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Invocation of supreme court's Inherent jurisdiction in broken marriages

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Abstract---"Till death do us apart" the myth of perpetual bond of cohabitation in a Sacrosanct marriage has been faded with time. The social taboo attached to divorce has been diluted and has been accepted as a remedy rather than a curse. There has been a journey in divorce cases from guilt theory to consent and further to breakdown of marriage. Irretrievable Breakdown of Marriage though received the attention of Law Commission of India[1], Judiciary [2] and attempts have been made by the legislature[3] but could not be substantiated in the Family Jurisprudence of India. This paper attempts to focus upon the judgments of the Supreme Court where the inherent jurisdiction under Article 142 of the Constitution has been invoked for doing complete justice in matrimonial disputes. The author tends to limit the scope of the paper to Hindu Marriage Act, 1955.

Keywords---divorce, matrimonial fault, mutual consent, irretrievable breakdown marriage, inherent jurisdiction, supreme court.

Introduction

Divorce laws over a period of time throughout the world have seen tremendous change. There has been a shift from fault-based divorce to mutual consent to divorce on demand. Earlier, the Doctrine of Recrimination applied in matrimonial disputes as no remedy could be granted to the party at fault. So, the only option left with such spouses was to fabricate a fault ground, and the other spouse did not contest it. These were termed as collusive decrees but were strictly prohibited in matrimonial laws. Divorce by mutual consent was witnessed as a broad transformation in Divorce laws. With the advent of the consent theory of divorce, the sacramental notion of marriage got diluted and it acquired a fabric of contractual partnership. Despite such progressive development, the law proved to

be inadequate in dealing with the cases where there is a complete breakdown of marriage and lack of consent of both parties for divorce. The 71st Law Commission Report, 1978 recommended for incorporation of Irretrievable Breakdown of Marriage as an independent ground of divorce. One of the distinctive features of the Irretrievable Breakdown of Marriage is that such divorce is unconcerned with the wrongs of the spouses in past and hence does not attract the provision of section 23(1)(a).[4] This would definitely obviate the necessity of producing evidence of acrimony and similar incidents during married life, which the parties may not like to reveal.[5]

Hon'ble Supreme Court in *Naveen Kohli v. Neelu Kohli*[6] observed that the law of divorce based on fault ground is inadequate and recommended the Union of India to consider bringing an amendment in Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground of divorce. In furtherance Law Commission of India *suo motu* took up the study of the subject in its 217th Report[7] in March 2009 and recommended amendment in the Hindu Marriage Act, 1955 and Special Marriage Act, 1954 for the inclusion of Irretrievable Breakdown of Marriage as a ground of divorce.

Now, it becomes imperative to discuss whether we have the traces of Irretrievable breakdown of marriage in Indian Family Jurisprudence in the absence of substantive law. How far the legal presumption of having the provision[8] can help the parties stuck in the procedural complexities in already dead marriages. If there is a lacuna in family jurisprudence on broken marriages, how is the Judiciary dealing with such cases.

Traces of Irretrievable Breakdown of Marriage in India

Section 13 of Hindu Marriage Act, 1955 provides for dissolution of marriage. In 1964, Section 13(1A) was inserted in Hindu Marriage Act, 1955 containing two clauses as per which non-resumption of cohabitation for two years or more after the decree of restitution of conjugal rights or judicial separation was made a ground of divorce. The Marriage Laws (Amendment) Act, 1976 reduced the time limit from 2 years to 1 year. It is a legal presumption that Section 13(1A) introduced the element of Breakdown theory in the Hindu Marriage Act, 1955.

Traces of the breakdown principle is presumably present in section 13(1A) of Hindu Marriage Act, 1955. But as rightly explained by the Law commission of India this is not purely a case of breakdown of marriage. A divorce petition under section 13(1A) must be preceded by a decree for judicial separation or restitution of conjugal rights. A decree for judicial separation again could not have been passed unless circumstances which prove what may be called marital offences or marital disability were established. In this sense the petition for divorce under section 13(1A) indirectly brings in a consideration of fault or disability. Similarly, a decree of restitution of conjugal rights could not have been passed unless it has been proved that the respondent had without reasonable cause withdrawn from the society of other. Thus, the petition under section 13(1A) in so far as it is based on a prior decree of restitution also involves consideration of fault.[9] Since divorce by mutual consent requires the consent of both the parties and if one of the parties withholds his or her consent, divorce can never be obtained. In many

cases, parties are not ready to give divorce even if the marriage has been broken down. It may occur that one of the spouses may not give his or her consent for divorce on account of a belief in indissolubility of marriage or on account of malice, bigotry or avarice.[10]

Since it is evident from the above discussion that there is a legislative lacuna in family jurisprudence in the cases of broken marriages where one of the parties is not ready to end the already dead marriage. Hence, it becomes imperative for Judiciary to provide justice to such parties who are suffering endlessly in the bad marriages. But due to lack of substantive provisions, the hands of the Judiciary are also tied up due to the principle of separation of power. The Judiciary has time and again addressed this issue by emphasizing upon the need of amendment by incorporating Irretrievable Breakdown of Marriage as an independent ground of divorce. In the light of judicial activism, Supreme Court has granted divorce by invoking Article 142 of the Constitution in the cases where the marriages have reached the breaking point and there is no possibility of reconciliation. We shall now discuss the Inherent power of the Supreme Court under Article 142 of the Constitution of India and how the Court has used this power to show impeccable activism to relieve the parties from the burdensome relationship of a broken marriage.

Supreme Court's Inherent Jurisdiction Under Article 142

Article 142 of the Indian Constitution envisages that Supreme Court under its inherent jurisdiction may pass such decree or order which is necessary for doing 'complete justice' in any cause or matter pending before it. Article 142: Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.[11]

The extent of the extraordinary power has been explained in *Supreme Court Bar Association v. U.O.I.*[12]as:

"The plenary power of this court under Article 142 of the Constitution are inherent in the court and are complementary to those powers which are specifically conferred on the court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power, exists as a separate and independent basis of jurisdiction apart from the statutes."

Supreme Court's Intervention in Broken Marriages

The Hon'ble Supreme Court has invoked Article 142 in number of cases and every case is different in terms of facts and circumstances. The following are some of

the instances where the Supreme Court has invoked its inherent jurisdiction in matrimonial disputes:

- By waiver of statutory period of six months
- where one of the parties have withdrawn consent
- By blending Irretrievable Breakdown of Marriage with cruelty
- By treating transfer petition as one under section 13B.

By waiver of statutory period of six months

Section 13B[13] of Hindu Marriage Act deals with divorce by mutual consent. One of the essential ingredient of sub-section (2) is that both the parties should apply to the Court not before than six months from the presentation of the divorce petition and not later than eighteen months after that date. Now the essential ingredients can be deduced as that

- It provides a period of *interregnum*[14] i.e., a minimum of six months and a maximum of eighteen months;
- It requires that the motion needs to be made by both the parties, during the time of filing a petition of divorce and also at the time of divorce decree being granted.

In many cases where the waiting period causes extreme hardship to the parties the courts have waived off such period of *interregnum*. By overstepping the statutory limitations in section 13B(2) of the Act, the Supreme Court has used its inherent powers for dissolution of marriage by mutual consent, relying on the doctrine of irretrievable breakdown of marriage.[15]For understanding this concept it is important to discuss a few cases pertaining to the issue in hand.

There are several cases of Supreme Court where it has invoked its inherent jurisdiction under Article 142 and passed a decree of dissolution of marriage by mutual consent without waiting for a statutory period of six months to expire. In *Anjana Kishore v. Puneet Kishore*[16] a three-judge bench of Supreme Court invoked its inherent jurisdiction under Article 142 while hearing a transfer petition. The Court ordered the parties to present a joint petition before the family court under section 13B of the Hindu Marriage Act for grant of decree of divorce by mutual consent along with the copy of term of compromise arrived at between the parties. The court further directed the court to do away with the statutory period of six months. After passing of the abovementioned judgment various High Courts[17] started waiving off the statutory period of six months.

The issue regarding the jurisdiction of matrimonial courts and High Courts to reduce the statutory period of six months for second motion under section 13B(2) came up before Supreme Court for consideration in *Anil Kumar Jain v. Maya Jain*[18]. Justice Altamas Kabir observed and directed as:

" In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13B of the Hindu Marriage Act. This doctrine of irretrievable Breakdown of Marriage is not available even to the High

Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Neither the civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on the grounds not provided for in Sections 13 and 13B of the Hindu Marriage Act, 1955."[19]

The Supreme Court opined that only this Court has the extraordinary power to waive off the statutory period as mentioned in section 13B.

While on the contrary, similar pleas invoking article 142 for waiving a statutory requirement were rejected in *Manish Goel v. Rohini Goel*[20] and *Poonam v. Sumit Tanwar*[21]. It was mentioned by the Hon'ble Supreme Court that as per article 142 of the Constitution the Court cannot altogether disregard the substantive provisions of the statute.

The question whether the Supreme Court has the power to waive off the statutory period as mentioned in section 13B of Hindu Marriage Act, 1955, has been put to rest in *Amardeep Singh v. Harveen Kaur*[22]. The Supreme Court held in that the period mentioned in section 13-B (2) is not mandatory but directory and the court can exercise its jurisdiction based on the facts and circumstances of cases where there is no possibility of resumption of cohabitation between the parties. It was held by the Court that where it is satisfied that the case has been made to waive off the statutory period under section 13-B (2), the Court can do so after the consideration of the following factors: - "

1. The statutory period of six months specified in section 13-B (2), in addition to the statutory period of one year under section 13-B (1) of separation of parties is already over before the first motion itself;
2. All efforts for mediation/conciliation including efforts in terms of Order 32-A Rule 3 CPC/ Section 23(2) of the Act/ Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;
3. The parties have genuinely settled their differences including alimony, custody of a child or any other pending issue between the parties;
4. The waiting period will only prolong their agony.

The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied the waiver of the waiting period for the second motion will be at the discretion of the court concerned."[23]

Where one of the parties have withdrawn consent

The second requirement which is required under section 13-B (2) of Hindu Marriage Act, 1955 is that motion should be made by both the parties, at the time of presenting a petition of divorce and also at the time of divorce decree being granted. It is mandatory for the court to make sure that the consent of parties subsists till the expiry of the six months statutory period. In *Sureshta Devi v. Om Prakash*[24] the issue before the Court was whether the parties to the mutual divorce petition unilaterally withdraw his/her consent? The Court categorically stated that the consent must continue till the time of the decree and not just at

the time of the filing of the petition. In *Ashok Hurra v. Rupa Bipin Zaveri*[25], the wife withdrew her consent after about 19 months after the presentation of the petition and sought for dismissal of the petition. The husband contended that she did not have a right to withdraw her consent after 18 months had elapsed. Hon'ble Supreme Court invoked its inherent jurisdiction under article 142 of the Constitution and granted the divorce conditional on the husband paying a lump sum amount towards permanent maintenance and litigation expenses of the wife. The Court held that the marriage had irretrievably broken down and there was no point in prolonging the agony of the couple who were fighting like 'Kilkenny cats'. The Supreme Court held in *Anil Kumar Jain v. Maya Jain*[26] that no court except Supreme Court can pass a decree when one of the parties withdraws the consent. Justice Altamas Kabir analyzed two propositions in this case:

"29. The first proposition is that although irretrievable breakdown of marriage is not one of the grounds indicated whether under Sections 13 or 13-B of the Hindu Marriage Act, 1955 for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13-B of the aforesaid Act....."

30. The second proposition is that although the Supreme Court can, in exercise of its extraordinary powers under Article 142 of the Constitution, convert a proceeding under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13-B and pass a decree for mutual divorce, without waiting for the statutory period of six months, none of the other courts can exercise such powers. The other courts are not competent to pass a decree for mutual divorce if one of the consenting parties withdraws his/her consent before the decree is passed....."

Hence it is clear with the language of the judgment that in special circumstances Supreme Court can pass orders to do justice to the parties in cases where the marriage has been broken down irretrievably by invoking inherent jurisdiction under Article 142 of the Constitution, but in normal circumstances the statutory provisions should prevail.

A contrasting approach has been taken in number of cases where the Supreme Court refused to grant relief in similar circumstances. One such case is *Hitesh Bhatnagar v. Deepa Bhatnagar*[27] where the Court held that consent of both the parties until the final decree is mandatory. The Court further held that "though there is bitterness amongst the parties and they have not lived as husband and wife for the past 11 years, we hope that they will give this union another chance, if not for themselves, for the future of their daughter".

Even though the judgment is clear that the statutory provisions are to be followed but the length of the separation between the parties makes it a fit case of broken marriage. Where the marriage is practically broken and is subsisting only for the purpose of law then the justice demands that the same be legally buried.

By blending Irretrievable Breakdown of Marriage with cruelty

The Supreme Court in many cases[28] has granted divorce in cases where the petition is filed on the ground of cruelty, adultery or desertion and held that there is an irretrievable breakdown of marriage. In some cases, the Hon'ble Court has blended the concept of Irretrievable Breakdown of Marriage with Cruelty and invoked its inherent jurisdiction in order to do the complete justice to the parties. In *Romesh Chander v. Savitri*[29] Justice R.M. Sahai observed that if the marriage is dead emotionally and practically, continuance of such relation namesake would add further agony and affliction.

In *Sukhendu Das v. Rita Mukherjee*[30] both the parties were district judges and their marriage was performed under Special Marriage Act. They lived separately for around 17 years and due to marital discord. The respondent did not appear before the Trial Court and High Court. Despite several notices did not appear before the Supreme Court also. The Hon'ble Court made the reference to *Samar Ghosh v. Jaya Ghosh*[31] where it was held that refusal to participate in proceeding for divorce and forcing the appellant to stay in a dead marriage would itself constitute mental cruelty. The Court held that since they have lived separately for more than 17 years and their only daughter has turned 24 hence there is no purpose in compelling the parties to live together. The Court in order to do complete justice between the parties exercised its inherent power under Article 142 and dissolved the marriage.

In *R. Srinivas Kumar v. R. Shametha* [32] the Hon'ble Court observed that the parties have been living separately for past 22 years and there is no possibility of reunion because of strained relationship. The contention of the respondent wife that marriage cannot be dissolved on the ground of irretrievable breakdown of marriage unless there is consent of both the parties is baseless. The Court further explained that if both the parties' consent to stay separate then they can move the competent court for divorce by mutual consent. It is only such cases where one of the parties refrain from consent that the power under Article 142 needs to be invoked to do the substantial justice between the parties. The Court further clarified that this inherent power have been exercised by this Court in number of cases "*where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of case do not provide a ground in law on which the divorce could be granted*[33]".

Similarly in *MuneeshKakkar v. Nidhi Kakkar*[34]It was observed by the Hon'ble Court that no doubt the consent is absent, however, there is no willingness on the part of the parties to live together. Most recently in *Sivasnkaran v. Santhineelam*[35] 2021 judgment of Hon'ble Supreme Court the similar question came up for consideration. The Court once again invoked its inherent jurisdiction to pronounce divorce on the grounds of Irretrievable breakdown of marriage.

By treating transfer petition as one under section 13-B

These are such cases where the parties during their petition under section 13 of Hindu Marriage Act approaches the Hon'ble Court for the transfer of case and during the pendency, they arrive at a settlement and Court under its inherent

jurisdiction under Article 142 treats such divorce petition as divorce by mutual consent under section 13-B. In most of these cases the court invokes the doctrine of Irretrievable Breakdown of Marriage and brings a quietus upon the long pending litigations between the parties. A few of such cases are discussed here.

Sandhya M Khandelwal v. Manoj M. Khandelwal[36] came before the Supreme Court by way of transfer petition seeking transfer of matrimonial suit. During the pendency of the petition, the parties settled their disputes. Even though the original suit was under section 13 of Hindu Marriage Act, the court treated the application as under section 13-B keeping in mind the settlement arrived between the parties and their interest involved.

In *Kiran v. Sharad Dutt*[37] after living separately for years and fighting for divorce under section 13 the parties filed a joint petition before the Supreme Court. Treating the divorce petition as under section 13-B of the Act, the Hon'ble Court granted a decree of divorce at the SLP stage by invoking its powers under Article 142.

Similarly, in *Swati Verma v. Rajan Verma*[38] the Supreme Court while hearing a transfer petition invoked its inherent jurisdiction under Article 142 and applied the doctrine of irretrievable breakdown of marriage. After the parties arrived at compromise settlement the Court allowed the application for divorce by mutual consent in the said proceedings to give the parties relief from the pending litigation.

Conclusion

The Apex Court in various judgments has exercised the inherent power under Article 142 of the Constitution of India for dissolution of marriage where the Court finds that the marriage is totally unworkable, emotionally dead and has broken down irretrievably. The Law Commission proposed twice to include Irretrievable Breakdown of Marriage as a ground of divorce. Marriage Laws Amendment Bill was introduced twice in 2010 and 2013 for incorporating Irretrievable Breakdown of Marriage as a separate ground of divorce but could not be passed. Even though The Marriage Laws Amendment Bill, 2013 lapsed on its prorogation[39] the idea[40] has been merged in the legal system and has made a back-door entry[41] through various judgments.[42] Without getting into the argument of whether Supreme Court has rightly exercised its inherent jurisdiction under Article 142 of the Constitution of India in matrimonial disputes, it becomes imperative to fill the legislative lacuna in Hindu Marriage Act, 1955 and Special Marriage Act, 1954 by incorporating Irretrievable Breakdown of Marriage as an independent ground of divorce. This is quite visible from the thorough discussion of various judgments of Hon'ble Supreme Court that in the absence of a concrete legislation, Judiciary has played a role of a guiding light and has provided the relief for the perpetual suffering of spouses where the marriage has shattered into pieces and parties have been living in the trauma of namesake marriages hence now more than ever is the time where there is a dire need of incorporation of the ground of Irretrievable breakdown of marriage in the cases of divorce with the adequate safeguards of-course.

References

1. Law Commission of India, 71st Report 1978 and 217th Report 2009.
2. In certain judgments Hon'ble Supreme Court has invoked its inherent power under Article 142 for doing the complete justice between the parties.
3. Marriage Laws Amendment Bill was introduced twice in 2010 and 2013 for incorporating Irretrievable Breakdown of Marriage as a separate ground of divorce but could not be passed.
4. Section 23 Decree in Proceedings: (1) In any proceedings under this Act, whether defended or not, if the court is satisfied that – (a) any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief.
5. Law Commission of India, 71st Report 1978, p. 3.
6. AIR 2006 SC 1675.
7. Irretrievable Breakdown of Marriage – Another Ground for divorce.
8. Section 13(1A) of Hindu Marriage Act, 1955 and like provisions in different statutes.
9. Law Commission of India, 71st Report, 1978, p. 7.
10. Paras Diwan, Modern Hindu Law, 1993, p. 73.
11. Constitution of India, 1950, Article 142.
12. (1998) 4 SCC 409.
13. 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, 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. 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 enquiry 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 decree.
14. the period of *interregnum* is meant to give time and opportunity to the parties to reflect on their move.
15. Rajat Pradhan, *Ironing out the Creases: Re-examining the Contours of Invoking Article 142(1) of the Constitution*, (2011) 6 NALSAR Student Law Review 1 available at <https://nslr.in/wp-content/uploads/2019/03/NSLR-Vol-6-No-1.pdf> visited on May 3rd 2020.
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18. (2009) 10 SCC 415.
19. *Id.* at p 423 para 29.

20. (2010) 4 SCC 393.
21. (2010) 4 SCC 460.
22. (2017) 8 SCC 746: 2017 SCC OnLine 1073.
23. *Id.* at 756 para 9.
24. AIR 1992 SC 1904: (1991) 2 SCC 25.
25. AIR 1997 SC 1266: (1997) 4 SCC 226.
26. AIR 2010 SC 229.
27. AIR 2011 SC 1637: (2011) 5 SCC 234. See also *SmrutiPahariya v. Sanjay Pahariya*, AIR 2009 SC 2840.
28. *Chanderkala Trivedi v. Dr. S. P. Trivedi* (1993) 4 SCC 232; *V. Bhagat v. D. Bhagat* (1994) 1 SCC 337; *A. Jayachandra v. Aneel Kaur* AIR 2005 SC 534; *Naveen Kohli v. Neelu Kohli* (2006) 4 SCC 558; *Samar Ghosh v. Jaya Ghosh* 2007 (3) SCJ 253; *K. Srinivas Rao v. D.A. Deepa* (2013) 5 SCC 226.
29. (1995) 2 SCC 7.
30. (2017) 9 SCC 632.
31. (2007) 4 SCC 511.
32. MANU/SC/1382/2019.
33. *Id.*, para 7.
34. (2020) 14 SCC 657.
35. 2021 SCC OnLine SC 702.
36. (1998) 8 SCC 369.
37. (2000) 10 SCC 243.
38. (2004) 1 SCC 123.
39. The Marriage Laws Amendment Bill, 2013 was passed in Rajya Sabha and lapsed before it could be considered by the Lok Sabha, as the Lower House was dissolved upon completion of its term and general elections were held. The Bill sought to amend Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 to incorporate the Irretrievable Breakdown of Marriage as a third ground of divorce by inserting Section 13(C), (D), (E), and (F) after Section 13(B) in Hindu Marriage Act, 1955 and Section 28(A), (B), (C), and (D) after Section 28 in Special Marriage Act, 1954.
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