



## KNOW YOUR RIGHTS

# Divorce Laws

### ***What are the different types of divorce?***

There are basically two kinds of divorce: contested or by mutual consent. As the name suggests, in a divorce by mutual consent both husband and wife agree to end their marriage and they jointly decide on questions regarding child custody, maintenance, etcetera.

In a contested divorce, either the husband or the wife petitions the court to grant a divorce, based on any of a number of grounds, which the other party will “contest”. The court grants a divorce only if it is satisfied that these grounds for divorce exist. In a divorce by mutual consent, the court allows divorce if it is satisfied that both parties are freely and voluntarily giving their consent.

### ***Are there any legal alternatives to divorce?***

In legal terms, there are two alternatives to a divorce: judicial separation and separation by agreement. A decree of judicial separation does not dissolve a marriage, as does a divorce. For instance, a woman cannot remarry while she is judicially separated; if her husband dies during the period of separation, she has the right,

which she does not have if she is divorced, to inherit his property along with his other heirs. A woman can apply for judicial separation at any time during her marriage; when filing for a divorce, however, she has to wait for at least a year. During the period of judicial separation, her conjugal rights, and those of her husband, remain suspended. Hence, even though marital rape is not recognised as a crime in India, forcible sexual intercourse during judicial separation is a criminal offence.

A separation agreement is like a contract in which a woman and her husband agree to live separately and release each other from the obligations that come with marriage. Their marriage will continue to exist, but they need to go to court to validate this agreement.

### ***How soon after a marriage can a woman apply for a divorce?***

A married couple ordinarily cannot apply for a divorce until one year after marriage. An exception is made in cases where staying on in the marriage will inflict exceptional hardship on the petitioner – for example, in cases of domestic violence.

### ***When and how can a married couple opt for a divorce by mutual consent?***

A husband and wife can apply for a divorce by mutual consent only after living separately for one year

and if both parties declare that their marriage has “irretrievably broken down”. The first application for divorce is known as the “first motion”. In order for the divorce to be finalised, the couple must make a joint “second motion” between 6 to 18 months after the first motion.

### ***Can a woman refuse her husband a divorce?***

Yes. In the case of a divorce by mutual consent, either party can refuse to consent to the divorce until the second motion is granted. If one party refuses to a divorce by mutual consent, the other may, of course, petition for a divorce on a number of grounds.

### ***What are the different grounds for divorce?***

There are a variety of grounds for divorce in the case of a Hindu marriage. The grounds available to the wife alone are given below:

- Cruelty;
- Voluntary sexual intercourse outside the marriage;
- Desertion for two years or more;
- Insanity;
- Conversion to another religion;
- Leprosy or venereal disease;
- Renouncing the world by entering a religious order;
- Not being heard of as being alive for seven years or more;
- No resumption of cohabitation between the parties for a year or more after a decree of judicial separation has been passed;

- No restitution of conjugal rights for a year or more after a decree for restitution has been passed.
- The husband has been found guilty of rape, sodomy, or bestiality before the age of 15 (a ground only available until the wife is 18).

The grounds upon which a registered marriage may be dissolved are slightly different: for instance, they include the imprisonment of either husband or wife for a period of seven years or more.

#### **Who initiates the divorce?**

In a divorce by mutual consent, both parties must apply for the divorce jointly. In a contested divorce, the person seeking the divorce must initiate proceedings and must prove that the grounds for divorce exist (for example, that one's spouse has committed adultery). The other party has to refute the allegations made.

#### **Is going to court the only way of obtaining a divorce?**

No. The Hindu Marriage Act recognises forms of divorce based on the customs of a particular community. For instance, the dissolution of marriage by a *panchayat* is a recognised customary practice.

#### **On what grounds can the court refuse to grant a divorce?**

In a divorce by mutual consent, the court will refuse to grant a divorce if it feels that consent has been obtained by force or fraud. In the case of a contested divorce, the court must be satisfied that certain "bars to matrimonial relief" are not present. These include:

**Taking advantage of one's own wrong or disability:** The person who seeks divorce (i.e. the petitioner) must satisfy the court that he or she has not been the cause of the ground of divorce, whether directly or indirectly. For

instance, if a woman contracted a venereal disease from her husband, he cannot divorce her on the ground that she has a venereal disease.

**Being an accessory or conniving:** This is usually applicable to cases of adultery. A woman cannot get a divorce on the grounds of her spouse's adultery if she has actively or passively encouraged it.

**Condonation:** If a woman files for divorce on the grounds of cruelty or adultery, she must satisfy the court that she has not "condoned" or forgiven her spouse for the matrimonial "offence". Condonation means not only that she has forgiven her spouse, but also that he has been "reinstated", i.e. that she and her spouse continue to live together as they did before the matrimonial offence was conducted.

**Delay:** If there has been a long delay between the commission of the matrimonial offence and the petition for divorce, the petitioner will have to give a satisfactory explanation for the delay. The courts have generally been sensitive to a range of reasons for long delays in filing for divorce, especially for women in the Indian context.

#### **What can a woman do if her husband abandons her?**

She has three options. She may:

- File for a divorce if her husband has deserted her for two years or more;
- File a claim for maintenance. Under the Hindu Adoptions and Maintenance Act, a woman is entitled to maintenance and separate residence even without getting a divorce.
- Petition the court for restitution of conjugal rights. If the court is satisfied that her husband deserted her "without reasonable cause",

it can order the husband to "cohabit" with her. If he does not do so, he can be fined by the court. A woman can also file for a divorce within one year of the passing of the order if her husband has not returned to her.

Men can also file for restitution of conjugal rights. However, even if the Court orders in favour of the person who is seeking restitution, there is no compulsion on the other partner to cohabit with his or her spouse. If the person who has been directed by the court to resume cohabitation with his or her spouse refuses or fails to do so, the only remedy available to the aggrieved spouse is to file for divorce. Failure to cohabit with a partner after a restitution order by the court is, by itself, sufficient ground for divorce. However, the law does not lay down any punishment for failure to cohabit.

#### **What are a woman's rights regarding confidentiality and privacy in a divorce proceeding?**

For both Hindu marriages and civil marriages, divorce proceedings may be held *in camera*, which means that only the parties, their lawyers and the judge are present. Nobody is allowed to publish anything in relation to these proceedings, except a judgement of the High Court or Supreme Court.

A woman can also ask the court to suppress her identity during court proceedings and in all court records.

#### **What is meant by a "settlement"?**

It is possible that, once a divorce case is underway, the parties reach some sort of compromise over the case. For instance, if a woman went to court to demand maintenance, her husband may decide to give her maintenance even before the court orders him to do so, on condition that she withdraw her suit. This is known as an "out-of-court settlement". □