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# DIVORCE LAW UPDATES
## THE COOLING-OFF PERIOD AND THE USE OF VIDEO CONFERENCING

Two recent judgments of the Supreme Court of India have provided interesting new perspectives on divorce proceedings under the Hindu Marriage Act, 1955 ("Hindu Marriage Act"). The Hindu Marriage Act applies to all Hindus, Buddhists, Jains and Sikhs except those married under the Special Marriage Act, 1954.

### Six month cooling-off period for mutual consent divorce

The first of these judgments considers an issue that has already been considered numerous times by Indian courts – whether the six month cooling-off period prescribed under the Hindu Marriage Act for mutual consent divorces is mandatory in all cases.

Under the Hindu Marriage Act, in order to obtain a divorce by mutual consent, parties must first file a petition for divorce. They must then wait a minimum of six months before filing a motion to finalise the divorce. In *Amardeep Singh v. Harveen Kaur*,[1] the Supreme Court considered whether this six month cooling-off period could be waived.

The Supreme Court ruled that it had no discretionary power to override the explicit provisions of the Hindu Marriage Act (or any other statute). However, the court decided that the provision of the Hindu Marriage Act requiring the six month cooling-off period is not mandatory but only directory. Therefore, the family court before which divorce proceedings are pending *can* waive this period in exceptional circumstances, if certain conditions are fulfilled, including that the parties have been separated for over 18 months, that all efforts for mediation and conciliation to reunite the parties have failed, that the parties have genuinely settled their differences including regarding alimony, child custody etc. and that the waiting period would only prolong their agony.

*"the court decided that the provision of the Hindu Marriage Act requiring the six month cooling-off period is not mandatory but only directory"*

Thus, the Supreme Court has given family courts the discretion to determine whether to waive the six month cooling-off period. The Supreme Court also held that the application for waiver can be made as early as one week after the petition for divorce had been filed.

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## Video conferencing facilities in divorce proceedings

*Video conferencing facilities:*

- *cannot be used at the urging of only one of the parties*
- *can only be used after the court is satisfied that no settlement or resolution is possible*
- *cannot be used as an alternative to transferring divorce proceedings*

In *Santhini v. Vijaya Venketesh*,[2] the Supreme Court considered a newer question – the extent to which video conferencing facilities can be used in divorce proceedings.

A three judge bench of the Supreme Court was asked to consider this question by a smaller bench. The question was asked in the context of a transfer petition filed by a wife in divorce proceedings, seeking transfer of the proceedings to a jurisdiction more convenient to her. The court was asked to consider whether instead of transferring the proceedings, the court could instead ask the wife and other witnesses to appear before the court using video conferencing facilities; it had been suggested in an earlier case that video conferencing facilities might be a solution to the inconvenience caused to parties involved in divorce proceedings who were located in different places.

By a majority judgment of two judges against one, the court held:

- Video conferencing facilities cannot be used at the urging of only one of the parties. Both parties must agree before video conferencing can be used. This is to protect the privacy of the parties, the importance of which is recognised in both the Hindu Marriage Act and the Family Courts Act, 1984.
- Video conferencing facilities can only be used after the court is satisfied that no settlement or resolution is possible between the parties. The Hindu Marriage Act also emphasises that divorce courts should encourage reconciliation. This cannot be achieved through video-conferencing.
- Video conferencing cannot be used as an alternative to transferring divorce proceedings in cases in which transfer petitions have been filed.
- The use of video conferencing facilities for the hearing of a divorce case can only be permitted on a specific joint application of both parties or if both parties file consent memorandums with respect to the use of video conferencing. It can also only be permitted after settlement efforts fail.

One judge did not agree with the view above and held that courts should be permitted to hear divorce proceedings through video conferencing because of the convenience associated with video conferencing. The judge stated that whether to use video conferencing facilities should be left to the discretion of the family court judge hearing the matter, subject to rules framed by the appropriate High Court, and the Supreme Court should not have laid down a judicial restraint on the use of video conferencing.

*"until the infrastructure of the family courts in India is improved, video conferencing may be available in divorce proceedings in theory only"*

Interestingly, although video conferencing was not in issue in the *Amardeep Singh* case, the court in this matter also commented on the use of video conferencing facilities, stating that in conducting divorce proceedings, the court could use the medium of video conferencing. However, these reflections of the court in *Amardeep Singh* will now be subject to the conditions set out in the *Santhini* case.

When the Hindu Marriage Act was enacted in 1955, modern technologies such as video conferencing facilities simply did not exist, and therefore are not referred to in the Act. It is heartening that Indian courts are at least recognising video conferencing as a useful tool in dispute resolution, albeit a tool to be used in certain limited circumstances only. A greater impediment to the use of video conferencing facilities, in our view, may be the practical lack of these facilities in the family courts in India – until the infrastructure of the family courts in India is improved, video conferencing may be available in divorce proceedings in theory only.

***- By Krishna Hariani***

***Editor: Trupti Daphtary***

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[1] Civil Appeal No. 11158 of 2017.

[2] Transfer Petition (Civil) No. 1278 of 2016.