

INCORPORATION OF IRB AS A GROUND FOR DIVORCE IN INDIA- Adv. Tanupriya Singh¹**ABSTRACT**

Irretrievable breakdown of marriage (hereinafter referred as IRB), is a concept of the English matrimonial law. Earlier, divorce was dependent on fault theory. The spouse wronged could pray for dissolution of marriage, not the spouse at fault so as to take advantage of his or her own wrong. But another theory was also gaining ground. If the relationship between the spouses has reached such a stage that they could no longer live like husband and wife, then what was the purpose of investigating as to which spouse was at fault and which was not? It is submitted that marriages in India are considered to be made in heaven. It is regarded as predestined act of God. It is generally a supposition that all marriages will be successful and long lasting. Marriages in India especially under Hindu law are a permanent nuptial lock but if we see in the contemporary surroundings, it is pertinent to see and analyse that with the passage of time the concept of marriage has changed a lot.

Keywords: IRB (irretrievable breakdown of marriage), Article 142, complete justice, Hindu Marriage Act.

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I. Introduction

“Divorce isn’t such a tragedy. Rather tragedy is staying in an unhappy marriage.

- Jennifer Weiner”

This social reflection is imbibed in various laws relating to Hindu marriages including the Hindu Code Bill, Marriage Bills/Acts Marriage Laws Amendment Acts such as, 2010,² 2012 and 2013.³ Therefore, it is correct to say that, the 71st Report of Law Commission of India on IRB as a ground of divorce under the HMA, 1955⁴ is an important document in this content, in which the committee opined that where the marriage was broke down irretrievable or beyond repair, there was no point in continuing with such marital tie.

In India, at present the prevailing laws regarding the issue of divorce have not recognised a situation where the spouses are facing a situation that despite the fact that they live under the same roof, their marriage is equivalent to a separation. There is no codified law for IRB. The HMA, 1955 under section13⁵ has recognised few grounds for the dissolution of marriage. But with changing social scenario and with the changing nature of marriage in the society, the Supreme Court has shown special concern over the matter of making IRB as a ground for divorce. The Supreme Court has with a view to do complete justice and shorten agony of the parties engaged in long drawn battle, directed dissolution of marriage. Indeed, these were exceptional cases, as the law does not specifically provide for the dissolution of marriage on the grounds other than those given in the HMA, 1955 and IRB is not a ground for divorce under the HMA, 1955. Because of the change of circumstances and for covering a large number of cases where the marriages are virtually dead and unless this concept is pressed into services, the divorce cannot be granted by the courts other than supreme court.

So, ultimately, *“it is for the Legislature whether to include IRB as a ground of divorce or not”* but in our considered opinion the Legislature must consider IRB as a ground for grant of divorce

²45th report of Rajya Sabha on Marriage Law (Amendment) Bill, 2010 available at: https://prsindia.org/files/bills_acts/bills_parliament/2010/SCR_Summary_marriage_amendment_law.pdf 45th report of Rajya Sabha on Marriage Law (Amendment) Bill, 2010 available at: https://prsindia.org/files/bills_acts/bills_parliament/2010/SCR_Summary_marriage_amendment_law.pdf (last visited on April28, 2024).

³The Marriage Laws (Amendment) Bill, 2013 (Bill No. XLI-C of 2010), available at: https://prsindia.org/files/bills_acts/bills_parliament/2010/Marriage_Laws_Bill_as_passed_by_RS.pdf (last visited on: April 17th, 2024).

⁴Law Commission of India, “71st Report on The Hindu Marriage Act, 1955- Irretrievable breakdown of marriages as A Ground of Divorce, 1978” (April, 1978).

⁵The Hindu Marriage Act, 1955 (Act 25 of 1955), s.13.

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under the HMA, 1955 itself. Further, it is also pertinent to see under what circumstances the court will accept as proof of IRB of marriages. So here are some instances under which IRB may be granted as mentioned below:

1. The couple has not *lived like husband and wife* for a period of time.
2. One partner had *sexual intercourse with somebody else* and because of this the other partner finds it impossible to continue living together as husband and wife.
3. One partner is in prison after being declared an '*habitual criminal*'. (This means he or she keeps committing crimes, and because of this was sentenced to *ten to fifteen years* in prison).
4. One partner *deserted* the other.
5. One partner abused the other, e.g., the husband keeps *assaulting* the wife.
6. One partner is *alcoholic or a drug addict*.
7. The partner *no longer love each other* they may be too different, or they married when they were too young.
8. One of the partners finds it *impossible to live together* as husband and wife for any other reason etc.

Further, in 1964, section 13 (1-A) was inserted which contains second type of divorce based on the 'Break down theory'. Thus, the two grounds mentioned in sub-section (1-A) are available to both the husband and wife. The two clauses under which, non-resumption of cohabitation for two years or upwards after the decree of judicial separation or restitution of conjugal rights was made a ground of divorce. This is a modification of clauses (viii) and (ix) of section 13(1) of the HMA, 1955. By the *Marriage Laws (Amendment) Act, 1976* the period of two years is reduced to one year this is how section 13(1-A) introduced an element indirectly related to *breakdown theory* in the HMA, 1955.⁶

II. Idea behind IRB

The idea behind the declaration of IRB is also based on the *consent* as it plays a major role in the occurrence of a valid marriage. Since, consent is accorded primacy at the time of marriage, it follows that when one or both parties believe that the marriage has broken, they can petition for

⁶G.C.V. Subba Rao, *Family Law in India* 205 (S. Gogia & Company, Hyderabad, 2005).

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divorce. When both parties agree the marriage has failed, they can apply for divorce by “*mutual consent*” but, when only one of the parties believes that the marriage is failing, it would be enabling for the party to seek divorce arguing that the marriage has broken down, despite the unwillingness of the other party to end the relationship.⁷

But there is one more important thing that has to be kept in mind that, whatever the conditions or the facts and circumstances of the case are, no one will be permitted to be benefited from one’s own wrongs or disability, for example; In *Kharak Singh Dhapola v. Mrs. Sarojini Dhapola*⁸ husband filed a petition for divorce on the ground of desertion by wife. In this case, husband disallowed wife to live with him. Wife started living in separate room in the same house. They are living separately for many years. She was living in father-in-law’s house. Held, wife cannot be said to have deserted her husband. Decree of divorce cannot be granted on the ground of IRB.

There is a dearth of laws in India relating to IRB as ground for divorce. There have been many positive developments regarding IRB in Constitutional Bills, Suggestions of Law Commission Reports, and Supreme Court of India’s jurisdiction relating to Article 142⁹ of Constitution of India. A healthy precedent has been established for providing better avenues and opportunities to both husband and wife if they find it difficult to continue their marriage. They can resort to divorce on the ground of IRB. Laws in favour of IRB as a ground for divorce are evolving over the years very strongly especially in favour of emergent Indian women. There is Article 142¹⁰ of Constitution of India, case laws and Law Commission’s suggestions. But, divorce on ground of IRB is still a rare phenomenon in India despite Article 142¹¹ of Constitution of India because the Indian Legislature believes that there should not be a sudden break of the marriage tie. It believes in reconciliation. It believes that cooling-off period which is not only desirable but essential too being sacramental. This is why it allows husband and wife time to come together to the conjugal fold.

For example, In the case of restitution of conjugal rights decree, it orders the withdrawing spouse to return to cohabitation. In the case of judicial separation, it sees whether there has been resumption of cohabitation within a period of one year or not because the underlying idea is same i.e., to facilitate reconciliation in matrimonial relations.

⁷*A. Jayachandra v. Aneel Kaur*, AIR 2005 SC 534.

⁸AIR 2009 (NOC) 2157 (UTR).

⁹The Constitution of India. art. 142.

¹⁰*Ibid.*

¹¹*Ibid.*

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III. Article 142 of The Constitution of India and IRB

The interpretation of Article 142¹² under the Indian Constitution describes various situations of the application of this provision. This provision of the Indian Constitution mainly deals and elucidates about the interpretation of the word “*complete justice*” but as of now for our concern we will limit ourselves only to the concept related to IRB and providing complete justice therein by the virtue of this article. In such case the Supreme Court has time and again repeatedly has exercised its inherent powers in specific cases of divorce either solemnized under statutory laws or personal or customary laws by exercising their jurisdiction to take up cases under Article 142.¹³

The Indian Constitution grants special powers to specific organs to ensure a smooth and conflict free society. Similarly, the Supreme Court of India is the apex institution which is responsible for imparting justice to the people by passing decrees or such orders as is necessary for doing complete justice in any cause or matter pending before it and to grant special leave against orders or decree form any subordinate court in the country. These powers thus are most commonly referred to as *in-hand powers* or *inherent powers* of the Supreme Court that only aim towards delivering complete justice to any person whatsoever. As a result, the Supreme Court has repeatedly inclined towards the utilization of Article 142¹⁴ in many cases and have thus passed orders to serve complete justice to the aggrieved people.

Therefore, these powers have been granted so as to ensure that no party remains remediless during his final resort and make sure that justice is delivered bypassing the hurdle of jurisdiction. It thus stands reasonable for us to study the existing understanding of Article 142¹⁵ and analyse whether such powers need a judicial restraint or not and study a particular situation where the existing provisions fail to deliver justice thereby granting the Supreme Court powers to serve remedy.

IV. Judicial Pronouncements on IRB

In *Chandrakant Patil v. state through CBI*,¹⁶ the Supreme Court held that such orders should be passes by the court when it is necessary for doing complete justice. However, “*the power should not be exercised frequently, but sparingly*”. These extra ordinary powers are exercised by the

¹²*Ibid.*

¹³*Ibid.*

¹⁴*Ibid.*

¹⁵*Ibid.*

¹⁶(1998) 3 SCC 38.

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apex court when the subordinate courts fail to deliver an order so as to meet ends of justice. Therefore, here the Supreme Court will try to bridge the void present in the circumstances of insufficient law in order to ensure complete justice to the parties.

The wide ambit of the extraordinary powers under 142 was first acquainted with in the case of *Prem Chand Gard v. Excise Commissioner, U. P.*¹⁷ where the then Solicitor General of India, C. K. Daphtary, put forth the astonishing nature of Article 142¹⁸ and argued that the powers of the court under Article 142¹⁹ could not be controlled by Article 32²⁰ This interpretation added a rider to the exercise of wide extraordinary powers laying down that “an order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws.

The concept of “*complete justice*” as entailed under Article 142²¹ is the word of width couched with elasticity to meet myriad situations created by human ingenuity.²² The term “*complete justice*” more or less follows a utilitarian view, that is benefit of the masses. It mainly aims that justice to be delivered so as to ensure no person suffers or his rights are violated in any way. “While exercising the power under 142 the Court cannot pass an order, which would cause injustice to others in particular those who are not before it.” Secondly, it means to deliver justice according to law and not by superseding any of the fundamental rights incorporated with the individuals.

Although the Supreme Court can mould the relief, it would not grant relief which would amount to perpetuating an illegality. In the name of individualizing justice, it is also not possible for the Supreme Court to shut its eyes to the Constitutional scheme and the right of numerous persons, who are not before the Court.²³

The Supreme Court has time and again put reliance on Article 142²⁴ to deal with cases falling outside the purview of existing laws and overcome with the loopholes in the laws as well as some unique circumstances. However, to prevent any conflict with existing laws, the Supreme

¹⁷AIR 1963 SC 996.

¹⁸*Supra* note 9, art,142.

¹⁹*Ibid.*

²⁰*Supra* note9, art.32.

²¹*Supra* note 9, art,142.

²²*Ashok Kumar Gupta v. State of U. P.*, (1997) 5 SCC 20.

²³*Supreme Court Bar Association v. Union of India*, (1998) 4 SCC 409.

²⁴*Supra* note 9, art,142.

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Court laid down restrictions over itself to exercise powers under Article 142.²⁵ The Court hence does not intend to override any statutory provision already in force and cannot be used against a definite statutory provision.²⁶

Now that we've gotten to the heart of our issue, opponents of include IRB as a cause for divorce typically claim that "divorce by mutual consent" that was added to the HMA, 1955 in 1976 more than suffices the current issue in place and bringing about IRB would be a futile exercise. So, considering that, it is crucial to remember that "mutual consent" necessitates the agreement of both parties but what if one refuses to participate, the abovementioned then it marks as its inapplicability. IRB, on the other hand, is a ground which the Court can examine and if the Court, on the facts of the case, concludes that the marriage cannot be repaired/saved, then divorce can be granted. The grant of divorce is not dependent on the volition of the parties but on the Court concluding, on the facts pleaded, that the marriage has irretrievably broken down. A too technical and hypersensitive approach would be counter-productive to the institution of marriage.²⁷

But the real truth is that, as contended time and again, IRB has yet not been recognized as a self-sufficient and valid ground for divorce but it is the evidences on record that can be helpful for determining the grounds taken for defence can be taken into consideration or not. An application for divorce under this ground is not maintainable prima facie if the party seeking divorce on this ground is at fault by himself or herself, an adulterous husband or wife cannot file for a divorce by themselves since there is no aggrieved party and this ground cannot be used by one to curtail faults committed by themselves. Instead, the validity arises only when both parties have accused or levelled such heinous allegations against one another that by no means they could think of resuming their matrimonial bond afresh and the marriage stands dead practically. This is the prime criterion to ponder upon while court stands in a dilemma whether or not to dissolve the marriage of the parties in question.

Therefore, keeping in mind all these factors one can definitely say that Article 142²⁸ of the Indian Constitution acts as a safeguard to any person who is governed by any personal law, customary law or even who is outside the purview of existing religious laws and rights and guarantees a remedy to each and every citizen of India governed by the Indian Constitution. This

²⁵*Ibid.*

²⁶*A. R. Antulay v. R. S. Nayak*, (1988) 2 SCC 602.

²⁷ AIR 2006 S.C. 1675

²⁸*Supra* note 9, art,142.

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is how our grund norm enables that no party could be left remediless and grievances of a party have to be examined on its own merits.

However, a restraint over the inherent powers of the apex court would seem a major impediment in delivering complete justice to an aggrieved having denied remedy by the lower courts over an assumed lack of jurisdiction. A restraint on such powers, however, may extinguish the prime purpose of a guaranteed complete justice under this specific provision. Considering the case of *R. Srinivas Kumar*,²⁹ wherein the Supreme Court granted divorce for a marriage solemnized under customary laws by exercising its powers conferred under Article 142³⁰, stating that there was an irretrievable breakdown between the parties, considering the facts of the case and even though there is lack of consent between the parties, and divorce must be granted to ensure complete justice to the aggrieved parties.

Hence, in my view, it seems legit not to abstain the apex court from the inherent powers granted to it for the benefit for the people since it may backfire in one or the other way and may restrict the court from serving complete justice to the citizens. As specified by *Adv. K.K. Venugopal*,³¹ this particular *article should not be used to supplant the existing law, but only to supplement the law*. Therefore, this being the prime reason why the Supreme Court is vested with powers of undefined jurisdiction to serve complete justice and simple reasoning, however, is that the *inherent powers are granted just to tackle situations where the existing provisions of law are not effective*. Such powers are inherent in nature and to some extent discretionary as well as it applies only to specific predefined cases only.

Even according to some recent Supreme Court judgments, it clearly manifests that IBR as a ground for divorce is the need of the hour. For instance, in *Shilpa Sailesh v. Varun Sreenivasan*³² it was held that by invoking discretionary power of supreme court to do complete justice to the parties wherein the court satisfies itself that the parties can no longer cohabit together and continue formal legal relationship then “*Fault theory can be diluted by the Court to do ‘complete justice, apportioning blame and greater fault may not be the rule to resolve and adjudicate the dispute in rare and exceptional matrimonial cases - It would be in the best interest of all, including the individuals involved, to give legality, in the form of formal divorce,*

²⁹(2019) 9 SCC 409

³⁰*Supra* note 9, art,142.

³¹ K.K. Venugopal, *Article 142 and The Need for Judicial Restraint*, available at: <https://www.thehindu.com/opinion/op-ed/Article-142-and-the-need-for-judicial-restraint/Article18474919.ece> (Last visited on August 22, 2023).

³²2023 LiveLaw (SC) 375

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to a dead marriage, otherwise the litigation, resultant sufferance, misery and torment shall continue". Further in *Rakesh Raman v. Kavita*³³ it was held that, "cruelty may not be attributed to one party alone despite the fact that marriage had broken down irretrievably and tying parties together leads to more cruelty to both the spouses". Further in *Prakashchandra Joshi v. Kuntal Prakaashchandra Joshi @ Kuntal Visanji Shah*³⁴ the marriage between the parties on the ground of irretrievable breakdown in exercise of powers under Article 142(1) was dissolved.

V. Conclusion

So, until and unless we have specific provision that deals with the IRB as a ground for divorce under HMA, 1955, till then we have no other way out to sort matter related to the matrimonial bonds which is beyond any repairs to be dealt herein under Article 142³⁵ only. Therefore, For the exercise of this discretionary power, there must be clear and factual grounds, since those rights are intended to be used in order to legitimize administration of justice. In order to defend against the injustice that is visible in the eyes of the court and to ensure the position of the Supreme Court as the saviour of justice in this modern world, these inherent powers, thus, should be used judiciously to allow the ends of justice to meet until corresponding amendments and specific provision are added in desired piece of legislations in near future.

³³2023 SCC OnLine SC 497

³⁴2024 Latest Caselaw 48 SC

³⁵*Supra* note 9, art, 142.

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