



A divorce by mutual consent under different personal laws

Pankaj Karki^{1*}

¹Department of Law, HNB Garhwal University, BGR Campus Pauri, Pauri (Garhwal)-246001, Uttarakhand, India

*Corresponding Author Email: karkipankajggs@gmail.com

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Abstract: Marriage is a social institution in all religion and a union between a male and a female. Marriage gives rise to status to the parties but divorce dissolves the status of marriage and parties are free to marital rights and obligations. Marriage and divorce is treated as a part of personal law of the parties. There are two kinds of divorce fault and no fault. Divorce by mutual consent is the form of no fault theory of divorce and it is a matrimonial relief. Divorce by mutual consent means after the constitute of marriage both the parties to the marriage agree in a simple way that they cannot live together anymore and this is the solution to termination of marriage without any reasons or allegation against each other.

Keywords: Divorce, Mutual Consent, Act, Section

Introduction

Divorce by mutual consent has authorized under – the Hindu Marriage Act, 1955, Special Marriage Act, 1954, Parsi Marriage and Divorce Act, 1936, Christian Law and Muslim Personal Law. So there are different laws of divorce by mutual consent for different religion.

Divorce by mutual consent means both the marriage parties are for easeful separation and it is a simple way to coming out of the marriage and dissolves it legally. So divorce by mutual consent is identical and basically based on break down theory of divorce.

The provision of divorce by mutual consent under Hindu law, Special Marriage Act, and Parsi Marriage and divorce law are same. Under Section 13B, Hindu Marriage (Amendment) Act, 1976, Section 28 of the Special Marriage Act, 1954, Section 32 B of the Parsi Marriage And Divorce (Amendment) Act, 1988. The following requirements are necessary for the presentation of the petition by mutual consent –

1. The marriage parties have been living separately for a period of one year or more.
2. That they have not been able to live together, and
3. That they have mutually agreed that their marriage should be dissolved.

“Live separate” means that the parties are not living as husband and wife. Irrespective of fact they are living are living in the same house or in different house. (Samistha v/s Om Prakash, AIR 1992, SC 1909)

“Not able to live together” means that marriage had broken down irretrievably.

After the filing of the petition of both the parties, the court almost adjourns the matter for a period of six month. During this period of six months when the petition is pending in the court, any of the party is entitled to withdraw the petition. But after expiry of the period of six months, the marriage parties should move a motion in the court that a decree of divorce dissolving their marriage be passed. In case no motion is made within the period of eighteen months after the presentation of petition for divorce, the

petition shall stand dismissed. The court must in every case be satisfied that consent of neither party has not been obtained by force, fraud or undue influence.

In case of Hindu Law, divorce by mutual consent was not possible before 1976. Divorce by mutual consent had introduced in section 13 B. In this provision has been added by the marriage laws (Amendment) Act, 1976. Which now provides an additional ground for divorce by mutual consent, this ground has already been provided under section 38 of the special marriage act, 1954. This ground has been given a retrospective effect so as to make it applicable to marriage whether solemnized before or after the commencement of the marriage law (Amendment) Act, 1976.

Section 13 B (2) no doubt cautions the courts of its duty to fight the last ditch battle to save the marriage, but when the court is fully satisfied on the basis of the proved facts. Section 13 B (2) does not impose any fetter on the powers of the court to grant instant decree of divorce.

Amardeep v/s Harveen Kaur civil App. No. 11158 of 2017 – in this case the apex court apprized that, waiting period mentioned in section 13 B (2), is not mandatory but directory, it will open to the court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming of alternative rehabilitation. (Para 21)

In the case of special marriage Act, 1954 – By 1976 amendment this added ground was inserted as section 28. It provides for divorce on the joint petition by the husband and wife.

In the case of Parsi Law – Section 32 B of the Parsi Marriage and Divorce Act, 1936 had inserted by 1988 Amendment Act. It provides that a suit may be filed together by both the parties to the marriage.

In the case of Christian Law – Amending Act 51 of 2001 has inserted section 10 A which is comparable to section 13 B of the Hindu marriage Act or section 32 B of the Parsi marriage and divorce act or Section 28 of the special marriage act. Before this amendment divorce act by mutual consent was not permitted to the Christians. The apex court to accept this ground for divorce in the case of- *Reynold Rajamani v/s union of India* (AIR 1982.sc 1261).

If the parties agreed and consented to have their marriage dissolved, the court would not permit it, the court held in the case of –*Susanna v/s Yeshwant* (AIR 1985 kant 133).

When there is no possibility for reunion and marriage between the parties is practically dead, enforced continuity of the marriage would only force parties to spend more year in agony and bitterness. –*Iffat Jamalunnisa v/s Md. Suleman siddique*, 2006 (1) HLR 334 (AP).

Where litigation stated with a petition for nullity or dissolution of marriage and more than six month there after the joint petition for divorce by mutual consent was made and the marriage parties were already living separately since two years, the waiting period of six months vide sub section (2) of section 10A was waived. (*Gracy v/s electus*, (2002) 1 DMC 401 (Ker)).

In the case of *esther Gunabhovshanam v/s Christopher Immanuel* (2007) DMC 39 (mad- DB) – a marriage was dissolved by mutual jurisdiction vested in the High Court, vide section 8 of the act. All the conditions as laid down in section 10A were satisfied.

It is significant to note that for a divorce by mutual consent, the marriage parties must obtain a decree under section 10 A of the Act. There can be no divorce by a deed by dissolution between the marriage couple.

In the case of Muslim personal law – a divorce by mutual consent of the married couple is a peculiar feature of Islamic law. Under Muslim personal law, a Muslim husband has an absolute and unrestricted right to divorce his wife without any reason, but a Muslim wife has no independent right to divorce. The implication of hadith is that if there is a cause, the wife has the right to look for divorce. So Islamic law has never conferred the same power to talak on the muslim wife, as if has on the Muslim husband, however, it recognizes that a muslim wife has the right to give divorce with the consent of her husband.

Khula and Mubaraat are a divorce by mutual consent, but in the case of Mubaraat, divorce by mutual consent is very close to the provisions of divorce by mutual consent, thus, it is submitted that Khula is not a divorce by mutual consent but divorce obtained by the wife with the consent of the husband where she gives something for her release. So more properly Khula is thus a form of divorce by purchase.

Khula- In the context of matrimonial law it means “laying down by a husband of his right and authority over his wife for an exchange”. For the point of view of the law. It means divorce by the wife with the consent of her husband on payment of something to him.

Quran lays down about Khula- “and if you bear that they may not be able to keep within the limits of Allah, in that case it is no sin for either of them if the woman releases herself by giving something (to the husband)” - (Quran- sura II, Ayat 229)

In *Munshie Buzlul Raheem v/s Lutefutoon Nissa*. (1861) 8min 379. 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 agree to give a consideration to the husband for her release from the marriage tie. In such a case the terms of the bargain are matters of arrangement between the husband and wife, and wife may, as the consideration, release her due dower and other rights.”

Mubaraat- Mubaraat may also be considered as divorce by mutual consent of the husband and wife. In Mubaraat both the parties are equally interested to terminate the marriage. Therefore in Mubaraat the proposal for separation may come either from husband or from wife to be accepted by the other. The important feature of a Mubaraat is the willingness of both the parties to get rid of each other and both the parties are equally interested in the termination of marriage, no party is required to compensate the other by giving some consideration.

References

Kesari. U.P.D., *Modern Hindu Law*.
Diwan. Paras , *Modern Hindu Law*.
Sinha. R.K., *Muslim Law*.
Standley. Kate, *Family Law*.
Special Marriage Act, 1954.
Parsi Marriage and Divorce Act, 1936.
Christian Law.
