

DIVORCE BY A HINDU (THE HINDU MARRIAGE ACT, 1955)

1. Definition of Void Marriage / Nullity of Marriage (Section 11)

The term “void” can in general parlance be understood to be a synonym of the word “illegal”. Hence anything which is void would have one consequence for sure – that it would be illegal. A void marriage therefore means an illegal marriage.

- It has been held by various High Courts that conditions mentioned in section 11 rendering a Hindu marriage null and void are exhaustive. It is only on these grounds that a Court can grant a decree of nullity. **[1985 1 26 Guj Law Rep 47; AIR 1965 Him Pra 15; ILR 1970 Cut 1215]**

- **Following are the grounds which shall render a marriage void:**

- * *Bigamy*
- * *Persons falling within degrees of prohibited relationships*
- * *Sapinda relations (blood relation) to each other.*

- **The consequences of void marriage are:**

- * *The parties don't have the position of husband and wife in a void marriage.*
- * *Childrens are called legitimate in a void marriage (Section 16 of Hindu Marriage Act, 1955).*
- * *Mutual rights and obligations are not present in a void marriage.*

1.1 Definition of Voidable Marriages (Section 12)

A marriage is voidable on either side of the party is known as voidable marriage. It will be valid unless the petition for invalidating the marriage is made. This marriage is to be declared void by a competent court under the Hindu Marriage Act, 1955. The parties of such marriage have to decide whether they want to go with such marriage or make it invalid.

- **The grounds where marriage can be termed as voidable:**

- * *The party to the marriage is not capable of giving consent due to the unsoundness of mind.*
- * *The party is suffering from mental disorder which makes her unfit for reproduction of children.*
- * *If the party has been suffering from repeated attacks of insanity.*
- * *The consent of marriage by either of the parties is done by force or by fraud*
- * *If either of the parties are under-aged, bridegroom under 21 years of age and bride under 18 years of age.*
- * *If the respondent is pregnant with a child of someone other than the bridegroom while marrying.*

- **Necessary conditions to be fulfilled by a petition under Section 12 for nullity of a Voidable Marriage:**

- * *A petition can be filed before the court within one year of discovery of such fraud or application of force.*
- * *The allegation based upon which the petition is filed was beyond the knowledge of the petitioner at the time of solemnization of marriage.*

- * *The petition on such an allegation must be presented in the court within one year of knowledge of such facts.*
- * *No sexual relationship is established after knowing about alleged facts.*

2. Definition of Divorce (Section 13)

The divorce (also known as dissolution of marriage) is the process of terminating a marriage, any Marriage solemnized, whether before or after the commencement of this act, May, on a petition presented by either the husband or the wife, is dissolved by a decree of divorce.

2.1 Types of Divorce Petitions

* **Divorce with Mutual Consent (Section 13 B of Hindu Marriage Act, 1955):**

When husband and wife both agree to a divorce, the courts will consider a divorce with mutual consent, 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.

- In the case *Smt. Roopa Reddy vs Prabhakar Reddy on 4 June, 1993*, The High Court held that mutual consent is in the nature of compromise.
- In the case *Sureshta Devi v. Om Prakash, AIR 1992 SC 1904*, if The parties should have no desire to perform marital obligations and both agree to a divorce, the courts will consider a divorce with mutual consent.
- In the case *Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 51*, the court held that there has been a long period of continuous separation and the marriage becomes a fiction it would be appropriate to dissolve such marriage.
- In *Smt. Sureshta Devi v. Om Prakash, AIR 1992 SC 1304*, this Court held that mere filing the petition for divorce by mutual consent does not authorise the court to make a decree for divorce. The interregnum waiting period from 6 to 18 months is obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends.

* **Divorce without Mutual Consent (Section 13 A of Hindu Marriage Act, 1955):**

In case of a contested divorce, there are specific grounds on which the petition can be made. It isn't as if a husband or wife can simply ask for a divorce without stating a reason.

- In this case of *Lalit Joshi vs Smt. Girja on 2 September, 2019*, the court holds that the decree of divorce should be granted to the appellant, both on the count of cruelty and desertion, because these are the sufficient grounds for taking divorce.
- In the case *R. Lakshmi Narayan vs. Santhi, AIR 2001 SC 211*, Supreme Court observed that to brand the wife as unfit for marriage and procreation of children on account of the mental disorder, it needs to be established that the ailment suffered by her is of such a kind or such an extent that it is impossible for her to lead a normal married life.
- *Sukhendu Das V. Rita Mukherjee 2017 (8) Supreme 33*, Wife refusing to participate in proceeding for divorce – Forcing the husband to stay in a dead marriage – Itself

constitutes mental cruelty – No point in compelling parties to live together in matrimony.

- *Narendra V. K. Meena, AIR 2016 SC 4599 (Karnataka)*, Cruelty by wife—Persistent effort of wife to constrain husband to be separated from family— Constitutes an Act of —cruelty||—Husband entitled to decree of divorce.
- *Suman Kapur vs Sudhir Kapur (2009) 1 SCC 422*, Abortion by a woman without her husband’s knowledge and consent will amount to mental cruelty and a ground for divorce, the Supreme Court has held. “Mental cruelty is a state of mind.
- *Savitri Pandey vs Prem Chandra Pandey (2002) 2 SCC 73*, Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. “Cruelty”, therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party.

3. Who can file the divorce petition?

On a petition presented by either the husband or the wife, be dissolved by a decree of divorce. Both husband and wife have a right to file a petition for divorce with or without mutual consent, the grounds for filing remain the same for both spouse.

3.1 Mandatory Ingredients of a Divorce Petition:

The Hindu Marriage Act, 1955 Grounds in Section 13 (1) on which either the husband or wife could sue for divorce.

- * **Cruelty**
- * **Adultery**
- * **Desertion**
- * **Conversion**
- * **Mental Disorder**
- * **Communicable Disease**
- * **Renunciation of the World**
- * **Presumption of Death**
- * **Harming reputation**
- *

4. Documents to be enclosed with the petition:

The documents required in the case of divorce petition are mentioned

- * Address proof of husband
- * Address proof of wife
- * Marriage certificate/Marriage Card of the spouse
- * Passport size photograph/Marriage photograph of both the husband and wife
- * Evidence proving spouses are living separately for more than a year.
- * Evidence proving the mandatory grounds for divorce on which they filed the petition.

- * Income tax statements for the last 2-3 years
- * Details of the profession and present remuneration
- * Information relating to family background
- * Details of properties and other assets owned by the petitioner
- * Other documents too may be needed, depending on facts and circumstances of the case.

5. What is the procedure to file a divorce petition?

▪ **Divorce Notice:**

Before anything, you should be aware to produce a divorce notice to your spouse. This is to clarify the emotions and a platform to initiate your thoughts on discontinuing the relationship. A legal notice for divorce will bring in clarity to the other spouse about the future relationship which you want to hold. A spouse can send a legal notice for divorce to the other spouse in order to communicate his/her intention to take legal steps forward covering the marriage relationship. It is a formal communication which is the first step to break the 'husband and wife' connection.

▪ **In Mutual consent divorce**

STEP 1: First Motion involves joint filing of divorce petition.

STEP 2: Husband & wife appear before court to record statements after filing of petition.

STEP 3: Court examines petition, documents, tries reconciliation, records statements.

STEP 4: Court passes order on First Motion.

STEP 5: Cooling off period of six months given to couple by court to rethink decision.

STEP 6: Filing of Second Motion and the Final Hearing of petition

STEP 7: Decree of Divorce

▪ **In Without Mutual consent divorce**

Step 1: Filing Petition

Step 2: Service of Summons

Step 3: Response to Petition

Step 4: Trial

Step 5: Temporary Orders

Step 6: Final Order

6. Tentative Timeline for divorce :

▪ **In Contested Divorce Will Take Longer**

If your divorce is contested, your divorce could take a lot longer. A contested divorce, where at least one major issue cannot be resolved, will often involve a trial on any unresolved issues. If you add the time for a trial to the mandatory waiting period, your divorce proceedings could take more than a year.

The duration for obtaining divorce varies from case to case and place to place. Generally speaking, contested proceedings take 18 to 24 months. Mutual consent varies from 6 months to 18 months.

▪ **In Mutual consent divorce**

As per law, duration/time of obtaining mutual consent divorce is six months. Although, parties have option of filing the second motion petition any time between six months and eighteen months from the date of the filing of the Mutual Consent Divorce Petition.

7. Whether the Power Of Attorney can represent either Husband or wife in Court?

In Divorce by Mutual Consent, the same can either be effectuated via the parties personally (in their physical presence) or by way of authorizing Power of Attorney. You first need to file a Power of Attorney, authorizing someone else to present on your behalf.

8. Whether proceedings orders/ judgments are published on website?

The proceedings of family courts are not conducted in open court and therefore the proceedings are conducted only in the presence of the judge, the parties and their lawyers. Such proceedings include all proceedings emanating out of the Hindu Marriage Act 1955 and may include divorce, child custody, maintenance proceedings and family disputes, and hence the proceedings orders/judgments are not published on website.

9. Jurisdiction for filing application?

▪ **The Hindu Marriage Act 1955 (Section 19)**

This jurisdiction applies to a marriage solemnized under this Act only. Section 19 of the Act provides for the Court to which petition under this Act shall be presented. Every petition under the Act shall be filed with the District Court (family courts) within the local limits of whose ordinary civil jurisdiction:

- * The 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
- * In case wife is the petitioner, where she is residing on the date of presentation of the suit, or
- * The petitioner is residing, in case respondent is out of the territory of which the Act applies or has not been heard for 7 years.

10. When either Husband or Wife is Hindu but the other spouse is of another religion?

- Marriage under Hindu Marriage Act can be solemnized only between two Hindus.
- It would be a case of special marriage. In this regard, reference may be made to provisions of Special Marriage Act (43 of 1954). Section 4 of Special Marriage Act provides as to conditions relating to solemnization of special marriages. It provides that a marriage between any two persons (who are not Hindus or when one of them is Hindu and the other is from other religion) may be solemnized under this Act.

11. Case law/ Citation for filing Income Affidavit and its ingredients?

- Delhi High Court directed in many cases that affidavit of assets, income and expenditure to be filed by both the parties at the very threshold of a matrimonial litigation. These directions/guidelines shall apply to all matrimonial cases including cases under Hindu Marriage Act, 1955; Protection of Women from Domestic Violence Act, 2005; Section 125 CrPC; Hindu Adoption and Maintenance Act, 1956; Special Marriage Act, 1954; Indian Divorce Act, 1869; Guardians and Wards Act, 1890 and Hindu Minority and Guardianship Act, 1956.
- In the case *Kusum Sharma v. Mahinder Kumar Sharma, 2014 SCC*, The directions to be followed while dealing with matrimonial cases were first issued.

- In the case *Jaspreet Singh v. Gurleen Kaur 2020(1)RCR(Criminal)646*, the Courts shall insist upon the parties to furnish "Affidavit of assets, income and expenditure"

❖ **Affidavit of Assets, Income and Expenditure in matrimonial cases:**

- ***Salaried person***

A salaried person is required to disclose the particulars of his employment including salary, DA, commissions, incentives, bonus, perks, perquisites, other benefits, Income tax, etc.

- ***Self-employed person***

A self-employed person is required to disclose the nature of business/profession, share in the business, net worth of the business, number of employees, annual turnover/gross receipts, gross profit, Income Tax, net income and regular monthly withdrawal/drawings from the business.

- ***Income from other sources***

The parties are further required to disclose income from other sources, namely, agricultural income, rent, interest on bank deposits and other investments, dividends, mutual funds, annuities, profit on sale of movable/immovable assets, etc.

- ***Assets***

With respect to the assets, the parties are required to disclose the particulars of the immovable properties, financial assets including bank accounts, DEMAT accounts, safety deposit lockers; investments including FDRs, stocks, shares, insurance policies, loans, foreign investments; movable assets including motor vehicles, mobiles, computer, laptop, electronic gadgets, gold, silver and diamond jewellery, etc.; intangible assets; garnishee(s)/trade receivables; corporate/business interests; disposal and parting away of properties; properties acquired by the family members, inheritance.

- ***Standard of living and lifestyle***

The affidavit requires the parties to disclose their standard of living and lifestyle, namely, credit/debit cards, membership of clubs and other associations, loyalty programmes, social media accounts, domestic helps and their wages, mode of travel in city and outside city, category of hotels, category of hospitals for medical treatment, frequency of foreign travel, frequent flyer cards, brand of mobile, wrist watch, pen, expenditure ordinarily incurred on family functions, festivals and marriage of family members, etc.

- ***Household expenditure, etc.***

The affidavit further requires the disclosure of expenditure on housing, household expenditure, maintenance of dependents, transport, medical expenditure, insurance, entertainment, holiday and vacations, litigation expenses, discharge of liabilities, etc.

12. Time after which either of the Spouse can re-marry?

As per section 15 of Hindu Marriage Act, 1955 when a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

13. The aspect of custody of children and maintenance i.e. whether these are part of Divorce Proceedings?

As per section 25 of Hindu Marriage Act, 1955 permanent alimony and maintenance & Section 26 Custody of children, yes either the wife or husband can file an interim application in divorce petition for seeking the custody, maintenance for education of minor children, consistently with their wishes, whenever possible, and may after the decree, upon application by petition for the purpose, make from time to time, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

14. Whether Hindu couple living abroad (outside India) are covered under this Act and how would the proceedings be done for them?

It is settled law that in order to apply the provisions of the Hindu Marriage Act both parties must be 'domiciles' of India and it is not enough that one of them alone is a domicile of the country.