

Case Commentary: Shilpa Sailesh Versus Varun Sreenivasan [2023] 3 MLJ 617, *LNIND* 2023 SC 325

Karandeep Singh*

Background: Constitutional and Jurisprudential dimensions

The leading case of *Shilpa Sailesh v. Varun Sreenivasan* addresses a pivotal issue of Indian matrimonial law: the acknowledgment of irretrievable breakdown of marriage as a legitimate reason for divorce. Such a concept, although not expressly enunciated under the Hindu Marriage Act (HMA), has gained prominence in recent years as a solution to fulfilling marriages beyond repair. The judgment rendered by the Supreme Court strikes a perfect balance between the codified law (the Hindu Marriage Act) and the inherent jurisdiction of the judiciary under Article 142(1) of the Constitution to administer “complete justice” in exceptional situations.

Issues and Relevant Laws

The central concern pertains to the degree to which the Supreme Court is authorized to issue divorce decrees grounded in the irretrievable breakdown of marriage, regardless of the explicit criteria outlined in the Hindu Marriage Act, including instances of cruelty.

What are the jurisdiction and parameters of the Supreme Court as prescribed under Article 142(1) of the Indian Constitution?

Can the jurisdiction under Article 142 be invoked to dissolve a willing couple’s marriage without referring them to the Family Court to fulfill the obligatory waiting period specified in Section 13-B(2) of the Hindu Marriage Act, and to dispose of other related proceedings under laws such as the Protection of Women from Domestic Violence Act, 2005, Section 125 of the Code of Criminal Procedure, 1973, or criminal trials under Section 498-A and other provisions of the Indian Penal Code, 1860?

Does the authority vested by Article 142 become restricted in situations where it is held by the court that there has been an irretrievable breakdown of marriage, yet one of the parties is not agreeing to the conditions provided?

* Advocate, Punjab and Haryana High Court, Chandigarh.

The relevant law is:

- The Hindu Marriage Act (HMA): This Act prescribes the law governing marriage and divorce among Hindus in India. While it gives recognition to several grounds for divorce, it does not specifically refer to irretrievable breakdown.
- Article 142(1) of the Indian Constitution: The provision gives the power to the Supreme Court to rule on “complete justice” in every ‘cause or matter’ decided by it. It is the basis of the power of the court to grant divorce on grounds of breakdown irretrievable. The expression ‘necessary for doing complete justice’ is a wide equitable jurisdiction, and it is exercised where strict adherence to the law does not lead to a fair decision.

Scrutiny by the Supreme Court

Power under Article 142(1): With regard to the power under Article 142(1), the court recognized its discretion in granting divorce under this provision, emphasizing the need for careful exercise to ensure “complete justice” to both sides. Article 142(1) of the Constitution of India grants broad powers to the Supreme Court to secure justice in any ‘cause or matter,’ to put an end to litigation. This power has to be exercised legitimately. Interpreting Article 142(1), the court, in *M. Siddiq (Dead) through Legal Representatives (Ram Janmabhumi Temple Case) vs. Mahant Suresh Das and Others* (2020) 1 SCC 1, emphasized the interface between general and specific laws, pointing to equitable principles. It was held that the equitable power under Article 142 of the Constitution of India emphasizes the interface between general and specific laws. This power equates to Professor C.K. Allen’s division of equity into two broad categories: (i) a broad and humane interpretation of law without contradicting it, referred to as equity in general, and (ii) a humane adjustment of the law in exceptional situations, referred to as particular equity. The words ‘cause or matter’ in Article 142(1) empowers the court to secure ‘complete justice’ in a specific case, emphasizing the applicability of particular equity. The court noted that Article 142(1) reverses the maxim ‘equity follows the law’ and allows precedence to equity over law. Relief based on equity, however, cannot disregard substantive legal requirements based on public policy. Subject to this limitation, the court can relax the enforcement of law or excuse parties from legal requirements based on case-specific facts. In the case of *I.C. Golak Nath and others vs. State of Punjab and another*, AIR 1967 SC 1643, the court stressed that Article 142(1) empowers the development of principles of law to secure the ends of justice, reason and moderation being the limitations. This exercise of discretion upholds the doctrine of separation of powers and steers

clear of judicial encroachment into the field of the legislature. The broad discretion vested in the Supreme Court under Article 142(1) of the Constitution of India, although apparently unfettered, is circumscribed by the requirement to take into account essential elements of general and specific public policy. General public policy elements are considerations of basic rights, secularism, federalism, and other basic constitutional ideals. Specific public policy is specific prohibitions established by material laws to provide for compliance with basic principles inherent in the statute.

In *Union Carbide Corporation and Others v. Union of India and Others* (1991) 4 SCC 584, the Supreme Court emphasized the importance of the expression 'cause or matter,' explaining that 'cause' means any action or criminal proceedings, whereas 'matter' means proceedings in the court. When the two are used together, the expression 'cause or matter' covers almost all kinds of proceedings irrespective of their nature- civil or criminal, interim or final, pre or post judgment. But the court stressed that the exercise of jurisdiction under Article 142(1) of the Constitution of India to administer 'complete justice' in a 'cause or matter' is limited only when the order prayed for is clearly prohibited by statutory provisions of substantive law, based on fundamental considerations of general or specific public policy.

Dissolving Deadlocked Marriages: Irretrievable Breakdown, Article 142(1), and Section 13-B of the Hindu Marriage Act (Divorce by Mutual Consent): The court recognized irretrievable breakdown as a possible ground for divorce under Article 142(1), emphasizing the need for compelling evidence and careful consideration of factors like duration of separation, nature of allegations, and attempts at reconciliation. In the case of Section 13-B of the Hindu Marriage Act, the court observed that it allows divorce by mutual petition and satisfaction of conditions like a one-year period of separation, inability to cohabit, and mutual consent to terminate the marriage. Sub-section (2) of Section 13-B requires a six-month period of cooling-off before the second motion for divorce, giving parties time to reflect. Nevertheless, in cases of exceptional hardship characterized by prolonged litigation and irreconcilable differences, parties may request waiver of the requirement of the second motion. The court pointed out cases where the cooling-off period causes suffering without advancing either party, postponing alimony and maintenance payments. In such cases, the procedural requirement should give way to the larger public and personal interests of resolving disputes expeditiously and removing distress through a formal decree of divorce, recognizing the de facto termination of the marriage.

Analyzing the provisions of sub-section (2) to Section 13-B of the Hindu Marriage Act, the Supreme Court in *Amardeep Singh v. Harveen Kaur* (2017) 8 SCC 746, deliberated on whether the cooling-off period of six months is mandatory or discretionary. It was determined that the court has the authority to waive the cooling-off period in exceptional situations, particularly when proceedings have been prolonged in the courts. The court held that the waiting period stipulated under Section 13-B(2) is directory and can be waived by the court in exceptional circumstances. This interpretation finds support in judgments from several High Courts including those of Andhra Pradesh, Karnataka, Delhi, and Madhya Pradesh, albeit the Kerala High Court holds a contrary view. It was argued that while Section 13-B(1) pertains to the court's jurisdiction, mandating that the petition is maintainable only if parties have been living separately for a year or more, and have agreed to dissolve the marriage, Section 13-B(2) is procedural. The discretion to waive the period is guided by considerations of justice, especially when reconciliation is unlikely and parties have been separated or involved in litigation for an extended period. Hence, the court should assess factors such as the duration of marriage, pending litigation, period of separation, existence of other proceedings between the parties, participation in mediation/conciliation, and the presence of a genuine settlement addressing alimony, child custody, or other pending issues.

In the current case, the court held that the legislative period as provided under Section 13-B(2) can be waived in certain situations:

1. If the statutory six-month period, together with the one-year statutory period under Section 13-B(1), has lapsed prior to the filing of the initial motion.
2. Where all attempts at mediation or conciliation have failed, and there is no chance of success.
3. Provided that the parties have actually resolved their matters, such as alimony and custody of the children.
4. If the waiting period only serves to prolong their suffering.

The application for waiver can be filed one week from the first motion, along with grounds for the application. If these are fulfilled, the court may exercise discretion to waive the waiting period for the subsequent motion. The effect of the cooling-off period is not to extend the suffering of a failed marriage but to create a space of reflection for the parties. Thus, when all attempts towards reconciliation have been unsuccessful, and reunion is no longer an option,

the court may accelerate the divorce process. But the exercise of this power should be based on the facts of the case and should not be in contravention of the statutory goals.

In *Amit Kumar v. Suman Beniwal* (2021) SCC Online SC 1270, the Supreme Court has clarified the provisions of Section 13-B of the Hindu Marriage Act, which prescribes a waiting period of a period of one and a half years from the time of separation prior to a decree for divorce by mutual consent being granted. The period is to afford the parties a chance for reflection, thus avert hasty decisions and provide scope for potential reconciliation. But where the parties have been separated for long and agreed to a mutual consent to divorce, it would be unfair to prolong the process of litigation by requiring them to return to the trial court. The court reasserted that Section 13-B does not restrict the jurisdiction of the Supreme Court to grant a decree of divorce by mutual consent, subject to the basic requirements being satisfied and the court being convinced that the divorce can be granted after consideration of relevant factors.

In *Ashok Hurra v. Rupa Bipin Zaveri*¹, which was decided in 1997, the Supreme Court was faced with a case where the marriage had totally collapsed and the couple had been living separately since 1983 due to differences. Even living apart for thirteen years, they could not agree on a mutual divorce, although the husband had remarried and had a child. Realizing the point of futility in prolonging their misery and the lifelessness of the marriage, the Court invoked powers under Article 142(1) of the Constitution of India for granting a divorce. Despite the culpable act of the husband in marrying again and having a child during the pendency of the proceedings, the divorce was made conditional that the husband would pay Rs. 10,00,000/- to the wife. Upon payment or deposit of the aforesaid amount, all proceedings, including those under Section 494 of the Indian Penal Code, would be terminated.

In *Naveen Kohli v. Neelu Kohli*², the Supreme Court three-judge bench referred to the principle of irretrievable breakdown of marriage, which is not a ground for divorce under the Hindu Marriage Act. The court criticized the blame theory for divorce and said that it generates bitterness and fails to consider the irreparable damage that occurs in unsuccessful marriages. Where rehabilitation fails and separation is inevitable, the court contended that divorce cannot be withheld. To remain in an unsuccessful marriage is only to continue suffering. As much as public interest may crave that marriages be saved wherever possible, ultimately to acknowledge

¹ *Ashok Hurra v. Rupa Bipin Zaveri*, AIR 1997 SC 1266.

² *Naveen Kohli v. Neelu Kohli*, AIR 2006 SC 1675.

the presence of an unsuccessful marriage is in the greater public interest. No one should be made to live a life in a marriage that has, in effect, ceased to be. In the instant case, where the parties were living separate for over a decade and proceedings had been initiated, the court dissolved the marriage, considering the facts of the case and directed payment of Rs. 25,00,000/- as permanent maintenance to the wife.

In the decision of *Owens v. Owens (2018)*³, Lord Wilson set out a tripartite test to determine whether a marriage has irretrievably broken down under the Matrimonial Causes Act 1973, and to determine to what extent the petitioner cannot reasonably be expected to live with the respondent by:

- (i) Assessing the behavior outlined in the petition in order to determine the respondent's actions or lack thereof.
- (ii) Assessing how the behavior of the respondent influenced the petitioner based on their personality, temperament, and surrounding environment.
- (iii) Considering whether, on account of the conduct of the respondent and its impact on the petitioner, it would be unreasonable to require the petitioner to cohabit with the respondent.

The court referred to this case not as a legal precedent but to suggest that even good people, if matched with unsuitable personalities, can have an unhappy marriage. The fault theory, which involves the attribution of guilt and blame, is impossible in the case of irreparable breakdowns of marriage. The court held that the Hindu Marriage Act does not prohibit the nullification of such marriages under Article 142(1) of the Constitution of India. The court can apply the fault theory to deliver 'complete justice' in certain cases within the self-imposed restrictions necessary under Article 142(1) of the Constitution.

Prior Rulings/Relevant Precedents: The court recognized earlier judgments, with the distinction between the ones dismissing divorce petitions due to irretrievable breakdown with inadequate exceptional circumstances and the ones that consider it feasible under Article 142(1). The ruling lists several relevant cases, including—

• ***Munish Kakkar v. Nidhi Kakkar***⁴, which affirmed the court's authority to grant divorce under Article 142(1) in clearly broken marriages.

³ *Owens v. Owens* (2018) UKSC 41.

⁴ *Munish Kakkar v. Nidhi Kakkar* (AIR 2020 SC 111).

- ***Sivasankaran v. Santhimeenal***⁵, the court reasserted that, as in Munish Kakkar's case, it possesses the authority to end a marriage on grounds of irretrievable breakdown. Nevertheless, it explained that issuing divorce on such grounds is not a right but discretionary to be weighed judiciously to administer 'complete justice' to both the parties. The court needs to be convinced beyond all doubts that the marriage is irreparable and cannot be repaired for granting divorce.
- ***Manish Goel v. Rohini Goel***⁶ was categorical in laying down the requirement of careful use of Article 142(1) and the requirement of avoiding going around rules of orderly judicial procedure. It held that the court should not disregard statutory rules or decide on sympathetic considerations.
- ***Hitesh Bhatnagar v. Deepa Bhatnagar***⁷ refused divorce as one of the parties withdrew consent prior to the second motion stage.
- ***Shyam Sundar Kohli v. Sushma Kohli***⁸ emphasized that the court would only cancel a marriage in exceptional cases of irretrievable breakdown.
- ***Savitri Pandey v. Prem Chandra Pandey***⁹: The court mentioned ***Jorden Diengdeh v. S.S. Chopra***, where a two-judge bench had recommended an entire re-structuring of the laws of marriage in the interests of uniformity between religions and castes. It also recommended the inclusion of irretrievable breakdown of marriage as a basis for divorce. The court appreciated that in some cases, marriages may irretrievably collapse due to the conduct or omission of both the parties.

Decision of the Court

The court made clear that under Article 142(1) of the Constitution of India, it can deviate from substantive and procedural laws as long as it is in consonance with basic considerations of public policy. While exercising discretion, the court has to take into account substantive provisions but can act as an arbiter to reconcile conflicting interests. This discretion is exercised in a 'cause or matter'. Further, the Supreme Court ruled that it can annul a marriage between consenting adults without subjecting it to the waiting period mandated by Section 13-B of the Hindu Marriage Act and dispose of ancillary proceedings under other acts such as the

⁵ Sivasankaran v. Santhimeenal (2021 SCC OnLine SC 702).

⁶ Manish Goel v. Rohini Goel [(2010) 3 MLJ 593].

⁷ Hitesh Bhatnagar v. Deepa Bhatnagar [(2011) 5 MLJ 521].

⁸ Shyam Sundar Kohli v. Sushma Kohli (AIR 2004 SC 5111).

⁹ Savitri Pandey v. Prem Chandra Pandey (AIR 2002 SC 591).

Protection of Women from Domestic Violence Act, 2005, or criminal proceedings under Section 498-A of the Indian Penal Code, 1860.

The judiciary clarified that according to Article 142 of the Indian Constitution, it has the authority to break a marriage despite the objections of one party, provided that there is an irretrievable breakdown. This discretion is to enable complete justice, confirming that the breakdown of the marriage is clear and that the maintenance of the legal relationships is not justified. The judiciary also needs to take into consideration the states of the party that is objecting to dissolution, thereby ensuring fairness in its decision.

The court made it clear that initiating divorce proceedings on the basis of irretrievable breakdown of marriage by way of a writ petition under Article 32 of the Constitution is not possible. In the case of *Poonam v. Sumit Tanwar*, AIR 2010 SC 1384, it was correctly held that such attempts should be rejected. The parties must adhere to the proper legal procedures for redressal of their grievances and cannot by-pass these procedures by invoking writ jurisdiction. Moreover, the relief available under Article 32 is meant for the enforcement of rights under Part III of the Constitution and cannot be taken advantage of to alter judicial orders concerning pending proceedings. Hence, seeking the dissolution of marriage directly from the Supreme Court by a writ petition under Article 32 is not permissible.

Rationale

The reasoning of the court is sound, accepting the limitations of the Hindu Marriage Act in light of the ever-changing nature of marriage and the necessity of Article 142(1) intervention in extraordinary situations. There can be criticism, however, on the grounds of the lack of clear criteria for determining “irretrievable breakdown.” Though the mentioned factors are useful, more clarification is required regarding the evidentiary requirements and relative weightage to be given to each factor.

Personalized results have significant implications for future cases. They are:

The doctrine of “complete justice” is emphasized as a core principle for the exercise of authority under Article 142(1) in divorce cases.

- Realization of the necessity of balancing interests of both parties due to irretrievable breakdown.

These conclusions, while not binding precedents technically, are likely to guide future courts to their construction of Article 142(1) and irretrievable breakdown in divorce cases.

The underlying principle created by this case is the recognition by the judiciary of its powers to grant divorce on the basis of an irretrievable breakdown of marriage, as envisaged by Article 142(1) in exceptional cases. This is a noteworthy development in Indian matrimonial law, providing a future option for marriages which are clearly broken but may not meet the requirements outlined in the Hindu Marriage Act.

The validity of such a basic principle may be questioned on two grounds:

- **Progressive Perspective:** Supporters view this decision as a reflection of the evolving nature of marriage, offering relief to those who are stuck in essentially broken relationships. It acknowledges marriage as a mutual contract that can end when its core aspects are irreparably broken.
- **Ambiguity and Risk of Misapplication:** There is concern among critics that the absence of clearly set criteria for ascertaining irretrievable breakdown may lead to possible abuse. Additionally, it is feared that the discretion given to the judges under Article 142(1) may lead to inconsistent application in various judicial jurisdictions.

Judgment: My opinion

The Shilpa Sailesh judgment is an evolutionary milestone in India's divorce law, acknowledging the shortcomings of the Hindu Marriage Act and bringing in flexibility for exceptional cases. The 5-judge bench was keen to drift away from fault grounds of divorce, inviting a more nuanced approach. However, concerns do exist regarding potential inconsistencies and the requirement for more detailed guidelines.

Contribution to Modern Jurisprudence

The Shilpa Sailesh case has significant contributions to Indian matrimonial law in that:

- **Introducing the Concept of Irretrievable Breakdown:** This concept introduces the aspect of accepting irretrievable breakdown as a grounds for divorce notwithstanding the fact that there is no such provision under the Hindu Marriage Act.
- **Explanation of Judicial Discretion Under Article 142(1):** This section clarifies the scope of the power of the Supreme Court to facilitate "complete justice" and to grant divorce in rare cases.

Need for Law Reform

A law amendment to the Hindu Marriage Act that specifically recognizes irretrievable breakdown as a reason for divorce would enhance legal accuracy and consistency. In both its 1978 and 2009 reports, the Law Commission of India favored this amendment, stressing the need for a legal recognition of irretrievable breakdown as a rational ground for divorce.

The Law Commission's 71st report in 1978 contained a detailed analysis of the principle of irretrievable breakdown of marriage. In addition, it highlighted the reality that New Zealand was the first Commonwealth country to include a provision for divorce petitions based on grounds of a period of three years or more living apart as far back as 1920 and thus set the precedent for the breakdown principle in matrimonial law.

Conclusion

The *Shilpa Sailesh vs. Varun Sreenivasan* case is a landmark court ruling that recognizes the evolving nature of marriage and encourages greater elasticity in divorce proceedings. While it sets a precedent for dealing with cases of irretrievable breakdown with greater sensitivity, there are also areas where legislative enhancement is conceivable. Having clear guidelines and the potential to modify the Hindu Marriage Act would enhance the legal framework for the grounds of irretrievable breakdown in Indian divorce proceedings.