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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

CONTRASTS BETWEEN THE INDIAN DIVORCE ACT AND THE HINDU MARRIAGE ACT

AUTHORED BY - SATHYAVRATHAN TC

INTRODUCTION

Marriage is an important institution of the society that not just involves the cultural aspect of two individuals coming to share their lives but also the legal aspect which gives recognition for such ties. These relations born out of such marriages between the two individuals can be dissolved through a procedure called divorce which is also governed by appropriate legislations. India being a diverse country, has personal laws of every religion with respect to matters such as marriage, divorce, adoption, succession, inheritance, guardianship and matters of like nature. The Christian personal laws governing marriage, divorce, adoption, succession, and guardianship, involves numerous legislations specifically enacted for Indian Christians such as the Indian Christian Marriage Act of 1872, Indian Divorce Act of 1869, Indian Succession Act of 1925, Juvenile Justice (Care and Protection of Children) Act of 2015, Christian Marriages Validation Act of 1940. In this article, special focus has been made to divorce according to the Divorce Act, 1869 in comparison to the Hindu Marriage Act, 1955.

HISTORY OF INDIAN DIVORCE ACT, 1869

The Indian Divorce Act, 1869 is a codified Indian personal law which governs matters related to dissolution of marriage for people who practice Christianity. The law established the jurisdiction for filing the divorce petition, grounds for dissolution of marriage between the husband and wife, grounds for decree of nullity and matters regarding alimony, child custody, settlements, procedure to be followed, re-marriage and much more.

Britishers passed this legislation during the pre-independence era which came into effect from 1st April 1869. The act extends to the whole of India except the state of Jammu and Kashmir.

After the British invasion, the Christian population in India increased, placing a need for separate

Christian personal laws. Hence the Britishers who earlier ruled by the Common Law of England on the principles of equity, justice and good conscience passed a legislation called the Indian Divorce Act of 1869 to govern matters relating to divorce between the husband and wife practicing and professing Christianity.

JURISDICTION

The jurisdiction for filing the divorce petition has been stated in Section 4 of the Act such as *“Matrimonial jurisdiction of High Courts to be exercised subject to Act. Exception.—The jurisdiction now exercised by the High Courts in respect of divorce a mensa et toro, and in all other causes, suits and matters matrimonial, shall be exercised by such courts and by the District Courts subject to the provisions in this Act contained, and not otherwise; except so far as relates to the granting of marriage-licenses, which may be granted as if this Act had not been passed.”*

The definition of High Courts and District Courts have been given in Section 3 – Interpretation clause of the Act.

In this Act, unless there be something repugnant in the subject or context,—

*[(1) “**High Court**”—“High Court” means with reference to any area:—*

(a) in a State, the High Court for that State;

[(b) in Delhi, the High Court of Delhi;

(bb) in Himachal Pradesh, the High Court of Punjab and Haryana up to and inclusive of the 30th April, 1967 and the High Court of Delhi thereafter;]

(c) in Manipur and Tripura, the High Court of Assam;

(d) in the Andaman and Nicobar Islands, the High Court at Calcutta;

(e) in [Lakshadweep], the High Court of Kerala;

[(ee) in Chandigarh, the High Court of Punjab and Haryana;]

and in the case of any petition under this Act, “High Court” means the High Court for the area where the husband and wife reside or last resided together;]

*(3) “**District Court**” means, in the case of any petition under this Act, the court of the District Judge within the local limits of whose ordinary jurisdiction, [or of whose jurisdiction under this Act the marriage was solemnized or] the husband and wife reside or last resided together;*

From the above definitions it can be observed that the statute states that the petition for the divorce can be filed by the husband or the wife in the place where the marriage was solemnized or in the

area where the husband and wife reside or where they last resided together. But over the years, this phrase “*the husband and wife reside or last reside together*” has become a question as to what is the reason to have such a term ‘together’?

As per the provisions of Hindu Marriage Act, 1955, “*Section 19. Court to which petition shall be presented.—Every petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction:—*

(i) the marriage was solemnized, or

(ii) the respondent, at the time of the presentation of the petition, resides, or

(iii) the parties to the marriage last resided together, or

(iiia) in case the wife is the petitioner, where she is residing on the date of presentation of the petition; or

(iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive.”

Here in HMA, if the wife is the petitioner, she can file the petition in the place where she is residing on the date of presentation of petition as mentioned in Section 19(iiia). The Divorce Act, 1869 on the other hand does not have such provision as in Hindu Marriage Act, 1955. The absence of such a provision or rather a vague phrase as “*the husband and wife reside or last reside together*” has given rise to the need to clarify as to how the term ‘together’ should be read. Will the term ‘together’ govern both the term ‘reside’ and ‘last resided’ or does it govern only the term ‘last resided’? In more simpler words, the question is, should the statute be understood in such a manner that ‘the petition can be filed in the place where the husband and wife reside together or last resided together’ or should it be understood that ‘the petition can be filed in the place where the husband and wife reside or last resided together’?.

The same issue was raised and discussed in several pre-constitutional and post-constitutional cases and judgements were pronounced on the same. Yet, they are not followed at present. In *Leadon v. Leadon* Ashworth¹, J., remarked: “*The general rule is that a qualifying word shall be deemed to qualify the word nearest to it.*” According to which the term ‘together’ shall apply only to the

¹ AIR 1926 Oudh 319

place where the husband and wife had last resided and not to the place where the husband or the wife currently resides.

*Daisy Amelia Borgonha v. Wilfred Churchill Borgonha*² Marten, J. expressed his views on the same such that one major reason to not make the word ‘together’ govern the word ‘reside’ is that one can hardly image a husband and wife residing together even after deciding to part ways. If such a case is found, then there might be chances that their petition might be dismissed on the ground of suspicion of collusion or connivance. He further clarified his views giving an example that if the petition was filed on the ground of cruelty or desertion there can hardly be any petition found where the parties reside together at the date of presentation of the petition.

*D.A. Borgonha v. W.C. Borgonha*³ was cited in the case *Dora Ina Eates vs Eric Nevel Eates*⁴ and was followed as a precedence which stated that the grammatical interpretation of the term ‘together’ might be open to both the words ‘reside’ and ‘last resided’ but the more reasonable way would be to restrict its usage to the immediately preceding words thus, making the word ‘together’ govern only ‘last resided’ and not ‘reside’.

*D.A. Borgonha v. W.C. Borgonha*⁵ was again followed in *Mrs. Hazel May Murphy vs L.E. Murphy*⁶ where the operation of the word ‘together’ was restricted to the immediately preceding words ‘last reside’ only.

Though there isn’t any provision unlike section 19 of Hindu Marriage Act, 1955 where it is expressly given that the wife can file the divorce petition at any place she resides, we may understand from the above-mentioned judgements that a Christian wife too can file divorce petition under Section 3(3) of Indian Divorce Act, 1869 from anywhere she resides without jurisdiction to file such petition being an issue.

²(1920)22BOMLR361 <https://indiankanoon.org/doc/406047/>

³(1920)22BOMLR361 <https://indiankanoon.org/doc/406047/>

⁴ AIR1949ALL421 <https://indiankanoon.org/doc/1189916/>

⁵(1920)22BOMLR361 <https://indiankanoon.org/doc/406047/>

⁶ AIR1951ALL180 <https://indiankanoon.org/doc/1198134/>

MINIMUM MANDATORY SEPARATE RESIDENCE AND COOLING OFF PERIOD

A married couple may seek separation when their marriage had failed. In certain cases, such termination of marriage happens by way of a mutual consent where the lawfully wedded husband and wife agree to part ways and mutually file their divorce petition without placing any allegations against each other. On the other hand, there is contested divorce, which shall be granted by the court when the parties to the marriage cannot agree on terms of dissolution of their marriage. This is a case where one party to the marriage would file a petition for divorce on certain grounds and the other party would simply not contest to it. The grounds for filing such divorce petition can be cruelty, adultery, desertion, conversion, mental disorder, communicable disease, presumption of death and much more. Apart from consensual and contested divorce, there is 'void marriages' which shall not be dealt in detail in this article.

Married couple who are Christians, can file for divorce either by mutual consent as per Section 10A of Indian Divorce Act, 1869 or on the grounds mention in Section 10 of the same legislation. Similarly, a Hindu couple can file divorce on a mutual basis as stated in Section 13B of Hindu Marriage Act, 1955 or on the grounds mentioned in Section 13 of aforesaid legislation.

[10A .Dissolution of marriage by mutual consent.—(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 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.

(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 mean time, 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 above provision from the Indian Divorce Act, 1869 provides that the parties to the marriage may file a mutual petition to dissolve their marriage on the ground that they have been living separately for two or more years and thereby their marriage had irretrievably broken. After filing such petition, the court shall grant a cooling off period of six months considering the chances of them cohabitating. If the petition is not withdrawn not earlier than this six month and not later than eighteen months, then the court after hearing both the parties shall pass a decree for divorce and the marriage stands dissolved from the date of passing such decree.

13B. Divorce by mutual consent.—(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 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.]

The preceding provision from the Hindu Marriage Act, 1955 states that the parties to the marriage may present a petition for divorce on mutual consent if they had been living separately for a year or more and thus the marriage had irretrievably broken. Under such a case, the court shall provide a cooling off period of six months considering the chances of them cohabitating. If such petition had not been withdrawn not before this six month and not later than eighteen months, then the court after hearing both the parties shall pass a decree for divorce and the marriage stands dissolved from the date of passing such decree.

While the Christian personal law requires the couple to live separately for a period of two years or more for filing a mutual divorce petition, the Hindu law which shall apply for any person who is

Hindu, Buddhist, Jain or Sikh by religion requires the couple to live separately only for a period of one year or more. This difference in these two personal laws has been seen discriminatory and had been quoted by several learned judges while pronouncing their judgements on cases where the petition had been filed before the completion of two years under the Indian Divorce Act, 1869.

In *Saumya Ann Thomas v. The Union of India*⁷, the issue that was raised was if the stipulated period of two years as the minimum period of separate mandatory residence as per Section 10A (1) of Indian Divorce Act, 1869 arbitrary and violative of Article 14 and 21 of the Indian Constitution? It was contended that while Section 13B of the Hindu Marriage Act, 1955, Section 32B of the Parsi Marriage and Divorce Act, 1936, and Section 28 of the Special Marriage Act, 1954, has a requirement of one year as the minimum mandatory separate residence period, the Christian personal law requiring two years is discriminatory. The court concluded that the minimum period of mandatory separate residence is made only to ensure that the decision by the parties to dissolve their marital ties is not taken hastily without sufficient forethought or contemplation. Considering that aspect, the hon'ble court declared that the Indian Divorce Act, 1869 having a stipulated minimum separate residence of two years is unconstitutional as it is violative of Article 14 and 21 of the Indian Constitution while the other personal laws require only one year. The provision Section 10A of the Divorce Act is now read down to a period of "one year".

In *Lancy Leo Mendonca v. The Union of India*⁸ where the divorce petition filed by the parties were dismissed in the lower court stating that the two-year minimum separate residence requirement was not met. On an appeal, the Hon'ble High Court followed the precedence set in *Saumya Ann Thomas v. The Union of India*⁹ (*supra*) and allowed the petition. The court also clarified that the judgement pronounced in *SA Thomas* case shall be applicable throughout India.

In *Robert Raj v. All Concerned*¹⁰, the divorce petition was filed by mutual consent. The district court dismissed the petition on the ground that the two-year minimum separate residence requirement was not met. On an appeal, the Hon'ble Telengana High Court following the

⁷ 2010 A I H C 3118 <https://indiankanoon.org/doc/475313/>

⁸ <https://www.casemine.com/judgement/in/58117e7c2713e17947892f02>

⁹ 2010 A I H C 3118 <https://indiankanoon.org/doc/475313/>

¹⁰ <https://indiankanoon.org/doc/96205804/>

precedence set in *Saumya Ann Thomas v. The Union of India*¹¹ (*supra*) and *Lancy Leo Mendonca v. The Union of India*¹² (*supra*) stated that the petition was maintainable.

CONCLUSION

Though several judgements have been made clarifying the ambiguity in jurisdiction for filing divorce petition as per the definition of 'district court', it is still an issue when a wife as a petitioner has to file a petition from wherever she resides. It may be clarified if the legislation is amended like the provision in HMA, 1955 thus removing the said ambiguity in the interpretation of the term 'together'. Regarding the minimum mandatory separate residence requirement, though many learned judges have pronounced their judgement on that behalf, the provision is still not amended leading to confusion on application of the same. It would be much better if the legislations are amended following the judgements pronounced in the aforesaid cases for, they are found to be discriminatory and violative of the fundamental rights such as Article 14 and 21 if people belonging to different religion are treated differently on ground of their religion in itself.



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¹¹ 2010 A I H C 3118 <https://indiankanoon.org/doc/475313/>

¹² <https://www.casemine.com/judgement/in/58117e7c2713e17947892f02>