
UNRAVELING THE KNOT: OBTAINING DIVORCE VIA ARTICLE 142

Rishi Vinayak, National University of Study and Research in Law, Ranchi

ABSTRACT

“Divorce is a declaration of independence with only two signers”

– Gerald F. Liberman

The Supreme Court of India on 1st, May, 2023 on a transfer petition delivered a judgement on one of the most substantial questions of law, defining the ambit of power and jurisdiction of the apex court under *Article 142(1)* of the Indian Constitution intricately knitting with the provision of statutory period of six months before granting decree of divorce, particularly defined under *Section 13-B* the Hindu Marriage Act, 1955.

This article is an attempts to unravel whether the Supreme Court had the requisite authority to grant divorce in case of ‘*irretrievable breakdown of marriage*’ even if the The parties directly approached the Supreme Court without filing an appeal from a decision rendered by a lower court?

It further analyses the *discretionary powers* of the court and their application in family law matters. Finally, raises concerns regarding the erosion of lower court jurisdiction, lack of procedural safeguards, limited applicability to complex cases, and potential burden on the Supreme Court.

Keywords: divorce, irretrievable breakdown, discretionary power.

INTRODUCTION

In the case of *Shilpa Sailesh v. Varun Sreenivasan*¹, the couple approached the Supreme Court of India in 2014 seeking a divorce using the court's discretionary powers under Article 142(1) of the Indian Constitution. The marriage was in a state of “*irretrievable breakdown*”, as it was termed, but the same is not recognized as a ground for divorce under the Hindu Marriage Act, 1955. Normally, mutually consenting parties as a corollary approach a Family Court under Section 13-B of the Hindu Marriage Act. However, the petitioners had reached a settlement before approaching the Supreme Court, while their case was still pending in the Family Court.

The following main concerns were raised in the case:

- I. Whether the Constitutional provision of Article 142(1) can be used to decide divorce cases at all?
- II. Does the Supreme Court have the authority under Article 142(1) to waive or reduce the cooling off period specified under Section 13-B (2) of the Hindu Marriage Act?
- III. The parameters for the exercise of powers under Article 142 to dissolve a marriage between consenting parties without referring them to the Family Court and waiting for the mandatory period prescribed under the Hindu Marriage Act?

In its judgment, a 5-Judge Constitution Bench unanimously held that the Supreme Court has the jurisdiction to grant divorce as a Court of first instance on the grounds of irretrievable damage under Article 142(1). The Court clarified that it has the discretion to depart from procedural and statutory provisions of law under Article 142 if it is necessary to establish “*complete justice*” for the parties. However, any departure from procedure must be based on fundamental general and specific principles of public policy.

The Court further held that it has the requisite authority to set aside the prescribed period and procedure for divorce by mutual consent under Section 13-B of the Hindu Marriage Act. It can

¹ *Shilpa Sailesh v. Varun Sreenivasan*, 2023 SCC OnLine SC 544.

also grant divorce on the ground of irretrievable breakdown of marriage in the interest of justice, even if one party opposes it.

The ruling made it evident that the SC's discretionary authority to grant divorce under Art. 142 (1) is based on each individual instance and is not a as a matter of right. Before deciding whether there has been an "*irretrievable breakdown*" of the marriage, the SC must take the following ingredients into account:

1. Period when the parties last cohabited,
2. Nature of allegations
3. Whether attempts were made to settle disputes through courts or otherwise
4. Continuous ill-treatment
5. Period of separation etc.

KEY CONCERNS ON THE IMPLICATIONS OF THE JUDGEMENT

I. INTERPRETATION OF LAWS

"The law is the public conscience" – **Thomas Hobbes.**

A) Article 142(1): Condescending provision?

142(1) - Enforcement of Decree and Orders of Supreme Court

The Supreme Court of India has the authority to issue any decree or order necessary to achieve *complete justice* in a case before it. These decrees or orders are enforceable throughout the territory of India, following the provisions of laws passed by Parliament or, in the absence of such provisions, in accordance with the President's order.

The Supreme Court has ample power to enforce any decree or issue any order as essential to

facilitate **complete justice** in any case or subject that is presently before it.²

In the case of *Mahant Suresh Das and Others v. M. Siddiq (Dead) Through Legal Representatives (Ram Janmabhumi Temple Case)*³, the apex court interpreted;

“The expansive meaning of the phrase “is necessary for doing complete justice” entails the application of equitable principles in situations where a precise application of the law alone is inadequate to achieve a fair outcome. The demands of justice compel that a great attention is devoted to both the positive law’s pronouncements and its silences in order to discover an equitable and just resolution within them. The intersection of the general and specific comes into focus attributable to the equitable power granted by Article 142(1) of the Constitution.”

Article 142(1) contains **no limitations** regarding the causes or the circumstance in which the power can be exercised nor does it lay down any condition to be satisfied before such power is exercised. The exercise of the power is left completely to the discretion of the highest judicature.⁴

In Article 142(1), the term "**complete justice**" refers to both **general equity** (the liberal and compassionate interpretation of the law) and **particular equity** (the liberal and compassionate adjustment of the law in exceptional circumstances).⁵ This component provides the Court to plug the gaps in the incumbent law, smooth out any sharp edges, and guarantee a fair and humane decision. This power gives equity precedence over law, but it should be modulated manner and kept within the parameters established by the Constitution.

In *Union Carbide Corporation and Others v. Union of India and Others*⁶, this Court laid specific emphasis on the expression ‘**cause or matter**’ to observe that ‘**cause**’ means **any action or criminal proceedings**, and ‘**matter**’ The expression “**cause or matter**” as stated in Article 142(1) includes various types of legal proceedings, spanning civil and criminal cases, interim and conclusive

² *Delhi Electric Supply Undertaking v Basanti Devi*, AIR 2000 SC 43, 49: (1999) 8 SCC 229

³ (2020) 1 SCC 1

⁴ *Dayaram v Sudhir Batham*, (2012) 1 SCC 333 (357) (*The power under Article 142 of the Constitution is not intended to be exercised, when such exercise will directly conflict with the express provisions of a statute*).

⁵ *Ibid.*

⁶ (1991) 4 SCC 584

stages, occurring either prior to or following a judgment.⁷

It covers practically every facet of legal proceedings. The authority granted to the Court under Article 142(1) is of a greater scope and greater magnitude than the authority granted by ordinary legislation. Ordinary law prohibitions or restrictions cannot automatically operate as limitations on the constitutional powers granted by Article 142. However, the Court ought to supervise its application of its dominion and discretion in accordance with any specific demarcation in substantive statutory provisions based on fundamental principles of public policy.

The authority conferred under Article 142 functions at a quite different level and constraints set forth by ordinary legislations cannot consequently restrict constitutional powers as observed in the matter of *Union Carbide Corporation v. Union of India*⁸, where the court pointed out that the authority conferred under Article 142(1) is not a mere expansion of the inherent power of civil courts under *Sec. 151 of the Civil Procedure Code (CPC)* and the inherent power of the High Court under *Sec. 482 of the Criminal Procedure Code (CrPC)*. While the latter empowers civil courts to pass orders to prevent abuse of court's process, the former confers a plenary and conscientious power on the Supreme Court to ensure justice without being bound by procedural provisions.

The court has to prevent injustice where injustice is founded on technical principles. Court cannot build a new structure to do complete justice ignoring substantive provisions of law, since that would amount to supplanting them, but it can certainly supplement them. Article 142(1) holds significant potential, and when necessary, the court is obligated to intervene to prevent injustice.⁹

B) Hindu Marriage Act, 1955: Antediluvian remedy?

(13-B) Divorce by mutual consent

Section 13-B of the Hindu Marriage Act allows for divorce by mutual consent, requiring a one-year separation period before filing. However, a judge may waive the six-month waiting period

⁷ M.P. Jain, *Indian Constitutional Law*, (8th ed. Justice Jasti Chelameswar ed, Justice Dama Seshadri Naidu ed., Lexis Nexis Butterworth 2008).

⁸ *Supra note 4.*

⁹ *Kulwant Singh v Daya Ram*, (2015) 3 SCC 177

under Section 13-B (2) if certain conditions are met. These conditions include the genuine resolution of differences, agreement on issues like alimony and child custody, failed attempts at reconciliation or mediation, and the belief that prolonging the waiting period would cause additional suffering to the parties involved.

Any order under Article 142 has to be made with extraordinary circumspection which is not *inconsistent with the substantive provisions of any relevant statutory laws*.¹⁰ Even with the breadth of its amplitude, Article 142 cannot be utilized to ignore clear statutory provisions dealing with a subject in order to *create new edifice where none previously existed* and consequently accomplish something indirectly that cannot be achieved directly.¹¹

Thus, the Supreme Court refused any diminution of cooling period under Section 13-B (2) of the Hindu Marriage Act, 1955 in the case of *Smt. Poonam v Sumit Tanwar*,¹² and ingeminated the same in the case of *Manish Goel v Rohini Goel*.¹³

The statutory period is intended to give the parties *time to reflect, consider their options, and decide wisely*. The cooling-off time is not intended to prolong an already faltering marriage or alleviate the misery of the parties. However, the court is not helpless in allowing the parties to exercise a better choice, which is to obtain a divorce, if every attempt has been made to revive the marriage and there is no prospect of reunion or cohabitation.

Subsisting misery and pain, requiring mitigation under Article 142, empowers the Apex Court to do '*complete justice*' and give precedence to '*equity over law*'.

In the case of *Ashok Hurra v. Rupa Bipin Zaveri*¹⁴ foregrounded the concept of *irretrievable breakdown of marriage*. The court exercised its power under Article 142(1) to grant a decree of divorce when the marriage had irretrievably broken down. The court observed that prolonging a dead marriage only leads to more emotional and practical suffering for the parties involved.

¹⁰ *Prem Chand Garg & Anr. v. The Excise Commissioner, U.P. & Ors.* 1963 AIR 996.

¹¹ *Supreme Court Bar Association v. Union of India and Another*, (1998) 4 SCC 409.

¹² (2010) 4 SCC 460.

¹³ (2010) 4 SCC 393.

¹⁴ *Rupa Ashok Hurra v. Ashok Hurra*, (1999) 2 SCC 103

Thus, when the marriage is *emotionally unworkable, dead beyond salvage* and *broken down irretrievably* decree of divorce is the only way forward, even if the facts in the case don't establish a legal foundation for granting divorce.¹⁵

II. DIRECT APPROACH: RISE TO CACOPHONY OF JUDGEMENTS?

The judicial authority granted by Article 142 is curative in nature; it is intended to "*supplement*" rather than "*supplant*" the substantive law relevant to the matter at hand. The Supreme Court cannot completely disregard a substantive statutory provision relating to the subject matter of a particular case when it issues an order under Article 142.¹⁶

Inherent powers under *Article 142 cannot be invoked when alternate remedy is available*, the inherent power is meant only to correct orders when other remedy is not available.¹⁷

Allowing parties to bypass lower courts and directly approach the Supreme Court for divorce raises concerns about the erosion of the jurisdiction of lower courts. Lower courts play a crucial role in the legal system by handling a wide range of cases, including divorce cases.

While Article 142 serves as a tool to address issues in unclear or ambiguous areas, the court must not completely disregard the relevant substantive statutory provisions pertaining to the subject matter of a particular case when issuing an order. Although these constitutional rights are unaffected by any statutory restrictions, they are also not intended to be used in situations where doing so might directly conflict with what has been expressly provided for in a statute dealing with the pertinent problem.¹⁸

Thus, in the case of *Shilpa Sailesh v. Varun Sreenivasan* where the Supreme Court not only defined the ambit of Article 142 but also elaborated its stance on the truncation of cooling-off period under Section 13-B (2) of the Hindu Marriage Act, 1955. The Supreme Court, therefore, clarified that while exercising its special powers under Article 142, it can depart from substantive

¹⁵ *Sukhendu Das v Rita Mukherjee*, AIR 2017 SC 5092 p. 5094; *Samar Ghosh v Jaya Ghosh*, (2007) 4 SCC 511

¹⁶ M.P. Jain, *Indian Constitutional Law*, (8th ed. Justice Jasti Chelameswar ed, Justice Dama Seshadri Naidu ed., Lexis Nexis Butterworth 2008).

¹⁷ Dr. J.N. Pandey, *Constitutional Law of India*, (59th ed. Dr. Surendra Sahai Srivastava ed, Justice H.C.P. Tripathi ed., Central Law Agency 2022).

¹⁸ *Supra* note 10.

provisions of any statutory laws where “*silences of the law to keep its humanitarian and sympathetic face, it must be given meaning or the rigors of its sharp edges must be smoothed over.*”

Ultimately clearing the air, the apex judiciary established that cooling off period prescribed under section 13-B of the Hindu Marriage Act, 1955, can be waived under anomalous circumstances and vouchsafes aggrieved parties a ticket to directly approach the Supreme Court, eroding the jurisdiction of lower courts, sparking cacophony of judgements around the nation.

The National Judicial Data Grid (NJDG) paints a somber picture of the case backlog, highlighting 68,745 cases remained unresolved before the Supreme Court as of June 1, 2023.¹⁹

By allowing parties to skip the normative procedure going through lower courts, undermines the role and authority of these courts, potentially leading to a backlog of cases and a burden on the Supreme Court's already corpulent workload.

III. ARTICLE 142: A FORUM SHOPPING TRAILBLAZER?

“The more laws, the less justice” – Marcus Tullius Cicero.

As part of their litigation strategy, lawyers strategically consider a suitable forum to approach.²⁰

For example, one could directly approach the Supreme Court via Article 142(1) instead of the concerned Lower Court or High Court because the issue could be presented in a more flamboyant manner.

Forum shopping is the practice of identifying the court to file a lawsuit in from those that could legitimately exercise jurisdiction based on which court is most likely to get an amicable outcome.²¹

¹⁹ Shreeyash Mittal, *Supreme Judicial Backlog: Pendency of cases in Indian courts crosses the 5 crore mark*, Organiser, (July 2, 2023) <https://organiser.org/2023/07/02/179854/bharat/supreme-judicial-backlog-pendency-of-cases-in-indian-courts-crosses-the-5-crore-mark/> (Accessed Jan. 10, 2024)

²⁰ Khadija Khan, *CJI Chandrachud condemns ‘forum shopping’: What is this practice?* The Indian Express, (May 23, 2023) <https://indianexpress.com/article/explained/explained-law/cji-chandrachud-forum-shopping-sc-8624879/> (Accessed Jan. 10, 2024)

²¹ Dr. Khair-Un-Nisa and Ors vs. UT of Jammu and Kashmir and Ors,

The SC described forum shopping as a disingenuous activity by the courts that lacks juridical power and preeminence.²²

Allowing parties to directly approach the Supreme Court for divorce without approaching lower courts may set a precedent for forum shopping. By bypassing lower courts, parties may seek to take advantage of the Supreme Court's discretionary powers and potentially exploit this judgment to their advantage, undermining the principle of equal access to justice.

IV. DIRECT DIVORCE: UNIVERSAL PHENOMENA?

In the United Kingdom, the Supreme Court does not hold the authority to directly grant divorces. Divorce proceedings are typically handled by the family courts in England and Wales, the sheriff courts in Scotland, and the family courts in Northern Ireland. The Supreme Court is the highest court in the UK and deals with matters of constitutional and legal importance rather than individual divorce cases. Divorce is a remedy which can be claimed under *Section 1 of the Matrimonial Causes Act, 1973*²³ (divorce on breakdown of marriage) on the grounds of Adultery, Desertion, Unreasonable behavior, 2 years separation (with the other spouse's consent) and 5 years' separation (without their consent).

Similarly, the Supreme Court of the United States (SCOTUS) does not directly grant divorces. Family law matters, including divorce, are primarily within the jurisdiction of state courts. Each state in the U.S. has its own legal system and courts that handle divorce cases. For example, procedure for divorce in state of California is specified under Division 6, Part 3, Chapter 2 of the *California Family Code*²⁴ stating grounds for divorce such as incurable insanity, irreconcilable differences etc.

Also, in Australia, the Supreme Court does not have the authority to interfere directly in family matters. The process of obtaining a divorce in Australia is typically handled by the Federal Circuit

²² *Vijay Kumar Ghai v. State of W.B.*, (2022) 7 SCC 124

²³ *The Matrimonial Causes Act, 1973*. § 1.

https://www.legislation.gov.uk/ukpga/2020/11/pdfs/ukpga_20200011_en.pdf (Accessed Jan. 10, 2024)

²⁴ *California Family Code*. § 2310.

https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FAM&division=6.&title=&part=3.&chapter=2.&article= (Accessed Jan. 10, 2024)

Court or, in some cases, the Family Court of Australia. Both of these are federal courts with jurisdiction over family law matters, including divorce. There are specific requirements and conditions that must be met before a divorce can be granted mentioned under Part VI, section 48 of the Family Law Act, 1975.²⁵

A WAY FORWARD

“A law without justice is a wound without cure” – William Scott Downey.

In the aftermath of the *Shilpa Sailesh v. Varun Sreenivasan*, the antiquated legislature should make a shift towards the dynamic needs of the society. *“Irretrievable breakdown of marriage”* must be incorporated as a valid ground for dissolution of marriage under the prevailing Matrimonial laws.

Furthermore, *“Exceptional circumstance”* for waiving off the statutory period of six months requires a definite specification with regards to conditions when the party is entitled to approach the apex court, to further streamline the process by keeping in check with the amassing case loads of the top judicial authority. Divorce cases involve a range of issues such as property division, child custody, and spousal support, which are often best addressed by specialized family courts. These courts are equipped to handle the intricacies of family law and understand the unique dynamics involved in divorce proceedings. Also, India's legal system follows a federal structure, and family law falls under the Concurrent List. Allowing direct divorce proceedings in the Supreme Court may raise concerns about encroachment on the powers of state courts.

Having divorce cases heard at the Supreme Court level might not be practical due to the high volume of cases that the Supreme Court deals with and the need for specialized knowledge in family law matters. It's generally more efficient for lower-level courts to handle divorce proceedings, with the option for appeals to higher courts if necessary. Ultimately, this is a complex issue that involves balancing the need for efficiency, access to justice, and the principles of federalism. Thus, this decision of the Apex court must be welcomed but at the same time

²⁵ *The Family Law Act*, 1975. § 48. No. 53, 1975. <https://www.legislation.gov.au/C2004A00275/2020-11-27/text> (Accessed Jan. 10, 2024)

accompanied with certain precautions of clarifying the criteria for the issue to further qualify under the term “Irretrievable breakdown of marriage”.