

MARRIAGE, SEPARATION, DIVORCE, CHILD CUSTODY



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SEMINAR ON WOMEN AND FAMILY
LAWS & LITIGATION

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HINDU MARRIAGE ACT, 1955

- All matters related with marriage and divorce as well as other related issues are governed by Hindu Marriage Act, 1955
- The definition of a Hindu is inclusive definition as it is difficult to define as to who is a Hindu. However, Hindu means all forms of Hindus, Buddhists, Jains or Sikhs by religion.
- Reversely, it can be said that this Act does not apply to a Muslim, Christian, Parsi or Jew
- Further, it is applicable to any child, legitimate or illegitimate one of whose parents is a Hindu, Buddhist, Jain or Sikh.



CONDITIONS FOR A VALID HINDU MARRIAGE (Sec 5)

Solemnization of marriage under this Act can be done only between two Hindus. Further, the following conditions have to be fulfilled:

- neither party has a spouse living at the time of the marriage
- should be capable of giving a valid consent
- sound mind
- should not suffer from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children



- groom must have completed 21 years and bride 18 years at the time of marriage
- should not be subject to recurrent attacks of insanity or epilepsy
- should not have lineal ascendants upto 5 generations from father's side and upto 3 generations from mother's side unless the custom allows it
- should not be within degree of prohibited relationship like brother and sister, aunt and nephew, uncle and niece, or children of brother and sister or of two brothers or of two sisters



Eg: Marriage solemnized between a Hindu and a non- Hindu under the Hindu Marriage Act is a nullity and its registration under the Gujarat Registration of Marriages Act, 2006 the Hindu Marriage Act cannot validate the same.

Gullipilli Sowria Raj vs. Bandaru Pavani @ Gullipili Pavani (MANU/SC/8368/2008)

In this case, it was held that marriage between a Hindu and a Christian under this Act is void.

It does not mean that a Hindu and a Christian cannot marry as they can always marry under the provisions Special Marriage Act, 1954



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CEREMONIES FOR A HINDU MARRIAGE (Sec 7)

A Hindu marriage is solemnized as per the customary rites of either parties. Generally, it includes saptpadi or 7 pheras i.e. taking of seven steps before the sacred fire.

REGISTRATION OF HINDU MARRIAGE (Sec 8)

Earlier, registration of marriage was not compulsory. However, after 2006, it has become necessary to register the same under Gujarat Registration of Marriages Act, 2006



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RESTITUTION OF CONJUGAL RIGHTS (Sec 9)

- When either the husband or the wife has abandoned the other spouse without any reasonable excuse and the other spouse does not want disruption of marriage, the spouse can file a petition for restitution of conjugal rights. Here, the court will direct the other party to resume the matrimonial cohabitation and to render the rights and duties of matrimonial life.
- The other spouse may justify that he/she left the matrimonial relation due to extreme mental or physical pain inflicted by the other spouse, the court will weigh the circumstances and pass an order accordingly.



- More than often, it is seen that such orders by the court are hollow orders which eventually leads to divorce as it is impossible to compel two adult persons to live together as husband and wife under compulsion.



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JUDICIAL SEPARATION (Sec 10)

- When a couple does not want to cohabit together but does not want a divorce, the party may file a petition for judicial separation where the parties are permitted to live separately and only those matrimonial rights and obligations are to be fulfilled which are mutually agreed upon and written in the decree.
- This gives the couple an opportunity to reconcile their differences before taking the harsh step of taking a divorce.
- Either spouse may file for judicial separation based on the grounds on which divorce can be sought.



NULLITY OF MARRIAGE AND DIVORCE

Void marriages (Sec 11)

Marriage which is solemnised after the commencement of this Act but if it violates the below mentioned conditions, it becomes void i.e. as if the marriage was never solemnised-

Conditions:

- Either party has a spouse living during the solemnisation of marriage
- Parties have lineal ascendants upto 5 generations from fathers side and 3 generations from mothers side
- Parties are related to each other like a brother and sister, aunt and nephew, uncle and niece etc.



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Voidable marriages (Sec 12)

Marriage which is solemnised before or after the commencement of this Act may be voidable i.e. the marriage remains valid and continues to bind the parties unless a decree is passed by the court at the instance of one of the spouses. Following are some of the grounds on which the petition can be filed:

- no consummation owing to impotency
- no valid consent or consent obtained by fraud
- unsoundness of mind, mental disorder or recurring attacks of insanity
- pregnancy with someone else during marriage



DIVORCE (Sec 13)

Either party can file a petition for divorce for a permanent dissolution of marriage in case the parties feel that there are no chances or bleak chances of reconciliation between the couple i.e. irretrievable breakdown of marriage due to any of the below mentioned grounds:

- after the solemnization of the marriage, other spouse had voluntary sexual intercourse with any person other than his or her spouse
- mental or physical cruelty
- abandoning the spouse without any just and reasonable cause, without consent of the other or against the wish of the other spouse, for a continuous period of 2 years immediately before filing case for divorce



- not a Hindu due to conversion to another religion
- incurably of unsound mind continuously or intermittently that it cannot reasonably be expected to live with that spouse
- spouse is suffering from a virulent and incurable form of leprosy or venereal disease in a communicable form
- renounced the world by entering any religious order
- Has not been heard of as being alive for a period of seven years or more



- not cohabitating for a period of one year or upwards even after the passing of a decree for judicial separation
- no restitution of conjugal rights for a period of one year or upward after the passing of a decree of restitution of conjugal rights
- irretrievable breakdown of marriage



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Wife may also present a petition for the divorce on the following grounds:

- that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality
- Decree of maintenance passed in favour of wife in proceedings under Section 18 of the Hindu Adoptions and Maintenance Act or Section 125 of CrPC
- marriage was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years



ALTERNATE RELIEF IN DIVORCE PROCEEDINGS (Sec 13 A)

- In case if the parties feel that there may be chances of some reconciliation and compromise, the party may make a request for judicial separation instead of divorce on all the grounds as mentioned for divorce except if the other spouse has either converted to another religion, or is not found to be alive for past 7 years or has renounced the world by entering into a religious order.



DIVORCE BY MUTUAL CONSENT (Sec 13 B)

In case both the parties want to end the marital tie together mutually, they may file a petition on the ground that they have been living separately for a period of one year or more and that there are no chances of reunion or rehabilitation.

The courts will consider duration of marriage between the parties, duration of pending litigation, duration of judicial separation, willingness of the parties to attend mediation/conciliation meetings, genuine settlement on child custody, alimony, any other pending dispute before granting divorce.



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The courts may in such a case waive of the cooling off period of 6 months in case the court comes to a conclusion that the marriage has broken down irretrievably i.e. there is no scope for any rehabilitation.

Eg. In a landmark judgment of **Naveen Kohli vs. Neelu Kohli (MANU/SC/1387/2006)**, the court held that there was irretrievable breakdown of marriage and that it was in favour of both the parties to separate immediately.



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DIVORCE WITHIN ONE YEAR OF MARRIAGE (Sec 14)

Earlier, the courts did not grant divorce unless at the date of the presentation of the petition one year has elapsed since the date of the marriage

But recently, Supreme Court in various judgments has allowed divorce on the grounds of exceptional hardship, irretrievable breakdown of marriage, if divorce is progressive, pragmatic option.

However, the court will look into chances of reconciliation or interest of children if any



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WHEN DIVORCED PERSONS MAY REMARRY (Sec 15)

Either spouse is allowed to remarry only when the present marriage is dissolved by a decree of divorce and when the neither party has approached higher forum as an appeal against the said judgment or if the prescribed time of 90 days has passed and no appeal is filed by either spouse against the judgment and order of divorce.



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LEGITIMACY OF CHILDREN OF VOID AND VOIDABLE MARRIAGES (Sec 16)

Even if marriage is null and void, child of such marriage shall be a legitimate child

- A child conceived or begotten before decree of nullity of voidable marriage is passed, child shall have the status of legitimate child
- Such child will not have any rights in or to the property of any person, other than the parents



WHERE TO FILE PETITION? (Sec 19)

Place where:

- marriage was solemnized, or
- the respondent, at the time of the presentation of the petition, resides, or
- the parties to the marriage last resided together, or
- place where petitioner resides in case the other spouse lives abroad or if his family/ friends/ relatives have not heard of him since 7 years



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Where separate petitions filed for divorce and judicial separation by the spouse

- within the same District court, they shall be clubbed together
- within different District courts, then the second petition shall be transferred to the place where first petition is filed



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OBTAINING A DECREE (Sec 23)

The court must be satisfied that the spouse:

- is not in any way taking advantage of his or her own wrong or disability
- has not in any manner been accessory to or connived at or condoned the act or acts complained of
- mutual consent has not been obtained by force, fraud or undue influence
- not been any unnecessary or improper delay in instituting the proceeding
- no scope for any reconciliation



MAINTENANCE PENDENTE LITE AND EXPENSES OF PROCEEDINGS (Sec 24)

When the couple is not cohabiting together due to any reasons as specified above, either spouse can move an application seeking immediate, interim financial help from the other spouse due to sudden separation of the couple.

The spouse applying for the same will have to show that he/she does not have sufficient independent income to support him/her and the child if any. Such amount shall be claimed by the spouse which is necessary for carrying out the day to day expenses and the expenses of the proceedings.



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While awarding maintenance and expenses of the proceedings, the court will look into income of both the parties, living standards of the couple before separation, number of persons dependant on the respondent, any other circumstances if exists and only then award a reasonable amount.

In landmark judgments *Jasbir Kaur Sehgal v. District Judge Dehradun and Ors.* (MANU/SC/0835/1997), *Sh.Bharat Hegde Vs. Smt.Saroj Hegde*, it has been held that while considering claim for interim maintenance, the Court has to keep in mind status of parties, reasonable wants of Applicant, income and property of Applicant, requirements of the other spouse, income and property of other spouse and additionally the other family members to be maintained by the other spouse have to be taken into all



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Further, the courts should also ensure that the applicant should be able to live in somewhat the same degree of comfort as in the matrimonial home, but it should not be so exorbitant that the other spouse is unable to pay the maintenance amount.

Also, if the spouse has been awarded maintenance under Section 125 of Code of Criminal Procedure or under any other law, this does not mean that the spouse will be restricted to claim maintenance under this Act. However, the court will adjust the amount accordingly.



Further, Section 20 of Prevention of Women from Domestic Violence Act, 2005 provides that the monetary reliefs which may be claimed by the woman and children if any under this Act (PWDVA) may include the maintenance amount awarded under Section 125 of the Code of Criminal Procedure, 1973 or may be in addition to the amount granted under Section 125 of the Code of Criminal Procedure, 1973 or any other applicable law.

In *Shalu Ojha vs. Prashant Ojha* (MANU/SC/0835/2014), the Supreme Court has relied on the above principle



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PERMANENT ALIMONY AND MAINTENANCE (Sec 25)

Court is also empowered to award such gross sum or such monthly or periodical sum to the spouse and child if any till the spouse is alive and till the child attains majority in case of a boy and till the child is married in case of a girl

While awarding permanent maintenance, the court will look into income of both the parties, their conduct, other circumstances like number of persons dependant on the respondent, amount of property of the respondent, his paying capacity, other expenses which are to borne by the respondent



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Court may modify the award if it finds that there is a change in the circumstances of either spouse or one of the spouse has remarried or one of the spouse has had sexual intercourse outside marriage



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CUSTODY OF CHILDREN (Sec 26)

In case the parties have decided to separate their ways, there is a major tussle regarding custody of the minor children. The court looks into various factors before giving custody to a particular spouse.

Factors which the court considers while giving custody of the minor child:

- welfare of the child including maintenance, education, extracurricular and recreational activities, medical facilities, other financial needs
- age of the minor- custody is given to mother if the child is below 5 years
- wish of the child
- physical and mental health of parents



Recently, the Supreme Court and other courts are fostering a way of joint custody whereby both the parents have to look after the child equally financially, emotionally and psychologically. The primary reason behind it is that the child should not suffer due to the matrimonial tussle of the parents and that the child gets care and protection and that the child remains emotionally attached to both the parents.

Tushar Vishnu Ubale vs. Archana Tushar Ubale
(MANU/MH/0033/2016)

In this case, the Bombay High Court carved out a method whereby both the parents will have to look after the welfare of their child for equal number of days.



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