials for Mubarat are:**

1. Either party can make the offer.
2. The offer of Mubarat should be made of free consent.

### **III. Dissolution of marriage by mutual consent under Christian Law.**

Section 10A of the Divorce act deals with mutual consent divorce, which reads:

(1) Subject to the provisions of this Act and the rules made thereunder, a petition for dissolution of marriage 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 Indian Divorce (Amendment) Act, 2001 (51 of 2001), on the ground that they have

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<sup>18</sup> Diwan Paras, *Muslim Law In Modern India*, (14th edn, Allahabad Law Agency)

been living separately for a period of two years or more, that they have not been able to live together and they have mutually agreed that the marriage should be dissolved.

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(2) On the motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and 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 declaring the marriage to be dissolved with effect from the date of decree.

**The essential condition for Divorce under this section:**

1. The couple has been separated for two years.
2. Not willing to live together and perform part of their obligation.
3. Mutually agree to dissolve the marriage.

**The minimum period of two years** is to be read down as one year, as decided in the Kerala High court judgment in *Saumya Ann Thomas Vs. The Union of India*.<sup>19</sup>

#### **IV. Dissolution of marriage by Mutual consent under Parsi**

##### **Law.**

Section 32B of The Parsi Marriage and Divorce Act, 1936 deals with Divorce by mutual consent. This section was not initially included in the Act but was annexed under the amendment of 1988. It reads:

(1) Subject to the provisions of this Act, a suit for Divorce may be filed by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Parsi Marriage and Divorce (Amendment) Act, 1988, on the ground that they have been living separately for 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: Provided that no suit under this subsection shall be filed unless at the date of the filing of the suit one year has lapsed since the date of the marriage.

(2) 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 under this Act and the averments in the

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• <sup>19</sup> Saumya Ann Thomas Vs. The Union of India, (2010) ILR 2010 (1) Ker 804

plaint are true and that the consent of either party to the suit was not obtained by force or fraud, pass a decree declaring the marriage to be dissolved with effect from the date of the decree.

### **The essential conditions for mutual Divorce under this section:**

1. Both husband and wife have been living separately for one year or more, and
2. They have not been able to live together, and
3. They have mutually agreed that the marriage should be dissolved.

## **Conclusion**

The introduction of the No Fault divorce theory that recognizes Divorce by mutual consent is a remarkable change in the changing attitude of the family system, where the spouses, without making any allegation towards each other, end their relationship. It is based on the notion that what cannot be mended should be ended. In this modern era, spouses are more independent and self-sufficient and are ready to live separately rather than unhappy together. This judicial trend is of the notion that it gives the spouses a suspension gap to reconcile with each other, and further, if they don't want to continue, it grants them a decree of Divorce, as there is no point in stretching the marriage. The applicability of the Act depends upon the specific Act under which the couple had solemnized their marriage. The present paper has covered the theory of mutual Divorce in Hindu Law, Muslim Law, Christian Law, and Parsi Law.

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## **List of abbreviation**

AIR – All India Reporter

AP- Andhra Pradesh

MP- Madhya Pradesh

Ker- Kerala

Bom- Bombay

P&H- Punjab and Haryana

SC- Supreme Court

Raj- Rajasthan

HMA- Hindu Marriage Act