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EXERCISE OF INHERENT POWER BY THE SUPREME COURT OF INDIA TO DO COMPLETE JUSTICE WITH SPECIAL REFERENCE TO DIVORCE MATTERS UNDER THE HINDU MARRIAGE ACT – A CRITICAL ANALYSIS

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Abstract- Driven by the Latin maxim 'Fiat justitia ruat cælum', the Supreme Court of India has displayed inconsistency over the years regarding the interpretation of Article 142 of the Constitution of India. This is quite evident from the numerous judicial pronouncements of the Supreme Court. The reason of it being the exercise of this inherent power under Article 142 of the Constitution of India is left completely to the discretion of the Apex Court. This has resulted in the judicial attitude of going overboard with the use of 'complete justice' in its desire to administer justice in the appropriate cases before it and particularly in divorce matters. The moment has arrived to put our thoughts to whether this judicial adventurism by the Supreme Court in its pursuit to do justice needs to be circumscribed. However, it will be possible only when the debatable question of whether Article 142 of the Constitution of India can be invoked to pass a direction or order, which is contrary to the express statutory provisions, is settled finally. This can be studied by critically analysing the judgements rendered by the Supreme Court in divorce matters.

Key Words – complete justice, inherent power, appropriate cases, extra-ordinary jurisdiction, supplement, supplant.

I. Introduction

'To do Justice' has been the purpose for which the institution of Judiciary came to be established. As has been famously said by Lord Hewart that, *'Justice must not only be done; but manifestly be seem to be done'* has also been the pivotal principle which guided the institution of Judiciary till date. Having said this, it makes one wonder as to what must have transpired in the minds of our Constitution makers to qualify the word 'justice' with 'complete' and more over to incorporate a separate provision for 'complete justice' by way of an independent Article in the Constitution of India. To add further, not only has the Supreme Court exhibited a wavering attitude as regards the scope of Article 142 but also as regards invoking Article 142 in 'appropriate cases'. Similar has been the situation in cases of divorce by mutual consent under the Hindu Marriage Act, 1955 where the Supreme Court has invoked and at times has refused to invoke its inherent power under Article 142 of the Constitution of India. From the time when the Apex Court's zeal to do complete justice was lauded by the populace, to the time where the increasing free-wheel use of Article 142 by the same Apex Court is being criticized; interpretation of Art 142 has been inconsistent for the Supreme Court and the masses alike. Here, it becomes pertinent to understand the provisions of Article 142 of the Constitution of India particularly to find out whether this inherent power can be used to circumvent the statutory provisions.

For the purpose of present research article, the researcher has restricted the study to judicial pronouncements of the divorce matters before the Supreme Court of India wherein the researcher will try to critically analyze the cases, map the inconsistency exhibited by the Supreme Court *vis-a-vis* the interpretation of Article 142 is concerned and try to answer the question whether the power under Article 142 of the Constitution of India can be invoked to pass a direction or order, which is contrary to the express statutory provisions. The present research article is divided into III parts. In part I the researcher deals with the nature & scope of Article 142 of the Constitution of India. Part II deals with approach based analysis of cases decided by the Supreme Court generally. Part III deals with the divorce matters decided on the basis of the inherent power exercised by the Supreme Court under Article 142 of the Constitution of India followed by conclusion.

II. NATURE AND SCOPE OF ARTICLE 142 OF THE CONSTITUTION OF INDIA -

Under Article 142 of the Constitution of India, in the exercise of its jurisdiction, the Supreme Court is entitled to pass any decree, or make any order, as is necessary for doing complete justice in any cause or matter pending before it. The expressions 'cause or matter' include any proceedings pending in the court and would cover almost every kind of proceeding in the Court including Civil or Criminal. From the phraseology of Article 142 (1) it is quite clear that there is no condition precedent whatsoever to be satisfied before such power can be exercised, nor is there any limitation regarding the causes or the circumstances in which the power can be exercised. There can be no strait jacket formula for its exercise nor there can be any fetters or limited scope of application, for, the power under Article 142 is plenary in nature.Ergo, the exercise of power is left totally to the discretion of the Apex Court. Likewise, the absence of statutory provision will not inhibit the Supreme Court from acting under this Article from making appropriate orders for doing complete justice between the parties. Another example of the amplitude of power wielded by the Supreme Court under this Article is that it is able to legislate under the provisions of this Article despite the fact that law-making power primarily lies with the Parliament. However, the judicial legislation is being done only when there is vacuum in law on the concerned subject matter. It has been held by the Supreme Court in *Vineet Narain v. Union of India* that it is competent for it to do substantial justice to fill the gap in legislation till the legislature by legislation or the executive by executive orders provides for that.

The researcher submits that from the above stated material it can be said that the Supreme Court follows a Three-pronged approach while invoking the provisions of Article 142 of the Constitution of India to do complete justice, i.e. 'in accordance with law', 'in absence of law' and 'contrary to law'. While the jurisprudence surrounding other provisions of the Constitution has developed manifold, rendering them more concrete and stable interpretations, Article 142(1) is far from tracing this trend. Therefore, the most debated notion *vis-a vis* Article 142 remains whether it can be invoked to pass a direction or order, which is contrary to the express statutory provisions. The answer to this question has been rather inconsistent.

III. APPROACH BASED ANALYSIS -

The Supreme Court's approach to this issue can be identified as chronologically falling into four phases of restricted, broad, benevolent and harmonious interpretations given to Article 142. All the four phases contains a plethora of cases putting forth variety of reasoning given by the Supreme Court. However, the researcher has restricted herself to a few landmark cases which depict the different attitude of the Supreme Court.

A. Restricted Phase –

From the year 1963 to 1989, the interpretation of complete justice was that it cannot be adverted to, to defeat statutory provisions. The researcher submits that this could be categorised as the Restricted Phase.

Prem Chand Garg v. Excise Commissioner, U.P., Allahabad is the first case of this segment wherein the Supreme Court had held that though Article 142(1) empowers the Supreme Court to pass any order to do complete justice between the parties, the Court cannot make an order inconsistent with the fundamental rights guaranteed by Part III of the Constitution. Clearly, the scope of power under Article142 (1), as the Court saw it, was limited to deviation from mere rules of procedure.

The ratio of this case came to be reiterated in the case of *A.R. Antulay v. R.S. Nayak* in which the seven judge bench of the Supreme Court observed that,

"*however wide and plenary the language of the article may be, the directions given by the Court should not be inconsistent with, repugnant to, or in violation of the specific statutory provisions which infringes the fundamental rights of the individual*."

The peculiar factual matrix of this case led the court to make several other observations as to the fallible nature of the Supreme Court as well. The Court observed that to err is human, and if an error is brought to the notice of the Court, the Court always has the power and obligation to correct it *ex debito justitiae*. It further remarked that correcting mistake will not malign the image of Judiciary in the minds of people, on the contrary it will lift its stature for, this Institution exists solely on the confidence that the people repose in it.

These were the judges who belonged to the school of thought that Article 142 is curative in nature and the power under Article 142 is meant to 'supplement' and not to 'supplant' substantive law applicable to the case under consideration. They believed in giving a restricted interpretation to the idea of complete justice engrafted in Article 142 of the Constitution of India. The power under Article 142 is a residuary power, supplementary and complementary to the powers specially conferred by the statutes to do

complete justice between the parties whenever it is just and equitable to do so. Substantive statutory provision dealing with the subject matter of the given case cannot be altogether ignored by the Supreme Court while making an order under Article 142.

In some cases, the Court has laid down restrictions on itself with regard to Article 142(1), viz., the Court does not exercise the power to override any express statutory provisions. The Court in categorical terms expressed that 'power is not to be exercised in a case where there is no basis in law to form an edifice for building up a super structure.'

B. Broad Phase –

Post the earlier stated case laws, we saw a shift in the interpretation of the Supreme Court viz. Article 142 where the Supreme Court refused to accept any fetters on its constitutional powers. In *Delhi Judicial Service Association v. State of Gujarat* the Supreme Court observed that,

"its power under Article 142 (1) to do complete justice is entirely of a different level and of a different quality and that any prohibition or restriction contained in ordinary laws cannot act as a limitation on the Constitutional power of the Supreme Court."

This constitutional power of the Apex Court cannot be limited or restricted by provisions contained in statutory law. Thus, no enactment made by legislature can limit or restrict the power of the Supreme Court under Article 142. At the same time the Court ensured that the statutory provision dealing with the matter in dispute should not be disregarded and therefore the court observed that it may take into consideration the statutory provisions regulating the matter in dispute. It is pertinent to point out here that Mr. Fali S. Nariman appearing for one of the parties, by placing reliance on the decision of the Supreme Court in the cases of *Prem Chand Garg v. Excise Commissioner. U.P. Allahabad* and *A.R. Antulay v. R.S. Nayak* argued that the power bestowed on this Court under Article 142 does not contemplate a decision or order contrary to the statutory provision. However, it seems that the court escaped the rigors of a binding precedent under Article 141 by arriving at a reasoning that in both these cases the observation regarding the sweep of power of the Supreme Court under Article 142 was made with reference to fundamental rights.

In the following case of *Union Carbide Corporation v. Union of India*, the Court has taken a very broad view of Article 142. The Supreme Court while explaining the 'cause or matter' requirement under Article 142 cited an example that, if any interlocutory order in a matrimonial dispute is challenged before the Supreme Court, can the Supreme Court be said to be powerless to withdraw the matter before it if the parties to the dispute are consenting to the final disposal of the matter by the Supreme Court? Can the order of the Supreme Court be assailed on the ground of lack of jurisdiction? The answer would be No to both the questions. The Supreme Court reasoned that the constitutional provision like this cannot be construed in such a restricted manner by which the power is whittled down. The Court's power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary law cannot, *ipso facto*, act as prohibitions or limitations on the Constitutional powers under Article 142. Perhaps the proper way of expressing the idea is that, in exercising power under Article 142 and in assessing the needs of 'complete justice' of a cause or matter, the Apex Court will take note of the express prohibitions in any substantive statutory provisions based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. This proposition does not relate to the powers of the Court under Article 142, but only to what is or is not 'complete justice' to a cause or matter and in the ultimate analysis of the propriety of the exercise of power."

Furthermore, the Supreme Court while distinguishing the precedent laid down in *Prem Chand Garg's* case which was decided by a five judge bench and subsequently which was approved by a seven judge bench in *A.R. Antulay v. R.S. Nayak* said that in these two earlier cases the question was not of inconsistency with express statutory provision but the challenge was on the ground of violation of fundamental rights. The observations as to the effect of inconsistency with statutory provisions were really unnecessary in those cases as the decisions in the ultimate analysis turned on the breach of constitutional rights.

Time and again the Supreme Court has emphasized that the power given to it under Article 142 (1) is conceived to meet situations which cannot be effectively and appropriately tackled by the existing legal provisions. The Supreme Court has preferred to leave the power under Article 142 'undefined and un-catalogued' so that it remains elastic enough to be moulded to suit any given situation.

C. Benevolent Phase –

In this phase we find the example of a case where the Supreme Court has displayed its gracious side in dealing with the matter in hand. In *H. C. Puttaswamy v. Hon'ble Chief Justice of Karnataka*, the Supreme Court while holding that appointments to the posts of clerks in the subordinate courts in Karnataka without consultation with the State Public Service Commission were not valid, the Supreme

Court nevertheless, exercising its power under Article 142 ruled on humanitarian grounds not to remove them from service as they had put in more than 10 years of service. These people deserved justice ruled by mercy. Accordingly, the Court ruled that these persons be treated as 'regularly appointed with all the benefits of the past service'. It seems that the Courts were guided by the principle that justice should not only be done but it should be seemed to be done. The power under Article 142 can be likened to the `equity jurisdiction` of the court exercising power in order to ensure that no injustice is caused to a person.

Thereafter, the Supreme Court put its power at its highest In *Re, Vinay Chandra Mishra* where it declared that,

"statutory provisions cannot override the constitutional provisions' and Article 142 (1) being a constitutional power cannot be limited or conditioned by any statutory provision. No enactment made by Central or State legislature can limit or restrict the power of the Supreme Court under Article 142, though the court must take into consideration the statutory provisions regulating the matter in dispute."

The limited view taken in *Prem Chand Garg's* Case was expressly overruled as being 'no longer a good law'.

D. Harmonious Phase –

Under this category we find the case-law where the Supreme Court has tried to balance the conflicting interpretations given by it in previous cases.

Aggrieved by the directions in *Vinay Chandra Mishra's* case, the Supreme Court Bar Association filed the present petition seeking appropriate direction. Therefore, the matter came to be placed before the Constitution Bench of this Court. In the year 1998 the Supreme Court in *Supreme Court Bar Association v. Union of India* modified and toned down its views as expressed in *Vinay Chandra's* case. Though the Court took the position that Article 142 gives it unlimited power, it seems it adopted a cautious and balanced approach.Accordingly, the Court has observed:

"*Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in statute dealing expressly with the subject*".

As has been stated earlier, the inconsistency which was exhibited by the Supreme Court generally continued even in the divorce matters under the Hindu Marriage Act. In the following part the researcher deals with this issue.

IV. ARTICLE 142 AND DIVORCE MATTERS

In India, Marriage is a socially approved union of a man and woman accompanied by certain social obligations. It is still considered as sacramental union of two individuals. Stability of the institution of marriage is primarily essential for a healthy society and its development. Matrimonial matters are matters of delicate human and emotional relationships. Mutual fidelity and devotion to their partner are still considered as essentials to a marital bond. However, with the changing times, the 'sacramental' ideal of the institution of marriage is being eroded in spirit with increasing number of couples opting for divorce. 'Parting ways' attaches a lesser social stigma as against to what was there during the earlier days. However, dissolution of, marriage is not a new trend. Contrary to the general notion regarding the indissolubility of Hindu marriages, a large section of Hindus among the lower castes have traditionally practiced divorce. Divorce received statutory recognition in India after independence. It was introduced for Hindus in the year 1955 in the form of the Hindu Marriage Act 1955. Section 13 of the Hindu Marriage Act (hereinafter referred to as the Act) has undergone a considerable change over the period of time. Section 13 (1-A) was introduced in the present Act by the Hindu Marriage (Amendment) Act (44 of 1964) while amendment of 1976 added Section 13-B to the Act providing for divorce by mutual consent. According to the requirements of Sub-Section (1) of Section 13-B of the Act both the parties to the marriage have to present a joint petition to the District Court on the following ground that;

(i) they have been living separately for a period of one year or more before the presentation of the petition;

(ii) they have not been able to live together; and

(iii) they have mutually agreed that the marriage should be dissolved.

Thereafter, according to the provisions of Sub-Section (2) of Section 13-B of the Hindu Marriage Act, 1955, the petition lays dormant for a period of six months. No action can be taken before the lapse of six months. The legislative intent behind incorporating such a provision seems to be that the couple must be offered some time to introspect before seeking divorce. The researcher submits that no doubt is raised either on the legislative wisdom or on the underlying design that the cooling off period has been specified to try and salvage the matrimonial bond. However, what needs to be addressed is that there might be

'appropriate cases' which warrants the invocation of power by the Supreme Court to do 'complete justice' by doing away with the wait-period.

Therefore, the question arises as to whether the procedure specified in Section 13-B (2) of the Act, 1955 is mandatory or directory in nature and can the Supreme Court circumvent the same in 'appropriate cases'. The researcher tries to analyze the same with the help of following case laws.

In this light, *Anita Sabharwal v. Anil Sabharwal* is a classic case to be taken notice of. The facts of this case reveal that a divorce petition was filed by the husband at Delhi. The wife by filing a petition before the Supreme Court sought transfer of the case to Mumbai. What is to be taken note of is that although no petition under Section 13-B of the Hindu Marriage Act was filed in the first matrimonial Court, the Supreme Court taking the original divorce petition on its own file granted divorce by mutual consent under Section 13-B of Act by exercising power under Article 142 of the Constitution of India and by waiving the period of interregnum as mentioned in S. 13-B (2) of the Act. Though, the power of the Supreme Court to withdraw a matter to itself was settled by this time.By overstepping the statutory limitations contained in Section 13B(2) of the Act, the apex court has used its inherent powers for granting a decree of divorce by mutual consent, relying on the doctrine of irretrievable breakdown of marriage. Irretrievable breakdown of marriage as a separate ground of divorce has not yet found a place in the marriage statutes in India.

Another important judgment of Apex Court which provided new horizons to the concept of divorce in India is *Ashok Hurra v. Rupa Bipin Zaveri*. The facts that led to the filing of the present case under discussion is as follows – the husband and wife both moved an application jointly under Section 13-B of the Hindu Marriage Act before the Trial Court for divorce by mutual consent. The interesting point was that the wife withdrew her consent after the lapse of 18 months from the filing of the application. For this reason, the Trial Court dismissed the petition of Divorce by mutual consent. Against this order, the husband filed an Appeal before the single judge bench of Gujarat High Court. The Gujarat High Court reversed the decision of the Trial Court and passed the decree of dissolution of marriage. Aggrieved by this, the wife filed an LPA before the Division Bench of the Gujarat High Court. This Division Bench set aside the decision of the learned single judge of the Gujarat High Court. It is against this judgment of the Division Bench that the present SLP came to be preferred by the husband. It was contended by the counsel for the respondent that in the light of the decision of this Hon'ble court in the case of *Sureshta Devi v. Om Prakash* it is open for one of the parties at anytime till the decree of divorce is passed, to withdraw the consent, which had happened in the present case. However, for a decree of divorce under sec. 13-B, mutual consent to divorce is *sine qua non*. Answering this issue the Court observed that,

"*the decision on the larger issue is only obiter and the decision requires reconsideration, that apart, this Court has got power to consider the totality of circumstances, including the subsequent events in order to do complete justice in the matter...*"

The Supreme Court further observed that it was a protracted litigation with passage of almost thirteen years. It observed that there was no useful purpose of prolonging the agony any further and that the curtain should be drawn at some stage. The Division Bench concluded that the marriage is dead, both emotionally and practically. Though it realized on the facts of the case that the ingredients of Section 13-B of the Act are not fully met, yet it preferred to grant divorce by mutual consent, and for that it had to exercise its power under Article 142 of the Constitution of India. All this was done by the learned Bench 'in order to meet the end of justice in all the circumstances of the case subject to certain safeguards.'

This extraordinary pursuit of the Supreme Court to grant instant divorce by exercising its inherent power under Article 142 of the Constitution of India bounced back on the Supreme Court in this case itself. The wife again approached the Supreme Court by filing a Writ Petition under Article 32 of the Constitution of India challenging the validity of the earlier judgment of the Supreme Court in *Ashok Hurra v. Rupa Bipin Zaveri*. The petitioner contented in this Writ Petition that the Supreme Court has exceeded the jurisdiction vested in it under Article 142 of the Constitution and the said judgment, being without jurisdiction, is a nullity and the validity of the same can be assailed in a petition under Article 32 of the Constitution. The learned Bench of the Supreme Court opined that the question needs to be considered by the Constitution Bench of this court and therefore directed that the matter should be placed for consideration before the Constitution Bench. In *Rupa Hurra v. Ashok Hurra*, the Constitution bench of the Supreme Court held that the final judgment or order passed by this court cannot be assailed in an application under Article 32 of the Constitution of India by any aggrieved person, whether he was party to the case or not. However, the court being cautious of the fact that there might be instances of gross abuse of the process of court or gross miscarriage of justice in which case it held that,

"*...it may reconsider its judgments in the exercise of its inherent power.*"

The researcher finds the decision of the Supreme Court in the above mentioned case applaudable for the reason that Supreme Court held that simply to secure finality of its judgements, the court should

not continue perpetuating the wrong. The real application of the maxim *'ex debito justitiae'* is in remedying the wrong.

In a later case of *Anjana Kishore v. Puneet Kishore* a three judge bench of the Supreme Court decided to waive the cooling-off period of 6 months mentioned in Section 13-B of the Act in a Transfer Petition before it and directed the parties to file a joint petition before the Family court which by dispensing the said period of 6 months can pass the final order on the petition. The court made it clear that this direction is being given under the power enshrined in Article142 of the Constitution of India to do complete justice.

Though the expected relief was granted to the parties before the Supreme Court, it directed the parties to get the final decree of divorce from the lower court which had the jurisdiction to do so. The researcher submits that this decision given by the Supreme Court amounted to protracting the litigation unnecessarily. The researcher submits that the Supreme Court itself is competent enough to dissolve the marriage in the matter before it by invoking its power under Article 142 of the Constitution of India. Rather than asking the parties to run from pillar to post, the Supreme Court could have rendered justice then and there itself.

Another important case decided by the Supreme Court is *Anil Kumar Jain v. Maya Jain* where the factual matrix was similar to the case of *Ashok Hurra v. Rupa Bipin Zaveri* wherein after jointly filing a petition under Section 13-B of the Act, after the lapse of six months when the matter came up for hearing, the wife withdrew her consent. The court observed that,

"Although irretrievable breakdown of marriage is not one of the grounds indicated whether under Sections 13 or 13B 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 13B of the aforesaid 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..."

The Court in Ashok Hurra had doubted the conclusion in *Sureshta Devi v. Om Prakash* that the consent given by the parties filling a petition for divorce by mutual consent had to subsist till a decree was passed on the petition. When the Supreme Court in Anil *Kumar Jain V. Maya Jain* came to consider both these cases, it opined that 'the law as explained in Sureshta Devi case still holds good, though with slight variations as far as the Supreme court is concerned and that too in the light of Article 142 of the Constitution.' By observing this, it seems that the Supreme Court made it clear that the inherent power under Article 142 cannot be subjected to any decision of this Court.

The case of *Naveen Kohli v. Neelu Kohli*, is of importance because, though, a three Judge Bench of the Supreme Court held that irretrievable breakdown of marriage is not a ground for divorce under the existing Hindu Marriage Act, 1955 however, it acknowledged the recommendations of the 71st Law Commission Report which briefly dealt with the subject of irretrievable breakdown of marriage. The Court went further and appealed the Union Government to consider amending the Hindu Marriage Act by adding irretrievable breakdown of marriage as another ground for divorce. A copy of the judgment was also sent to the Ministry for consideration.

In a later case of *Vishnu Dutt Sharma v. Manju Sharma*, however, the Supreme Court came a full circle when a two judge bench of the Supreme Court refused to grant a decree for divorce on the ground of irretrievable breakdown of marriage, holding that it would be amending the Act which was the exclusive function of the legislature, and hence this two judge bench seemingly overlooked the earlier three judge bench decision. Justice Katju and Justice V.S. Sirpurkar, while dismissing the appeal for divorce by mutual consent under Section 13B of the Hindu Marriage Act, 1955, after the unilateral withdrawal of consent, had strongly opined that,

"If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts."

Subsequent to this case, two attempts which went in vain were *Manish Goel v. Rohini Goel* and *Poonam v. Sumit Tanwar* which sought to seek divorce decrees based on the supposed *de novo* ground of irretrievable breakdown of marriage. This court taking a contrary view has observed that under Article 142 of the Constitution of India, this court cannot altogether ignore the substantive provisions of the statute & pass orders concerning an issue which can be settled only through a mechanism prescribed in the statute.

Thereafter was the case of *Neeti Malviya v. Rakesh Malviya* where the SC was dealing with a Transfer Petition. However, because of contrary view taken by the Supreme Court in the cases of *Manish Goel v. Rohini Goel* and *Poonam v. Sumit Tanwar*, the two-judge bench of the apex court in *Neeti Malviya v. Rakesh Malviya* referred this question to a three-judge bench, that whether the period prescribed in Section 13B(2) of the Act can be waived or reduced by the Supreme Court in exercise of its jurisdiction under Article 142 of the Constitution. In fact, the Supreme Court has previously invoked Article 142(1) to give a go-by to the procedure in Section 13B(2) of the Act in both situations of *Anita Sabharwal v. Anil Sabharwal and Anjana Kishore v. Puneet Kishore,* to name a few amongst others. However, the Courts did not get an opportunity to apply its mind to the question because the matter became infructuous on account of grant of divorce in the meanwhile.

The latest case in the league is the case of *Amardeep Singh v. Harveen Kaur.* Factual matrix giving rise to this appeal is that marriage between the parties took place on 16th January, 1994 at Delhi. Since 2008 the parties were living separately. Finally, on 28th April, 2017 a settlement was arrived at to resolve all the disputes and seeks divorce by mutual consent. The parties were living separately for more than eight years and there was no possibility of their re-union. The Supreme Court observed that further delay will affect the chances of their resettlement and further lead to their mental agony. The parties had moved the Supreme Court for pleading to waive off the cooling period of six months under Article 142, which the Supreme Court has in its power to do complete justice.

The Apex Court relied on decision of *Nikhil Kumar v. Rupali Kumar*, and the statutory period of six months was waived off by invoking its power vested under Article 142 of the Constitution and the marriage was dissolved. In this case the Court observed that both the parties have not been able to work out their marriage as husband and wife from day one. They realized the consequence of their decision which they have taken out of their free will and without any undue influence or coercion.

There are conflicting opinions of the Supreme Court on whether exercise of power under Article 142 of the Constitution of India for waiving the statutory period under Section 13-B is appropriate or not. The court held that the decision rendered in Manish Goel holds the ground until the issue is decided, otherwise by a larger bench. However, the Court was of the opinion that the question whether requirement of undergoing the statutory cooling-off period of six months is mandatory or directory was not gone into by the Supreme Court and therefore it can be looked into by this court in the present case. The court held that the object of the provision is to safeguard against hurried decisions and not to perpetuate a purposeless marriage. In the light of the same, the Court held that the requirement is directory in nature and it can be waived by the court in exceptional circumstances.

V. CONCLUSION

In view of the wavering interpretation of the Supreme Court in interpreting the provisions of Article 142 generally, and particularly in the divorce cases, it was of significance to find out the circumstances which necessitates the use of Article 142. From the cases discussed above, the researcher is of the opinion that there cannot be any strait jacket formula for the use of Article 142. In 'appropriate cases' wherein there is irretrievable breakdown of marriage, no point would be served to prolong a marriage in name which has broken down in substance. As has rightly been held by the Supreme Court in the case of *Amardeep v. Harveen Kaur* that the idea of cooling-off period is to safeguard against hurried decisions and not to perpetuate agony to parties who have not been able to perform their marital obligation towards each other and when all other methods to resuscitate the marriage have gone in vain. The researcher submits that in the absence of inclusion of the ground of 'irretrievable breakdown' of marriage in the statute book, the Supreme Court cannot be expected to turn a nelson's eye to the exceptional hardships faced by the parties. It can be logically deduced from the cases discussed above that the Supreme Court is quite conscious of the fact that legislative crystallization is the way of inclusion of a new notion of divorce in the statute book and judicial legislation is not. However, judicial legislation has come to the rescue of the individuals in cases of legislative silence. Therefore, the researcher submits that in 'appropriate cases only' when the Supreme Court is impeccably satisfied that resurrection of the matrimonial bond is impossible does it go ahead to invoke its power to do complete justice under Art. 142 of the Constitution of India and sever the marital bond.

Taking a cue from the Supreme Court, the Rajya Sabha had introduced the Marriage Laws (Amendment) Bill, 2010 to do away with the waiting period and adding the ground of irretrievable breakdown of marriage for granting Divorce. The Bill came to be eventually passed by the Rajya Sabha on 26th August, 2013, however, it could not be cleared by the Lok Sabha and lapsed with its dissolution and was finally shelved indefinitely. So, till the time the legislature takes upon itself to remedy the situation by legislating, the responsibility lies on the Judiciary to do complete justice in appropriate cases before it and

for this it can even go contrary to statutory provisions because statutory provision can in no way circumscribe constitutional provision.

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11. See *Vishaka v. State of Rajasthan* AIR 1997 SC 3011; *Common Cause (A Regd. Society) v. Union of India* (2018) 5 SCC.
12. Constitution of India enjoins the Judiciary to dispense justice in accordance with law.
13. *Supra* n. 10. See *Vishaka v. State of Rajasthan* AIR 1997 SC 3011; *Common Cause (A Regd. Society) v. Union of India* (2018) 5 SCC.
14. See *Anita Sabarwal v. Anil Sabarwal*, (1997) 11 SCC 490; *Ashok Hurra v. Rupa Bipin Zaveri*, (1997) 4 SCC 226; *Amardeep Singh v. Harveen Kaur* AIR 2017 SC 4417: 2017 (8) SCC 746.
15. Rajat Pradhan, *“Ironing out the creases: Re-examining the contours of invoking article 142(1) of the Constitution”*,[2011]NALSARStuLawRw1,availableat http://www.commonlii.org/in/journals/NALSARStuLawRw/2011/1.html, (visited on March 29, 2019).
16. *Ibid*. The original author has mentioned 3 phases under which heads the case laws can be divided based on their interpretation and effect. The researcher finds it pertinent to add another phase – ‘Benevolent Phase’ based on the effect that certain judgments of the Supreme Court have on the parties to the matter before.
17. Dr. R. Prakash, *“Complete Justice under Article 142*”, (2001) 7 SCC (JOUR) 14; available at http://www.supremecourtcases.com, (visited on January 4, 2019).
18. AIR 1963 SC 996: 1963 SCR Supl. (1) 885.
19. Shubhankar Dam, *“Vineet Narain v. Union of India: A court of law and not of justice—is the Indian Supreme Court beyond the Indian Constitution”;* available at https://ssrn.com/abstract=969976, (visited on May 3, 2019).
20. AIR 1988 SC 1531.
21. Y.V. Chandrachud et al. (rev.), D.D. Basu, SHORTER CONSTITUTION OF INDIA, 13th ed. 2001, rep. 2003, p. 684.
22. M.P. Jain, INDIAN CONSTITUTIONAL LAW, 5th ed., rep. 2009, p. 262.
23. *E.S.P. Rajaram & Ors v. Union of India* AIR 2001 SC 58:2001 (2) SCC 186.
24. AIR 1991 SC 2176.
25. *Ibid.*
26. The researcher submits that it is clear from the observation of the Court that though the Supreme Court held that there can be no limitations on it in the exercise of power under Article 142, the Court does not out-rightly disregard the statutory provisions and seems to be considerate of taking them into account.
27. (1991) 4 SCC 584.
28. http://clc.du.ac.in/.
29. *Ibid.*
30. *Supra* n.5.
31. *Union Carbide Corporation v. Union of India* 1992 AIR 248:1991 SCR Supl. (1) 251.
32. *Delhi Development Authority v. Skipper Construction Co*., AIR 1996 SC 2005: (1996) 4 SCC 622.

33. AIR 1991 SC 295: 1991 Supp (2) SCC 421.
34. B.S. Chauhan, *“Courts and its endeavour to do Complete Justice”,* p.5, available at http://www.nja.nic.in/ 17%20Complete%20Justice.pdf, (visited on May1, 2019).
35. (1995) 2 SCC 621.
36. AIR 1998 SC 1895.
37. http://www.supremecourtcases.com/.
38. *Ibid.*
39. Daljeet Singh, “*Instant divorce under Hindu Law: A critical appraisal of emerging trends in judicial approach.”Available at* http://14.139.60.114:8080/jspui/bitstream/123456789/15476/1/009_Instant%20Divorce%20Under%20Hindu%20Law%20%281-15%29.pdf (visited on April 10, 2019).
40. Anmol Samad, *“3 Important forms of Customary Divorce according to Hindu Law”,* available at http://www.shareyouressays.com/knowledge/3-important-forms-of-customary-divorce-according-to-hindu-law/95317, (visited on April 9, 2019): *See generally* “*Modes of Divorce/Dissolution of Marriage under Hindu Law”* available at https://shodhganga.inflibnet.ac.in/bitstream/10603/57778/9/10_chapter%203.pdf (visited on April 30, 2019).
41. Vijender Kumar, *“Irretrievable breakdown of marriage: Right of a married couple”*, NALSAR Law Review, vol. 5, p. 15.
42. Hindu Marriage Act 1955.
43. https://www.nalsar.ac.in/.
44. Section 13-B of the Hindu Marriage Act, 1955 reads as *“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, they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.*
2. 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 inquiry as it think 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 the decree.”
45. (1997) 11 SCC 490.
46. See *Union Carbide Corporation v. Union of India* 1992 AIR 248:1991 SCR Supl. (1) 251.
47. It means that the marital ties have broken to the extent that the same are beyond salvage or repair, there being no chance of reconciliation between the parties. The breakdown theory of divorce is inherently attached with no fault theory of divorce.
48. https://www.nalsar.ac.in.
49. (1997) 4 SCC 226.
50. (1991) 2 SCC 25: AIR 1992 SC 1094, in this case the consent was withdrawn within a period of 18 months so the judgment is distinguishable was observed by the Supreme Court.
51. (1997) 4 SCC 226, p. 234.
52. *Rupa Ashok Hurra v. Ashok Hurra* (1999) 2 SCC 103.
53. (1997) 4 SCC 226.
54. *Rupa Ashok Hurra v. Ashok Hurra* (1992) 2 SCC 103, p. 104.
55. (2002) 4 SCC 388.
56. *Ibid,* p. 416, this led to the adoption of an innovative concept of ‘Curative petition’ by the Supreme Court.
57. (2002) 10 SCC 194.
58. The researcher draws a parallel with a similar power exercised by the Supreme Court when it expanded its own Writ Jurisdiction to grant compensation (thereby developing Compensatory Jurisprudence) to the individuals wronged rather than asking the individuals to approach the Civil Court for the same. *See generally* Khatri v. State of Bihar (1981) 1 SCC 627: AIR1981SC 928 and Rudul Shah v. State of Bihar (1983) 4 SCC 141: AIR 1983 SC 1086.
59. (2009) 10 SCC 415.
60. (1997) 4 SCC 226.
61. (2009) 10 SCC 415, p. 423.
62. (2009) 10 SCC 415, p. 424.
63. (2006) 4 SCC 558, at 578-579.

64. 71st Report, Law Commission of India, The Hindu Marriage Act, 1955 – Irretrievable Breakdown of Marriage as a Ground for Divorce (1978), available at http://lawcommissionofindia.nic.in/51-100/Report71.pdf. The Law Commission of India in its 71st report has recommended that irretrievable breakdown of marriage should be a separate ground of divorce for Hindus. It suggests the period of three years' separation as a criterion of breakdown.
65. (2009) 6 SCC 379.
66. *Ibid*.
67. (2010) 4 SCC 393.
68. (2010) 4 SCC 460.
69. http://sci.nic.in.
70. (2010) 6 SCC 413.
71. AIR 2017 SC 4417: 2017 (8) SCC 746.
72. (2016) 13 SCC 38