

IRRETRIEVABLE BREAKDOWN OF MARRIAGE WITH SPECIAL REFERENCE TO *SHILPA SAILESH V VARUN SREENIVASAN* CASE

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Abstract

With the rapid advancement in the socio-economic milieu of the society, the institution of marriage has also undergone a massive change. Concept of divorce, although regarded as an evil and stigmatizing, has also become common nowadays. Presently, fault grounds for obtaining divorce under the Hindu Marriage Act, 1955 have been inadequate in several extraordinary situations prevailing in a matrimonial relationship. In such circumstances, the judiciary has also endeavoured to invoke irretrievable breakdown of marriage to grant divorce to the spouses. The article studies the judicial opinion over irretrievable breakdown of marriage prior to the judgment of Shilpa Sailesh v Varun Sreenivasan and the precedent laid down by the Supreme Court in its judgment in Shilpa Sailesh case in the year 2023. The researcher has applied doctrinal research methodology for conducting the research. It is true that ground of irretrievable breakdown of marriage lacks legislative backing. That is why, there is no consensus among the courts about whether the ground of irretrievable breakdown of marriage should be invoked to dissolve a marital tie in a given case where all other fault grounds of divorce cannot be applied. Recently, the Supreme Court in Shilpa Sailesh v Varun Sreenivasan in the exercise of its powers under Article 142 of the Constitution dissolved the marriage on the ground of irretrievable breakdown of marriage. The Apex Court has laid down a precedent to be followed in hearing divorce petitions which are based on no-fault grounds.

KEYWORDS : *Divorce; Irretrievable breakdown; Marriage.*

1. INTRODUCTION

Marriage is regarded as the foundational unit of a civilized society. Traditional view regards marriage as an indissoluble union of man and woman for the purposes of regulation of sexual instincts, procreation and legitimation of children and social acceptance of the family. But in modern times with the fast-changing socio-economic conditions of the society, the rate of disintegration of joint family system has also increased. Several factors such as modernity, education and employment of women in numerous sectors, advocacy to giving equal rights and status to women etc. have led to tremendous change in the role of women in society, as a result of which marital relationship too has become more complex and changed tremendously. Also, marriage in modern society has lost its earlier status as an ‘indissoluble union’, therefore, divorce rate has also been increased to a great extent, as presently the spouses prefer to opt for divorce instead of continuing an unsuccessful marital relationship.¹ Hindus are governed by the provisions of the Hindu Marriage Act, 1955 in the matters of marriage and divorce.

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¹ PROF. KUSUM, FAMILY LAW LECTURES— FAMILY LAW 209 (5th ed. 2019).

Marriage is considered as the instrument to provide social and economic security to the woman in society. It is true that divorce is considered to be one of the most painstaking and stigmatizing event, particularly in respect of life of a woman. That is why, petitions demanding divorce are often resisted by the female partner of marriage. However, cases are not wanting where, due to irreconcilable differences among them, both parties to the marriage may jointly agree for dissolving of their marital tie. For this, they both may reach the family court for a decree of divorce by mutual consent and they have to follow the procedure laid down under Section 13B of the Hindu Marriage Act, 1955, which lays down mandatory waiting period of six to eighteen months, which enables the spouses to reconsider their decision about divorce. Several cases may also arise, in which one of the spouses resists the prayer of divorce, despite the matrimonial relationship being virtually non-existing. The reasons behind such resistance can be numerous, such as the fear of financial hardship, revengefulness or ill-will etc. In such cases, obtaining divorce by mutual consent becomes impossible for the other spouse.² It is not always necessary to have one of the spouses being guilty of some matrimonial offences as required under Section 13(1) of the Hindu Marriage Act, 1955. Several circumstances may arise where marital tie becomes such embittered and burdensome due to insoluble differences between the spouses, even without having any of them being guilty of a matrimonial offence. In the above-mentioned cases, the court cannot grant them divorce under Section 13(1) of the Hindu Marriage Act, 1955.

Several cases have also arisen about necessity of following the procedure laid down in Section 13B of the Hindu Marriage Act, 1955 and also how to obtain divorce on the basis of complete breakdown of marriage without following lengthy litigation process, which is based on fault ground theories. Parliament of India has not granted express legislative recognition to irretrievable breakdown of marriage as a ground for divorce in its full terms. That is why, there are conflicting views of Indian judiciary whether divorce decree should be granted on the basis of irretrievable breakdown of marriage or not. The Supreme Court through its landmark verdict in *Shilpa Sailesh v Varun Sreenivasan* decided on May 1, 2023 has tried to put these conflicting views of the judiciary at rest by answering several questions of law framed before it.

1.1 OBJECTIVES OF STUDY

The central interest of this research is the irretrievable breakdown of marriage as a ground of divorce, particularly in respect of the Hindu Marriage Act, 1955. Through this research study, the researcher tries to analyse the legal position of irretrievable breakdown of marriage as a ground for granting decree of divorce before the judgment of *Shilpa Sailesh* and the judicial opinion laid down by the Apex Court through its judgment.

² *Id.* at 211.

1. To study the judicial perspective in respect of irretrievable breakdown of marriage as a ground for granting decree of divorce even without express legislative backing.
2. To examine the 5-judge Constitution Bench judgment of the Supreme Court in the case of *Shilpa Sailesh v Varun Sreenivasan*.

2. RESEARCH METHODOLOGY

This research over the concept of irretrievable breakdown of marriage is based on doctrinal research methodology. This methodology involves the processes to collect, arrange, systematize and analyse relevant information as per the requirements of a research topic for the purpose of an adequate understanding of it. The concept of irretrievable breakdown of marriage is related to the personal laws of marriage and divorce. The research focusses on this ground under the Hindu Law. To make the research meaningful and authentic, several books over the Hindu Law and several judicial pronouncements have been studied.

3. CONCEPT OF MARRIAGE AND DIVORCE UNDER PERSONAL LAWS

Black's Law Dictionary defines marriage as "the legal union of a couple as spouses". Marriage has been recognized as a social institution,³ which is the foundational unit of a stable family and also of the civilized society.⁴ Marriage among Hindus, Sikhs and Christians is considered to be sacrament in its idealized sense.⁵ Muslim Law regards marriage as a permanent solemn contract.⁶ Marriage among Parsis is also in the nature of a contract, for which conducting religious ceremonies is necessary.

As far as the word 'divorce' is concerned, it is derived from Latin term '*divortium*', the literal meaning of which is to turn aside or separate.⁷ Black's Law Dictionary has defined divorce as "the legal dissolution of a marriage by a court". In modern times, marriage is no longer considered to be an indissoluble union of husband and wife.⁸ Hindu Law has recognized divorce as a matrimonial remedy after the enactment of the Hindu Marriage Act, 1955, which has provided several grounds for divorce.⁹ The provisions for obtaining divorce under civil law codified in the Hindu Marriage Act, 1955 also apply to the spouses belonging to Sikh, Jain or Buddhist religion. Divorce of Muslim spouses is governed by the provisions of the Dissolution of Muslim Marriage Act, 1939 and also the Muslim Women (Protection of Rights on Marriage) Act,

³ 68 PARAS DIWAN, MODERN HINDU LAW (23rd ed., 2016).

⁴ KUSUM, *supra* note 1 at 3.

⁵ DIWAN, *supra* note 3 at 63.

⁶ *Amina v Hassan Koye*, 1985 Cri.L.J. 1996 (India).

⁷ KUSUM, *supra* note 1 at 27.

⁸ KUSUM, *supra* note 1 at 210.

⁹ KUSUM, *supra* note 7.

2019. Divorce among the Christians is governed by the provisions of the Indian Divorce Act, 1869. Spouses belonging to Parsi religion can seek divorce under the provisions of the Parsi Marriage and Divorce Act, 1936.

3.1 Grounds for Divorce under the Hindu Marriage Act, 1955

A marriage, whether solemnized before or after the commencement of the Hindu Marriage Act, 1955, can be dissolved only through a decree of divorce granted by a law court on the basis of any of the grounds enumerated under Section 13 of the Hindu Marriage Act, 1955.¹⁰ The said Act under its Section 13(1) and Section 13(1A) has provided those grounds, on the basis of which either husband or wife can seek divorce in a court of law. Section 13(2) has incorporated those special grounds, on the basis of which only a wife can pray for divorce.

Section 13(1) of the Hindu Marriage Act, 1955 has enumerated fault grounds of adultery, cruelty, desertion, conversion, insanity, venereal diseases, renunciation of world, which are also called as matrimonial offences. Here, one aggrieved party to the marriage can seek divorce from the opposite party guilty of a matrimonial offence.¹¹ For this, it is necessary that the spouse praying for divorce must not be at fault and he/she has to prove the guilt of the other spouse before the law court. In a particular case, if both the spouses are guilty of any type of matrimonial offence, then it becomes difficult to establish which party is aggrieved amongst both. However, it is also true that litigation process based on the fault ground is expensive and time-consuming, which leads to thwarting the chances of amicable solution of matrimonial disputes about maintenance, custody of children etc.¹²

4. IRRETRIEVABLE BREAKDOWN OF MARRIAGE AS A GROUND OF DIVORCE UNDER HINDU LAW

The Hindu Marriage Act, 1955 contains provision for divorce by mutual consent of both the spouses under Section 13B, in which there is no requirement of imputing fault or misconduct by one spouse on the part of other spouse.¹³ But there may be several cases, where despite the marital tie being substantially dead, still one of the spouses does not give consent for divorce.¹⁴ Then, in such circumstances, the other spouse can invoke and prove the ground of irretrievable breakdown of marriage in order to obtain decree of divorce.

The ground of irretrievable breakdown of marriage, being without statutory recognition, can be examined by a court on the basis of facts of every case. If the court is satisfied and concludes that marital tie in a given case is beyond

¹⁰ The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India), § 13(1).

¹¹ DIWAN, *supra* note 3 at 173.

¹² KUSUM, *supra* note 1 at 28.

¹³ KUSUM, *supra* note 1 at 211.

¹⁴ *Ibid.*

salvage or reconciliation, only then decree of divorce can be granted. The Indian judiciary has often adopted a more liberal and realistic approach, while deciding petitions for divorce and granting a decree of divorce on the ground of irretrievable breakdown of marriage.¹⁵

Irretrievable breakdown of marriage as a ground for divorce is based on complete failure of marriage. The court may regard a situation as complete breakdown of marital relationship, in which the very foundation of a marriage that is emotional bondage, affection or respect etc. has disappeared, because of which it becomes impossible for the couple to cohabit and fulfil the well-established personal and social objectives of marriage.

There may be cases, where marital relationship is non-existing in spite of husband and wife living in the same matrimonial home.¹⁶ Several cases may also arise where the marital relationship of husband and wife has become so embittered that every effort made to salvage the marital tie has failed. In such situations, where the court is satisfied beyond doubt that there is no reasonable probability of reunion and cohabitation of the spouses, then it can grant a decree of divorce to the parties.¹⁷

The Parliament has not given it the statutory recognition in express terms yet,¹⁸ however two grounds contained in Section 13(1A), namely, dissolution of marriage on the ground of (i) non-resumption of cohabitation for the period of one year or more after a decree for judicial separation was passed, and (ii) no restitution of conjugal rights for a period of one year or more after a decree for restitution of conjugal rights was passed, are also in the nature of grounds of breakdown of marriage. These two grounds are indicative of failure of marriage in essence.¹⁹ But here non-cohabitation for a period of one year or more is a condition precedent.

The Law Commission of India in its 71st Report (1978) made a recommendation that irretrievable breakdown of marriage should be inserted as a ground for obtaining divorce in addition to fault grounds under Indian law. It considered the merits and demerits of inclusion of irretrievable breakdown of marriage and also suggested several safeguards to prevent unbridled divorces. In similar terms, the 217th Report (2009) of the Law Commission also

¹⁵ KUSUM, *supra* note 1 at 213.

¹⁶ DIWAN, *supra* note 3 at 178.

¹⁷ Shilpa Sailesh v Varun Sreenivasan, 2023 S.C.C. OnLine SC 544 (India).

¹⁸ Manu Sebastian, 'Irretrievable Breakdown of Marriage' A Ground to Dissolve Marriage Invoking Article 142 Powers : Supreme Court, LIVE LAW (May 1, 2023, 10:48 AM), <https://www.livelaw.in/top-stories/irretrievable-breakdown-of-marriage-a-ground-to-dissolve-marriage-invoking-article-142-powers-supreme-court-227617>.

¹⁹ DIWAN, *supra* note 11.

recommended introducing irretrievable breakdown of marriage as a ground for divorce.²⁰

The Marriage Laws (Amendment) Bill, 2013 incorporated the irretrievable breakdown of marriage as a ground for divorce under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954. It was passed by the Rajya Sabha on 26th August 2013, but it could not be passed in the Lok Sabha due to its dissolution. Thus, irretrievable breakdown of marriage could not be inserted as a ground of divorce under Indian Law.

4.1 Views of Indian Judiciary over Irretrievable Breakdown of Marriage before *Shilpa Sailesh* Judgment

The Supreme Court has entertained several times petitions for divorce by mutual consent.²¹ Divorce through mutual consent requires the consent of both the parties to the marriage. However, if one of the spouses has withheld consent, then divorce cannot be granted.

While granting or refusing the grant of divorce, the courts have to consider several important facts, so that the party at fault shall not benefit from his/her own wrongdoing. In fact, there are no hard and fast rules, which may be applicable to every factual situation.

Indian judiciary in its several rulings has refused to grant divorce on the ground of irretrievable breakdown of marriage either because of its non-availability in the statute-book or because of failure of the party (demanding it) to satisfy the court in regard to fulfilment of essential conditions for grant of divorce in the case. However, in those rulings also, the courts have not discarded the breakdown theory outrightly. In the case of *Gulabrai Sharma v Pushpa Devi*²², Delhi High Court held that the allegation of the husband of desertion on the part of the wife could not be proved. Hence, none of the parties was at fault. The court took note of the fact that although marital relationship had miserably failed, but still both the parties did not agree for divorce by mutual consent. Due to rigidity of the legal provisions, prayer of the husband for divorce was rejected.

The Supreme Court in *V. Bhagat v D. Bhagat*²³ held that irretrievable breakdown of marriage itself is not a ground to grant divorce, but such circumstances can be kept in mind for ascertainment of correctness of the alleged grounds and for determination of the relief which may be granted in a case. In *Shyam Sundar Kohli v Sushma Kohli @ Satya Devi*²⁴, the Supreme Court observed that dissolution of marriage on the ground of complete

²⁰ KUSUM, *supra* note 1 at 212.

²¹ 2023 S.C.C. OnLine SC 544 (India).

²² (1979) I.L.R. 2 Del 220(India).

²³ A.I.R. 1994 SC 710 (India).

²⁴ (2007) 7 S.C.C. 747(India).

breakdown of marriage can be granted only under exceptional circumstances of a case. The court observed that allegation of desertion on the part of the wife could not be proved and the husband himself was at fault. Therefore, it declined to grant decree of divorce.

In *Vishnu Dutt Sharma v Manju Sharma*²⁵, the husband's petition for divorce on the ground of cruelty of the wife was rejected both by the trial court and the High Court. Then he appealed to the Supreme Court, on the ground of irretrievable breakdown of marriage. The Supreme Court dismissed the plea of the husband on the ground that irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955 and the court is not empowered to legislate in order to add it as a ground of divorce. However, the judgment did not consider the question of exercise of jurisdiction of the Supreme Court under Article 142 of the Constitution.

In *Neelam Kumar v Dayarani*²⁶, the husband filed petition for divorce on ground of cruelty of the wife, which the trial court decreed, but was set aside by the High Court in appeal. Thereafter, the husband appealed against the High Court judgment in the Supreme Court. The Supreme Court rejected the plea of the husband of irretrievable breakdown of marriage and refused to grant divorce to the husband in the exercise of its powers under Article 142 of the Constitution.

However, there are several other rulings, where the judiciary considered it most appropriate to grant divorce, on being satisfied that marriage has become irreconcilable and completely broken down and it is unjust to stretch such unwanted legal relationship. But it is notable that in the absence of express statutory provision, the family courts or the High Courts cannot grant divorce solely on the basis of irretrievable breakdown of marriage, but some other fault ground such as cruelty etc. or mutual consent has to be accompanied with it. Granting divorce in the exercise of power under Article 142 of the Constitution vests with the Supreme Court only. Therefore, in the case where family court or High Court refuses to grant divorce, the parties have to approach the Supreme Court.

In the case of *A. Jayachandra v Aneel Kumar*²⁷, the Supreme Court found it appropriate to grant divorce to the parties on the ground of complete breakdown of marriage. It observed that the ground of irretrievable breakdown of marriage has no statutory recognition, still the court can direct the dissolution of marriage in order to do complete justice and to lessen the misery of the parties involved in long-drawn legal battle.

²⁵ A.I.R. 2009 SC 2254 (India).

²⁶ (2010) 13 S.C.C. 298 (India).

²⁷ A.I.R. 2005 SC 534(India).

In the case of *Naveen Kohli v Neelu Kohli*²⁸, where despite opposition of the wife, the Apex Court allowed the dissolution of marriage holding that after irreconcilable breakdown of marriage, its continuation would be harmful to the interests of the parties and also of the society. Here, the court observed that fault grounds prove to be inadequate in several extraordinary circumstances and strongly advised the Parliament to incorporate irretrievable breakdown of marriage as a ground for divorce under the Hindu Marriage Act, 1955. A copy of the judgment was also sent to the Secretary of Ministry of Law and Justice for the purpose.²⁹

The Supreme Court dealt with the question of waiver of mandatory waiting period of six months laid down in Section 13B of the Hindu Marriage Act, 1955 in the case of *Amardeep Singh v Harveen Kaur*³⁰ and held that under exceptional circumstances, where legal proceedings have remained pending in the law courts for long period, the court can waive this cooling-off period after considering several factors of that particular case. However, the court did not examine the question of granting divorce by mutual consent through the exercise of power under Article 142 of the Constitution.

In the case of *R. Srinivas Kumar v R. Shametha*³¹, the husband filed divorce petition against the wife on the ground of cruelty and irretrievable breakdown of marriage, which was dismissed by the Family Court and later by the High Court. The husband appealed to the Supreme Court. Despite opposition of the wife in respect of dissolution of marital tie, the Supreme Court granted divorce by exercising its powers under Article 142 of the Constitution. The court observed that exercise of power under Article 142 can be done in a case to do complete justice, where despite the marriage being totally unworkable, still one of the spouses withholds consent for divorce and there are no other grounds made out for divorce under the law.

The Supreme Court in *Amit Kumar v Suman Beniwal*³² observed that waiting period of six to eighteen months contemplated under Section 13B of the Hindu Marriage Act, 1955 for grant of divorce by mutual consent intends to enable the parties to reconsider their decision to end the marriage. This cooling-off period tries to prevent heedless divorces. But in the cases of long separation, the parties having mutually agreed to separate, then the litigation for divorce should not be prolonged.

The above mentioned judicial rulings indicate that the courts are gradually moving in the direction of admitting of the complete breakdown of marriage as

²⁸ (2006) 4 S.C.C. 558 (India).

²⁹ KUSUM, *supra* note 1 at 221.

³⁰ (2017) 8 S.C.C. 746 (India).

³¹ (2019) 9 S.C.C. 409 (India).

³² (2021) S.C.C. OnLine SC 1270 (India).

a ground of divorce. While there has been no uniformity in the opinion of judiciary over the questions of (a) granting divorce to the spouses solely on the ground of irretrievable breakdown of marriage, (b) exercising power under Article 142 of the Constitution to grant divorce, (c) granting divorce through the exercise of power under Article 142 even when one of the spouses opposes to it, (d) right of the parties to ask for waiver of waiting period under Section 13B of the Hindu Marriage Act, 1955. The unanimous verdict of the Supreme Court in *Shilpa Sailesh* given by 5-judge Constitution Bench on May 1, 2023 tries to answer these questions of law in order to bring uniformity in the judicial opinion in respect of such cases for adjudication before the court.

4.2. The case of *Shilpa Sailesh v Varun Sreenivasan*

In the present case, the husband was a businessman living in Pune, while the wife was living and working in Muscat. During hearing of the petitions in 2015, both the parties involved in the case arrived at a settlement as earlier directed by the court and filed a petition for order of dissolution of marriage under Article 142 of the Constitution. The Supreme Court through its order dated May 6, 2015 granted them divorce through invocation of its powers under Article 142 of the Constitution, considering that applying for divorce before a Family Court would be a lengthy and burdensome procedure.³³ The Court kept the said petition pending for decision upon several important issues framed by it and also appointed amicus curiae for its assistance. The petitions were earlier heard by different benches of two judges of the Supreme Court. Later, on June 29, 2016, these were transferred to a constitution-bench for the consideration of the broader questions of law. The 5-judge Constitution Bench was comprised of Sanjay Kishan Kaul, J., Sanjiv Khanna, J., Vikram Nath, J., Abhay S. Oka, J. and J.K. Maheshwari, J. The hearings before the Constitution-bench concluded on Sept. 29, 2022 and the judgment was reserved. The judgment was pronounced on May 1, 2023 by Sanjiv Khanna, J. on the behalf of all the judges of the Constitution bench. The said judgment was a unanimous one. The main issues framed in the aforesaid case included the following:

- (a) What is the scope of the power and jurisdiction of the Supreme Court under Article 142(1) of the Constitution?
- (b) Whether the Supreme Court can allow the waiver of the statutory period of notice and the procedure laid down under Section 13B of the Hindu Marriage Act, 1955 under Article 142 of the Constitution and grant divorce by mutual consent along with disposal of other connected criminal proceedings. If yes, then under what circumstances the court should exercise its power.
- (c) Whether the power of the Supreme Court under Article 142 is inhibited in a case where the court opines that there is irretrievable

³³ 2015 (6) SCALE 457(India).

breakdown of marriage, but still one of the parties is not consenting to the terms?

Earlier, on April, 4, 2015, the two-judge bench had asked about the stance of the Government in respect of inclusion of irretrievable breakdown of marriage as a ground of divorce. But before the 5-judge Constitution Bench, this issue was not framed to know the standpoint of the Government in this regard.

It is also significant to mention here as discussed by the Apex Court in its judgment that the purpose behind incorporation of mandatory waiting period of six to eighteen months for moving second motion under Section 13B (2) for obtaining divorce is to enable both the spouses to introspect, ponder over their differences and the decision to end the marriage and try for reconciliation. It has been incorporated with the objective to safeguard against decisions hurriedly made and to encourage mutual settlement. It is not intended to drag the already disintegrated marital tie or to prolong the miseries of the parties to the marriage.

But there may be several cases, where after some years of prolonged litigation before the family court, the parties with mutual consent pray for dissolution of marital tie and also demand of waiver of the need of observation of the mandatory waiting period laid down for moving the second motion for divorce. In such circumstances, the procedure laid down under Section 13B(2) should be waived to end the prolonged litigation and to grant decree of divorce, keeping in view the larger interest of the parties and public at large.

In situations where marriage has remained merely an empty shell without substance and because of irreconcilable differences between them, continuation of marriage becomes impossible. In such situations, prolongation of litigation process in the form of mandatory waiting period of six months causes mental agony, suffering and harassment to the parties, without any beneficial outcome. Therefore, it becomes the duty of the court to ensure amicable resolution of the matrimonial disputes.

4.2.2 Verdict of the Apex Court

4.2.2.1 Major findings on exercise of power of the Supreme Court under Article 142

The court, while discussing the ambit of its power and jurisdiction under Article 142, observed that the said power to do complete justice is based on the concepts of justice, equity and good conscience. The Apex Court is not precluded from passing a decree or order, which a family court or High Court is empowered to pass. The provisions of Section 13B of the Hindu Marriage Act, 1955 do not prevent the Supreme Court to grant divorce by mutual consent to the spouses on a joint application for the purpose, provided that conditions for the same are fulfilled. But the court must use the power in contained and regulated manner on the basis of objective criteria and factual matrix of each

particular case. However, the court cannot ignore express statutory provisions and also it cannot supplant the existing substantive law, while granting or moulding a relief. The power under Article 142 to do complete justice by departure from the substantive or procedural laws is valid, when it is exercised without doing violation of the fundamental principles of public policy, be it general or specific. Because of it, the said power is flexible and has not been defined and catalogued in the Constitution, so as to enable the Supreme Court to mould a relief as warranted by a given situation. Conferment of the said power only to the Supreme Court assures its exercise with due circumspection.

This judgment laid down that the Supreme Court in its discretion can exercise the power under Article 142 of the Constitution to allow dissolution of marriage on the ground of complete failure of marriage without the observation of mandatory waiting period laid down for second motion under Section 13B of the Hindu Marriage Act, 1955. This discretionary power can be exercised with caution for the purpose to do complete justice. But this waiver of statutory waiting period cannot be claimed as a matter of right by invoking writ jurisdiction of the Supreme Court under Article 32 of the Constitution.

Further, it was held that for obtaining a decree of divorce, irretrievable breakdown of marriage has to be established firmly with reference to the specific facts of each case. The court must be fully convinced that marriage between the spouses is virtually and emotionally dead, totally unworkable and insoluble. Therefore, in such situation, there remains no utility in the continuation of marital tie and its dissolution is only the right solution to salvage the parties of a burdensome relationship.

The Apex Court laid down that in a case where despite the marriage between the parties has remained a dead letter without any substance, still one of the spouses opposes the prayer of divorce; then in such a case, the court can grant divorce in its discretion exercising its powers under Article 142. The court is empowered to do complete justice under Article 142, in situations where due to complete failure of marriage, there is no possibility of cohabitation or reunion of the parties; therefore, continuation of such marriage is wholly unjustified. The Supreme Court also held that the court, while exercising the power under Article 142(1) in granting divorce to the parties by mutual consent, can also quash or dispose of other related criminal proceedings and complaints on the basis of settlement arrived at between the parties.

4.2.2.2 Ruling in respect of non- application/dilution of fault theory

The Apex Court observed that the fault theory requires apportionment of fault and blame, which may not be possible for resolving and adjudicating several of matrimonial cases of rare and exceptional nature. In view of the circumstances of a particular case, the court can dilute the application of fault theory in order to do complete justice to the parties; while exercising its inherent power under

Article 142 of the Constitution without causing the breach of self-imposed restraint under it. Hence, the fault theory incorporated under the provisions of Section 13(1)(ia) of the Hindu Marriage Act, 1955 does not prevent the court to do complete justice through the exercise of the power under Article 142 of the Constitution. Therefore, the court can dissolve a marriage on settlement between the parties and it can also set aside other related proceedings and even related criminal proceedings.

4.2.2.3. Factors to be considered for determination of complete failure of marriage

The Supreme Court illustrated several factors for consideration for deciding firmly whether marriage between the husband and the wife has broken irretrievably. Such factors may include:

1. Period of cohabitation by the spouses after their marriage,
2. The time of last cohabitation of the spouses,
3. Nature of allegations, if any, made by the spouses against each other and also against their family members,
4. Legal proceedings initiated by one or the other spouse and the orders passed in those legal proceedings and their impact on the relationship between the spouses,
5. Attempts, if any, made by the court intervention or mediation etc. to settle the disputes between the spouses, the number of such attempts and time of the last such attempt made.

The Court observed that period of separation should be long enough, such as time period above six years or more would be a relevant factor for consideration by the court. During consideration of such factors, socio-economic status and educational qualification of the spouses, the husband and wife having children and their age and educational qualification and dependence of the other spouse and children must be evaluated. Further relevant considerations will be the custody and welfare of minor children, granting adequate alimony to the wife, economic rights of the children etc. The court also observed that such illustration of several relevant factors does not amount to the curtailment of the exercise of power of the Supreme Court under Article 142. The said power has to be exercised in accordance with the specific situations in each case.

5. CONCLUSION AND SUGGESTIONS

The Supreme Court verdict in *Shilpa Sailesh* is a great step towards relieving the parties of the burden of continuing and prolonging the unsubstantiated marriage and also of cumbersome accusatorial litigation process in the law courts for obtaining divorce. The judgment has upheld the granting of divorce by the Apex Court in the exercise of inherent power under Article 142 of the Constitution in order to do complete justice to the parties. It is in the discretion of the Apex Court to grant decree of divorce or refuse it altogether. Such discretionary power has to be exercised considering the facts and circumstances

of each case. Each case has to be decided on its own merits. However, guiding principles and adequate safeguards must be laid down and firmly established in a case for granting of divorce due to complete breakdown of marriage, so that no guilty party under a marriage benefits from his/her own guilt. The Apex Court itself has declared that it cannot supplant the existing laws or rule in express contravention of the existing legal provisions.³⁴ Therefore, it is necessary that no such relief should be granted to the parties in express contravention of any statutory provisions. The court must also remember that sanctity of marital relationship should be preserved and divorce on frivolous grounds must be deprecated. It may be mentioned here that after the judgment of *Shilpa Sailesh*, the Supreme Court has recently exercised its jurisdiction under Article 142 in order to grant divorce on the ground of irretrievable breakdown of marriage in several cases such as the cases of *Sneha Singh*³⁵, *Mansi Khatri*³⁶, *Sulakshana Kumari*,³⁷ *Monika Singh*³⁸, *Vidushi Sharma*³⁹ and *Monika Narendra Sharma*⁴⁰. In future, it would be interesting to see how these judgments are helpful to the couples, who would seek decree of divorce from the law courts specially when their cases are not expressly covered under any of the grounds of divorce mentioned in the provisions of the Hindu Marriage Act, 1955. However, it would be difficult to predict whether the Parliament will amend the laws to incorporate irretrievable breakdown of marriage after suggestions for the same made by the Supreme Court several times. It is highly desirable that the Parliament, after elaborate discussion with eminent personalities, jurists, intellectual groups and other stakeholders of the society, adds irretrievable breakdown of marriage as a ground of divorce and also provide sufficient safeguards for its exercise.

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³⁴ 2023 SCC OnLine SC 544 (India).

³⁵ *Sneha Singh v Anupam Pushkar*, T.App.(C) No. 1388 of 2022 (India).

³⁶ *Mansi Khatri v Gaurav Khatri*, T.App.(C) No. 1595 of 2022 (India).

³⁷ *Sulakshana Kumari @ Dolly v Ritesh Kumar Singh*, T.App.(C) No. 2561 of 2022 (India).

³⁸ *Monika Singh v Kripa Sindhu*, T.App.(C) No. 2088 of 2022 (India).

³⁹ *Vidushi Sharma v Rohen Vajpayee and Anr.*, T.App.(C) No.1287 of 2022 (India).

⁴⁰ *Monika Narendra Sharma v Mukeshkumar Ramnath Bhagal*, C.A. No. 4315 of 2023 (India).

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