# NOTES AND COMMENTS

## JUDICIAL LEGISLATION UNDER ARTICLE 142 OF THE CONSTITUTION: A PRAGMATIC PROMPT FOR PROPER LEGISLATION BY PARLIAMENT

**Abstract**

This paper is an advance over the present writer's earlier contribution made in "Varying judicial responses to dissolution of marriage by mutual consent under the Hindu Marriage Act, of 1955: A crisis of constitutional culture," published in *JILI*. Herein an attempt is made to explore through the latest decision of the Supreme Court in *Devinder Singh Narula* v. *Meenakshi Nagia* (2012) if one could decipher and locate any exposition, legally and constitutionally addressing to the concerns of the constitution bench of five Judges of the Supreme Court in *Prem Chand Garg* v. *Excise Commissioner, UP* (1963) that lays down that an order which the Supreme Court can make under article 142 of the Constitution 'to do complete justice' cannot be "inconsistent with the substantive provisions of the relevant statutory laws." Following this it is being argued that it is an opportune moment for the Parliament to move in and legislate in the area, which is sporadically and yet consistently being occupied by the apex court in exercise of its special power under article 142 of the Constitution for doing complete justice on pragmatic considerations. The legislative intervention shall strengthen the rule of law by streamlining the access to justice at the grass root level with all the attributes of law in the name of certainty, uniformity, transparency, *et al.*

ARTICLE 142 of the Constitution of India specifically stipulates that the Supreme Court in the exercise of its jurisdiction may "pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe."[1]

What is the nature or quality of the "decree" so passed or "order" so made by the Supreme Court "for doing complete justice" under article 142(1) of the Constitution? It is inherently something unique and distinctive in itself. It is exercised

1 Cl. (1) of art. 142 of the Constitution.

essentially in varied situations and circumstances[2] on the prime considerations of 'justice, equity, and good conscience,' jurisprudentially termed as 'residuary source of law.'[3] In order to bring out its true functional character, one tends to call it 'judicial legislation', because the judicial power is conceived to meet situations that cannot be otherwise adequately met to do 'complete justice' under the existing provisions of law. In that respect this power, thus, becomes similar to the law enacted by the legislature in the exercise of its legislative power.

Notwithstanding the substantive similarity between the two domains of the judiciary and the legislature, the two remain distinct and apart. The power of the Supreme Court, unlike that of the legislature, is highly contextual; the context is 'to do complete justice in any cause or matter pending before it' in the course of administering justice according to the law in force. In other words, this power cannot be used 'to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly'.[4]

However, in its own demarcated domain of doing 'complete justice', the Supreme Court enjoys 'plenary power' – the power which is complete, absolute and unqualified. Being an attribute of the Constitution, the exercise of this power under article 142 cannot be controlled or conditioned by any statutory provision.[5] In fact, the ambit of this discretionary power is as wide as is required 'to meet myriad situations created by human ingenuity' for 'doing complete justice'.[6]

Nevertheless, it is often axiomatically stated that the Supreme Court in exercising its 'plenary power' under article 142 of the Constitution cannot ignore any substantive

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2 See, for instance, *Mahmud Hasan* v. *State of U.P.* (1997) 3 SCC 138. Exceptional circumstances in connection with promotion warranting review of orders of the Supreme Court and setting aside orders of promotion by the state government with directions; *M.S. Ahlawat* v. *State of Haryana* (2000) 1 SCC 278. The Supreme Court correcting its own error after examining the correctness of litigant's contention; *New India Insurance Company* v. *Darshana Devi* (2008) 7 SCC 416.The Supreme Court directing the Insurance Company, though not liable, to satisfy the award and pay the claimants. See also, *British Physical Lab. India Ltd.* v. *State of Karnataka* (1998) 1 SCC 170*; Kewal Chand* v. *S.K. Sen* (2001) 6 SCC 512.

3 See*, Union of India* v. *C. Damani and Co.*, 1980 Supp SCC 707: Supreme Court can as much decide on the basis of 'justice, equity and good conscience'. See also, *Chandra Bansi Singh* v. *State of Bihar* (1984) 4 SCC316 at 323: Supreme Court is not only a court of law but also a court of equity.

4 *State of Punjab* v. *Bakshish Singh* (1998) 8 SCC 222. See also, *State of Punjab* v. *Rajesh Syal* (2002) 8 SCC 158.

5 *Md. Anis* v. *Union of India*, 1994 Supp. (1) SCC 145.

6 See, *Ashok Kumar Gupta* v. *State of U.P.*(1997) SCC 201*; R.C. Patuck* v. *Fatima* (1997) 5 SCC 334; *State of Karnataka* v. *State of A.P.* (2000) 9 SCC 572; *Kalyan Chandra Sarkar* v. *Rajesh Ranjan*, (2005) 3 SCC 284.

statutory provision dealing with the subject,[7] nor such a power should be pressed into service where it would amount to contravention of specific provision of a statute.[8] In other words, the directions given by the Supreme Court should not be inconsistent with, repugnant to, or in violation of, specific provisions of a statute.[9]

Recently, a decision of the Supreme Court in a special leave petition case *Devinder Singh Narula* v. *Meenakshi Nagia*[10] was flashed across the country by the national press in which the apex court by invoking their special powers under article 142 of the Constitution, waived the statutory period of six months' wait and granted a decree of divorce by mutual consent under section 13-B of the Hindu Marriage Act, 1955.[11] The implications of this decision have given rise to at least following two related issues of public interest, bearing legal and constitutional significance:

(a) Whether in exercise of powers under article 142 of the Constitution, the Supreme Court could negate, nullify or ignore the express provision of statutory six months' wait period and thereby contravene and counteract the specific provision of section 13-B(2) of the Hindu Marriage Act, 1955.

(b) Whether the decision of six months' waiver in exercise of powers under article 142 could be taken as 'the law' declared by the Supreme Court under article 141

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

8 See. *M.C. Mehta* v. *Kamal Nath* (2000) 6 SCC 213.

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

10 Civil Appeal No. 5946 of 2012, decided on Aug. 22, 2012. Hereinafter simply, *Devinder Singh Narula*. This appeal arose out of an order passed by the Additional District Judge-01, West Delhi on 13.4.2012 in HMA No. 204/2012, while entertaining a joint petition filed by the parties under s. 13-B of the Hindu Marriage Act, 1955. On such petition being presented, the judge posted the matter for the purpose of second motion after the wait-period of six months was over as envisaged under s. 13-B (2) of the Hindu Marriage Act, 1955.

11 S. 13-B of the Hindu Marriage Act of 1955 (Act 25 of 1955), inserted by s. 8 of the amending Act 68 of 1976, (w.e.f. 27-5-1976), adds a specific provision that deals with divorce by mutual consent. For its analysis, it needs to be reproduced in full:

(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, that 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 thinks 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.

of the Constitution,[12] and, thus, enforceable by all the courts 'within the territory of India.'[13]

The response of the apex court on these identified counts may be deciphered by closely examining the judgment in *Devinder Singh Narula* .

The first issue, whether in the exercise of its power under article 142 the Supreme Court can override the clear and categorical statutory prohibition as provided under section 13-B (2) of the Hindu Marriage Act, 1955, is judicially disputable[14] and, therefore, has become seemingly highly anomalous and ambivalent. On this count one needs to note at least the following varying versions of the different benches of the Supreme Court with different legal and constitutional implications.

In the first instance one may note a three-judge bench of the Supreme Court in *Anjana Kishore* v. *Puneet Kishore*.[15] In this case, while considering the transfer petition the Supreme Court directed the parties to file a joint petition before the family court under section 13-B of the Act for grant of decree of divorce by mutual consent, along with a copy of compromise arrived at between the parties.[16] In this respect, the further add-on stipulation of the Supreme Court was:[17]

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12 Art. 141 of the Constitution provides that "the law declared by the Supreme Court" shall be binding on all within the territory of India.

13 Under the classical doctrine of *stare decisis,* only the *ratio* of the case can be extended to apply to other identical situations, factual and legal, see *Rafiq* v. *State of U.P.*(1980) 4 SCC 262 at 265. However, the ambit of 'the law' under art. 141 of the Constitution seems to be wider: even the questions not specifically arising for decision but discussed and observations made, termed as merely *obite*r, are entitled to due consideration by the succeeding courts, see *Prithi Pal Singh* v. *Union of India* (1982) 3 SCC 140.

14 See generally, Virendra Kumar, "Varying judicial responses to dissolution of marriage by mutual consent under the Hindu Marriage Act, of 1955: A crisis of constitutional culture" 52 *JILI* 267-86 (2010).

15 (2002) 10 SCC 194 per Dr. A.S. Anand, CJI and R.C. Lahoti, and K.G. Balakrishnan, JJ. (Hereinafter simply *Anjana Kishore*)

16 *Anjana Kishore* was a transfer petition before the Supreme Court seeking transfer of divorce petition filed by the respondent husband before the Family Court at Bandra, Mumbai to the Family Court at Saharanpur. After notice was issued in this petition, efforts were made for settlement. The parties reached a compromise in terms of the following: "four demand drafts totalling to Rs. 7,00,000 (Rupees seven lakhs) only (3 demand drafts of Rs. 2,00,000 each and one demand draft of Rs. 1,00,000) drawn in the name of the petitioner payable at Saharanpur; the custody and visiting rights of the parties to the child born out of the marriage; and the parties also mutually agreed to get divorce by mutual consent. In fact, the Supreme Court made the release of demand drafts in favour of wife subject only to her furnishing a copy of the order of the Family Court at Bandra, Mumbai, regarding the grant of divorce. Till then, the four demand drafts would remain in the custody of the Registrar (Judicial) of the Supreme Court. See, *supra note 5* at 195 (para 4).

17 *Supra* note 15, para 3. Emphasis added.

> An application for curtailment of time for grant of divorce shall also be filed along with the joint petition. On such application being moved the Family Court may, *dispensing with the need of waiting for six months, which is required otherwise by sub-section (2) of Section 13-B of the Hindu Marriage Act, 1955*, pass final order on the petition within such time as it may deem fit.

This direction was made by the Supreme Court by invoking its extraordinary power under article 142 of the Constitution. In this, the apex court was satisfied of the need of making such a direction "to do complete justice" in the case by "looking at the facts and circumstances of the case emerging from pleadings of the parties and disclosed during the course of hearing."[18]

In this case, however, one may note that since there is no revealing analysis showing how the fact matrix prompted the bench to invoke its extraordinary powers 'to do complete justice' between the parties, nor an articulate conclusion of the complete breakdown of the marriage necessitating the immediate dissolution of their marriage by overriding the specific statutory stipulation in section 13-B(2), one may at best call it as a 'closed case' having not much of constitutional or persuasive 'precedent' value.

In the category of second version fall such cases of the Supreme Court as *Harpreet Singh Popli* v. *Manmeet Kaur Popli,*[19] and *Priyanka Singh* v. *Jayant Singh.*[20] In *Harpreet Singh Popli*, the Supreme Court concluded by observing:[21]

> Accordingly, H.M.A. Petition NO. 51 of 2009, pending on the file of the District Judge, Tis Hazari Courts, Delhi, is withdrawn to this Court and a decree of divorce by mutual consent is passed in terms of Section 13-B of the Act *by waiving the requirement of six months period specified in sub-section (2) thereof.*

The decree of divorce by mutual consent was passed in terms of the deed of settlement/compromise whereby the husband paid a sum of Rs.13,50,000/- to the wife towards full and final settlement by way of permanent alimony/maintenance,

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18 *Ibid.*

19 Transfer petition (CRL) No. 27 of 2009, per the SC Bench consisting of R.V. Raveendran, and G.S. Singhvi JJ(hereinafter simply cited as *Harpreet Singh Popli).*

20 Transfer petition (C) No. 400 of 2009, per the Supreme Court bench consisting of R.V. Raveendran, and G.S. Singhvi JJ. (hereinafter simply cited as *Priyanka Singh*).

21 *Id.,*para 6.

*etc.* and in return all the proceedings hitherto initiated by the wife against the husband were quashed.[22]

What is worth noticing here is that in this case there is no reference either to the exercise of power by the Supreme Court under article 142 of the Constitution, or to the three-judge bench decision in *Anjana Kishore*.

On similar lines is the decision of the Supreme Court in *Priyanka Singh*. In this case, on May 15, 2009, the parties made a joint application for grant of divorce by mutual consent. Since the averments necessary for making out a case under section 13-B of the Hindu Marriage Act, 1955, were not made in the application, the case was adjourned with a direction to the parties to file an appropriate application. Thereafter, the parties filed two successive applications[23] for dissolution of marriage by stating therein that "due to temperamental incompatibility, the parties have not been able to live together as husband and wife; that they have been living separately since 12.3.2005, and that the marriage is irretrievably broken down."[24]
Accordingly, the Supreme Court accepting the prayer made by the parties held:

> Divorce Petition … pending in the Court of Civil Judge (Senior Division), Gautam Budh Nagar (UP) is transferred to this Court and marriage between the parties is dissolved by granting a decree of divorce by mutual consent in terms of section 13-B.

It needs to be noted again that in this case as well while decreeing divorce by mutual consent, there is no mention either of the issue of waiver under sub-section (2) of section 13-B of the Hindu Marriage Act, 1955, or of reliance on the authority of the three-judge bench decision in *Anjana Kishore*.

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22 The proceedings initiated by the wife during a short span of couple of months from Oct. 30, 2008 to Jan.28, 2009 included : (i) FIR No. 443/2008 (Crime No. 564/2008) dated 30th Oct., 2008. Pending in the Court of Chief Judicial Magistrate, Meerut, U.P.; (ii) Application No. 514/2008 titled *Manmeet Kaur* v. *Harpreet Singh* under s. 125 Cr PC pending in the Family Court, Meerut, U.P.; (iii) Application No. 997/2008 titled *Manmeet Kaur* v. *Harpreet Singh* under the Domestic Violence Act, 2005, pending in the Court of Additional Chief Judicial Magistrate, Meerut, U.P.; (iv) Complaints filed with the Delhi Commission for Women dated 13.1.2009 and 2.2.2009; (v) Complaint dated 30.1.2009 filed with the Chief Minister, Delhi and Department of Law, Justice and Legislative Affairs, Govt. of NCT of Delhi, and (vi) Complaint dated 28.1.2009 made to the senior police officials against the husband and his family members.

23 I.A. No. 3 of 2009 with a prayer that their marriage be dissolved by granting a decree of divorce by mutual consent. The deficiency in this application was removed by another application I.A. No. 4 of 2009 in terms of specific grounds of divorce.

24 *Id.*,para 2.

In the category of third version fall such cases as *Manish Goel* v. *Rohini Goel,*[25] and *Smt. Poonam* v. *Sumit Tanwar.*[26] In these cases, the Supreme Court showed reluctance to invoke its extraordinary power under article 142 to waive the statutory period of six months' wait as prescribed in the provisions of section 13-B(2) of the Hindu Marriage Act, 1955, although it did not wipe out the possibility of using such a power. The basic thrust of their reasoning revolves around the authority of the observations made by the constitution benches of the Supreme Court[27] proclaiming that the courts meant for enforcing law are not expected to issue direction in contravention of law or to direct the statutory authority to act in contravention of law.

The fourth variant version is found in *Neeti Malviya* v. *Rakesh Malviya*,[28] a case in which in a transfer petition of the Supreme Court was required to respond precisely and expressly, whether the matrimonial court has the discretion to grant the divorce decree instantly by waiving the statutory requirement of waiting for a period of six months before making the motion as envisaged under sub-section (2) of section 13-B of the Act of 1955.

In *Neeti Malviya*, on fact matrix, soon after their marriage both the parties fell apart. The husband sought dissolution of the marriage. However, the parties reached the Supreme Court via transfer petition from one state to another (from the Additional Principal Judge, Family Court, Bangalore, Karnataka, to the Family Court Hoshangabad, Madhya Pradesh). In the process, however, they landed at the Delhi High Court Mediation Centre for amicable settlement of their matrimonial disputes. All this ultimately resulted in proceedings before the Supreme Court *Lok Adalat,*

25. 2010 (2) SCR 414: 2010 (2) SC SCALE 332, per Aftab Alam and Dr. B.S. Chauhan JJ. - Decided on Feb. 5, 2010. (Hereinafter *Manish Goel*). In *Manish Goel*, parties got married on July 23, 2008, and separated on Oct. 24, 2008. After claims and counterclaims, allegations and criminal prosecution between them, the husband petitioned for divorce in the competent court at Gurgoan. During the pendency of this case, the parties filed petition for divorce by mutual consent in Nov. 2009 before the Family Court in Delhi. Supreme Court deprecated this approach for approaching different forums for the same relief because the petitioner "is very eager and keen to get the marriage dissolved immediately even by abusing the process of the court." Supreme Court cited *Jai Singh* v. *Union of India*, AIR 1977 SC 898, which held that "a litigant cannot pursue two parallel remedies in respect of the same matter at the same time." This judgment was subsequently approved by the Supreme Court in principle but distinguished on facts in *Avadh Bihari Yadav* v. *State of Bihar*, AIR 1996 SC 122 and *Arunima Baruah* v. *Union of India* (2007) 6SCC 120.

26 Writ Petition (Civil) No. 86 of 2010, per Aftab Alam and B.S. Chauhan JJ-Decided by Supreme Court on Mar 22, 2010. (hereinafter *Smt. Poonam*). For similar result, see also, *Anil Kumar Jain* v. *Maya Jain* (2009) 10 SCC 415.

27 See *infra* notes 39, 40 and the accompanying text.

28 (2010) 6 SCC 413. (Hereinafter *Neeti Malviya*).

where the settlement was struck on two counts: one, the husband shall pay Rs 65 lakhs to the wife within a stipulated period; two, thereafter they shall seek divorce by filing a joint petition for a decree of divorce by mutual consent. Here the question arose whether the court could grant the decree of divorce immediately or instantly by waiving the period of six months' wait as required under sub-section (2) of section 13-B of the Hindu Marriage Act of 1955. The Supreme Court hesitated to answer this straight question in a straight manner. The reason being the impediment placed before it by a three-judge bench decision in *Anjana Kishore*[29] whose correctness came to be somewhat suspected, albeit obliquely, in later decisions of the Supreme Court in *Manish Goel* [30] and *Smt. Poonam* .[31]

In this predicament, the Supreme Court in *Neeti Malviya,* bearing in mind the problem posed by the observations made by the Supreme Court in *Manish Goel* and *Smt. Poonam*, adopted the strategy of making a reference to the three-judge bench of the Supreme Court in following terms: [32]

> [B]oth the said decisions do not altogether rule out the exercise of extraordinary jurisdiction by this Court under Article 142 of the Constitution, yet we feel that in the light of certain observations in the said decisions, particularly in Manish Goel (*supra*), coupled with the fact that the decisions in Anjana Kishore (*supra*) was rendered by a Bench of three learned Judges of this Court, it would be appropriate to refer the matter to a Bench of three Judges in order to have a clear ruling on the issue for future guidance.

Pending this reference, soon thereafter emerged another decision by the Supreme Court in *S.G. Rajgopalan Prabhu* v. *Veena*.[33] In this case, the matter of matrimonial dispute in a transfer petition came to be referred to the Supreme Court Mediation Centre. Through the intervention of the mediator, the parties entered into a compromise, whereby the husband agreed to pay a sum of Rs. 40 lakhs "in full and final settlement of claims of respondent – Mrs. Veena Rao (wife)." A pay order for a sum of Rs. 40 lakhs was given to her in the court, and, thereupon, both the parties prayed that all the cases filed by the wife against the husband "be quashed in view

29 See *supra* note 15.

30 See *supra* note 25 and the accompanying text.

31 See *supra* note 26 and the accompanying text.

32 *Supra* note 28 at 416.

33 (2010) 12 SCC 537, per Dalveer Bhandari and Deepak Verma, JJ (hereinafter *S.G. Rajgopalan Prabhu.*)

of the settlement."[34] Accordingly, the Supreme Court in view of the compromise between the parties deemed it appropriate "to quash" all the cases pending inter se between the parties and passed "a decree of divorce by mutual consent."

The fact matrices in *Neeti Malviya* (the judgment delivered on May 10, 2010) and *S.G. Rajgopalan Prabhu* (the judgment delivered on July 26, 2010) are similar in substance. Both the cases have landed in the Supreme Court via transfer petitions. In both the cases, parties were quite well off. In terms of the 'compromise', in order to get instant divorce by mutual consent, in *Neeti Malviya* the husband was willing to give to the wife Rs. 65 lacs, whereas in *S.G. Rajgopalan Prabhu* the wife agreed to release the husband from matrimony on receipt of Rs. 40 lacs. However, the decisions of the apex court in both the cases are distinctly different.

In *Neeti Malviya*, the bench of the Supreme Court was deeply concerned to straighten up the judicial proposition in view of the conflicting decisions taken by different benches, including the three-judge bench decision in *Anjana Kishore*. In order to have "a clear ruling on the issue for future guidance," the Supreme Court bench referred the matter to a bench of three judges. On the other hand, in *S.G. Rajgopalan Prabhu*, in which decision was rendered only a couple of months later by a bench of equal strength, there was neither a mention of the referral lead given by the bench in *Neeti Malviya* nor was there any analysis showing how divorce by mutual consent could be granted instantly.

The differential stands adopted by different benches of the apex court, thus, *prima facie* at least, create uncertainty, defy uniformity, and pre-empt predictability, and thereby affecting the whole systemic regime of the rule of law. Certainly there is no gainsaying that even when the apex court is settling law in exercise of its discretionary power on equitable grounds[35] under article 136[36] or article 142[37] of the Constitution, "such law, so settled, should be clear and become operational

34 The Supreme Court specifically included the following details of cases in their order: i) Criminal Case No. 54/2008, lodged by the 1st respondent accusing the petitioners – pending investigation at Vastrapur Police Station, Ahmedabad (Gujarat); ii) A petition filed by respondent no. 1 against the petitioners under the provisions of Domestic Violence Act, 2005, being Petition No.887 of 2008 pending before the 2nd Joint Judicial Magistrate Court, Ahmedabad Rural, Mirzapur, Ahmedabad (Gujarat); iii) A Petition for maintenance u/s 125 Cr.P.C., being N. 553 of 2009, pending before the 3rd Judicial Magistrate Court, Gandhinagar (Gujarat).

35 See *supra* note 3 and the accompanying text.

36 Art. 136(1) of the Constitution bestows special power on the Supreme Court by providing explicitly that it may in its discretion grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. The only exemption made in cl. (2) of art. 136 any judgment, decree, *etc.* passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

37 See *supra* note 1.

instead of being kept vague, so that it could become a binding precedent in all similar cases to arise in future."[38] For quality adjudication, therefore, it is imperative to remain wedded to the core values of certainty, uniformity and predictability that constitute the inalienable components of the cogent, credible, 'constitutional culture' in a civil society.

Be that as it may, the three-judge bench decision in *Anjana Kishore* and the cases following it even without its specific citation as an indication of relying on its authority[39] continue to remain somewhat suspect, at least seemingly, as long as one is not able to find some plausible explanation to overcome the clear and categorical observation of the constitution bench of five judges of the Supreme Court in *Prem Chand Garg* v. *Excise Commissioner, UP* which is as follows:[40]

> 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.

This observation from *Prem Chand Garg,* along with the similar approaches adopted in two other decisions of the constitution benches,[41] was indeed relied upon by the Supreme Court in *Manish Goel* for refusing to exercise extraordinary power under article 142 of the Constitution.[42] Expounding their refusal, the bench stated that the Supreme Court:[43]

> [C]annot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. It is not to be exercised in a case where there is no basis in law which can form an edifice or building up a superstructure.

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38 See, *Union of India.* v. *Karnail Singh* (1995) 2 SCC 728, cited in *Manish Goel* (para 5).

39 See, *supra* notes 19 and 20.

40 AIR 1963 SC 996. See, (2009) 10 SCC. See also*, Laxmidas Morarji* v. *Behrose Darab Madan* (2009) 10 SCC 425: "However, it is to be made clear that this power cannot be used to supplant the law applicable to the case. This means that acting under Article 142, the Supreme Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case."

41 *Supreme Court Bar Association* v. *Union of India*, AIR 1998 SC 1895 and *E.S.P. Rajaram* v. *Union of India*, AIR 2001 SC 581.

42 See *supra* notes 25-26 and the accompanying text.

43 *Manish Goel* (para 11).

In this backdrop,[44] one may try and explore the latest decision in *Devinder Singh Narula* [45]to decipher and locate any exposition that would legally and constitutionally address the concerns of the constitutional bench as raised above. In other words, can the extraordinary power be exercised by the Supreme Court under article 142 of the Constitution to waive the waiting period of six months notwithstanding the clear and categorical language of the legislature in section 13-B(2) of the Hindu Marriage Act, 1955, forbidding the second motion to be made before the expiry of at least six months from the date of presentation of the petition for divorce by mutual consent?

In *Devinder Singh Narula*, the Supreme Court addressed this issue consciously and specifically while deciding whether or not it should exercise its extraordinary power under article 142 in the instant case. On this count, by recalling the legislative objective of section 13-B(2) of the Hindu Marriage Act, 1955, the apex court observed that "[i]t is no doubt true that the Legislature has in its wisdom stipulated a cooling period of six months from the date of filing of a petition for mutual divorce till such divorce is actually granted, with the intention that it would save the institution of marriage,"[46] and that "the intention of the Legislature (in this respect) cannot be faulted with."[47] Notwithstanding the loud and clear objective of the legislature in providing for the wait-period, the apex court has stated that "there may be occasions when in order to do complete justice to the parties it becomes necessary for this Court to invoke its powers under Article 142 in an *irreconcilable situation*."[48]

To illustrate 'irreconcilable situation' that would instantly justify the exercise of extraordinary power under article 142 of the Constitution, the Supreme Court has cited its earlier decision[49] in the case of *Kiran* v. *Sharad Dutt*.[50] In this case, after

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44 Similar view has been reiterated in *A.R. Antulay* v. *R.S. Nayak* (1988) 2 SCC 602; *Bonkya @Bharat Shivaqji Mane.* v. *State of Maharashtra* (1995) 6 SCC 447*; Common Cause, A Registered Society* v. *Union of India,* AIR 1999 SC 2979; *M.S. Ahlawat* v. *State of Haryana,* AIR 2000 SC 168; *M.C. Mehta* v. *Kamal Nath,* AIR 2000 SC 1997; *State of Punjab* v. *Rajesh Syal* (2002) 8 SCC 158; *Government of West Bengal* v. *Tarun K. Roy* (2004) 1 SCC 347; *Textile Labour Association* v. *Official Liquidator,* AIR 2004 SC 2336; *State of Karnataka* v. *Ameerbi* (2007) 11 SCC 681; *Union of India* v. *Shardindu,* AIR 2007 SC 2204; and *Bharat Sewa Sansthan* v. *U.P. Electronic Corporation Ltd.*, AIR 2007 SC 2961. See also, *State of Punjab.* v. *Renuka Singla* (1994) 1 SCC 175; *State of U.P.* v. *Harish Chandra,*AIR 1996 SC 2173; *Union of India.* v. *Kirloskar Pneumatic Co. Ltd.,* AIR 1996 SC 3285; *Vice Chancellor, University of Allahabad.* v. *Dr. Anand Prakash Mishra* (1997) 10 SCC 264; and *Karnataka State Road Transport Corporation* v. *Ashrafulla Khan,*AIR 2002 SC 629.

45 See *supra* note 10.

46 *Id.*, para 9.

47 *Ibid.*

48 *Ibid.* Emphasis added.

49 *Ibid.*

50 (2000) 10 SCC 243. (hereinafter *Kiran*.) This case was considered by the Supreme Court in *Anil Kumar Jain* v. *Maya Jain* (2009) 10 SCC 415.

living separately for many years and 11 years after initiating proceedings under section 13 of the Hindu Marriage Act, 1955, the parties filed a joint application before the Supreme Court for leave to amend the divorce petition and to convert the same into a proceeding under section 13-B of the said Act. Treating the petition as one under section 13-B of the Act of 1955, the Supreme Court by virtue of its powers under article 142 of the Constitution granted a decree of divorce by mutual consent at the stage of special leave petition itself.

The fact matrix of *Kiran* clearly reveals that the marriage between the parties had broken-down completely or irretrievably; it was merely subsisting in name and not in substance. For doing 'complete justice' substantively in such cases, it is imperative to eschew the formal requirement that might be otherwise extremely useful to observe and follow both in letter and in spirit for exploring the possibility of resuscitating the marital union. The general principle on this count enunciated by the apex court, therefore, is:[51]

> Though we are not inclined to accept the proposition that in every case of dissolution of marriage under Section 13-B of the Act the Court has to exercise its powers under Article 142 of the Constitution, we are of the opinion that in *appropriate* cases invocation of such power would not be unjustified and may even prove to be necessary.

In the light of this principle-statement, the Supreme Court examined whether the averments made in the appeal before the Supreme Court could prompt it to invoke and exercise its extraordinary powers in favour of the appellant and the respondent.

The emerging scenario resurrected by the Supreme Court for its consideration in *Devinder Singh Narula* is that the appellant initially filed a petition under section 12 of the Hindu Marriage Act, 1955, on June 1, 2011 on the ground that the marriage contracted between him and the respondent on March 26, 2011, was a nullity; that both the parties had been living separately since their marriage and had not cohabitated with each other since the date of filing of the petition on June 1, 2011; and that in future also they could never live together under one roof. Besides, the averments also revealed that the respondent was presently working overseas in Canada. Since there was no possibility of their being together as husband and wife in view of the husband's petition for annulment of marriage under section 12 of the Act, the parties agreed to mediation during the pendency of the said proceedings. In the course of mediation before the mediator of the Mediation Centre of the Tis Hazari Court, the parties, after settling the contentious issues, agreed to dissolve

51 *Supra* note 10, para 10. Emphasis added.

their marriage under section 13-B of the Act for grant of divorce decree by mutual consent by filing appropriate petitions afresh.

The terms of agreement reached by the parties during mediation proceedings were duly recorded by the mediator and conveyed to the court where the petition under section 12 of the Act of 1955 (HMA No. 239 of 2011) was pending. In pursuance of the said agreement, an application was filed by the parties in the aforesaid pending HMA on December 15, 2011, indicating that they had settled the matter through mediation and they would be filing a petition for divorce on or before April 15, 2012. On the basis of the said application, the pending HMA proceedings were disposed of "as withdrawn." [52] Subsequently, on April 13, 2012, the parties filed a joint petition under section 13-B(1) of the Act of 1955, on which order came to be passed by the Additional District Judge, West Delhi, fixing the date for the second motion on October 15, 2012 after the lapse of the statutory minimum period of six months from the date of original joint petition in terms of the provisions of sub-section (2) of section 13-B of the said Act.

In the background of this fact situation, it was evidently clear that the marriage had broken down within a short period of less than three months after its solemnization on March 26, 2011, and that prompted the petitioner to file petition for a decree of nullity under section 12 of the Hindu Marriage Act, 1955. However, through mediation, the said petition was converted into a petition for divorce by mutual consent under section 13-B, requiring the parties to wait at least for a period of six months more under section 13-B (2) of the said Act. Thus, the summed up status of matrimony in the opinion of the Supreme Court is:[53]

> In effect there appears to be no marital ties between the parties at all. It is only the provisions of Section 13-B(2) of the aforesaid Act which is keeping the formal ties of marriage between the parties subsisting in name only. At least the condition indicated in Section 13-B for grant of a decree of dissolution of marriage by mutual consent is present in the instant case. It is only on account of the statutory cooling period of six months that the parties have to wait for a decree of dissolution of marriage to be passed.

At this juncture the crucial question raised by the apex court itself for its consideration is, whether or not the Supreme Court should invoke its extraordinary powers under article 142 of the Constitution for waiving the mandatory period of waiting as envisaged by section 13-B(2) of the Hindu Marriage Act, 1955. In the considered opinion of the apex court, "this is one of those cases where we may

52 *Id.*,para 11.

53 *Id.*, para 12.

invoke and exercise the powers vested in the Supreme Court under Article 142 of the Constitution."[54] The prompting reason articulated by the apex court for such an invocation is:[55]

> The marriage is subsisting by a tenuous thread on account of the statutory cooling off period, out of which four months have already expired. When it has not been possible for the parties to live together and to discharge their marital obligations towards each other for more than one year, we see no reason to continue the agony of the parties for another two months.

Accordingly, the Supreme Court allowed the appeal:[56] (a) by withdrawing the pending proceedings before the Additional District Judge, West Delhi, under section 12 of the Hindu Marriage Act, 1955, on the consent of the parties; (b) by converting those proceedings into one under section 13-B of the aforesaid Act; and (c) by invoking their powers under article 142 of the Constitution granted a decree of mutual divorce to the parties by waiving the remaining statutory period under section 13-B(2) of the said Act and directed that the marriage between them shall stand dissolved by mutual consent.

A perusal of the exercise of extraordinary power by the Supreme Court under article 142 of the Constitution in the instant case, thus, shows that waiving the mandatory wait-period of six months as stipulated in the provisions of section 13-B(2) of Hindu Marriage Act 1955 is done only after it came to the conclusion that once it is established that there is complete breakdown of marriage beyond redemption, it would indeed be futile to maintain the facade of marriage even during the wait-period of six months. In that eventuality, if the power is exercised 'for doing complete justice,' that does not in any way negate the provisions of existing law. It rather 'supplements', in certain situations even 'complements', them, as if by adding a new ground of divorce based on the principle of complete breakdown of marriage through, what we have termed, 'judicial legislation'.[57]

Since the waiving of statutory period is to be considered by the Supreme Court and the Supreme Court alone "in appropriate cases"[58] under article 142 of the

54 *Id.*, para 13.

55 *Ibid.*

56 *Id.*, para 14.

57 Resort to the exercise of extraordinary power under art. 142 of the Constitution has been made for dissolving marriage where the Supreme Court has found that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, see *Satish Sitole* v. *Ganga*, AIR 2008 SCC 3093; *Samar Ghosh* v. *Jaya Ghosh* (2007) 4 SCC 511; *Sanghamitra Ghosh* v. *Kajal Kumar Ghosh* (2007) 2 SCC 220.

58 *Devinder Singh Narula* is the one of those cases that merits the invocation of the powers under art. 142 of the Constitution in order to do complete justice between the parties. See, *supra* note 10, paras10-13.

Constitution, impliedly it means that such a waiver-decision would not come within the ambit of the law declared by the Supreme Court under article 141 of the Constitution.[59] This indeed is the response of the Supreme Court in the instant case to the second issue that have been raised above.

However, the question remains still open wherein the waiving of six-month wait period, as envisaged by section 13-B(2) of the Hindu Marriage Act, 1955, is done by the Supreme Court not specifically by invoking its special power under article 142 of the Constitution but generally in the course of administration of justice, say, while deciding an appeal case as a matter of course. This bears a consequence, which is of immense legal and constitutional significance: such decision(s) of the Supreme Court is likely to be construed as the one rendered under article 141 of the Constitution,[60] and, thereby empowering, nay obliging, all the courts in India to exercise the discretion of waiver on similar grounds while granting divorce decrees on the ground of mutual consent.

All cases relating to the waiving of statutory period with varying results, with or without mentioning the invocation of power under article 142 of the Constitution, create confusion and, thereby, seriously affect the rule of law. In fact, in the instant case, for instance, on behalf of the state it was specifically submitted that in view of the statutory provisions contained in sub-section (2) of section 13-B of the Hindu Marriage Act, 1955, "the prayer being made on behalf of the petitioner and the respondent wife should not be entertained as that would lead to confusion in the minds of the public and would be against the public interest."[61]

All such confusion, and much more, could be easily overcome through the enactment of proper legislation by Parliament on the lines indicated by the Supreme Court through 'judicial legislation'. In fact, legislative intervention is implicit in the very constitutional design of article 142. Its bare reading reveals that the life of 'judicial legislation,' brought in through the exercise of special power under article 142 of the Constitution, is 'transitory' in nature; its singular objective is to fill in the 'gap' in order to do 'complete justice'. In terms of its enactment, after all, 'judicial legislation' stays put 'until provision in that behalf is so made' by the Parliament.[62]

The legislature, may move at least in two ways in the alternative. One way is to make minor adjustment by adding a proviso to sub-section (2) of section 13-B of the Hindu Marriage Act, 1955, to the effect that the mandatory period of six months

59 See, *id.,* para 10. See also *Anil Kumar Jain, supra* note 50: "[A]n order of waiving the statutory requirements can be passed only by this court in exercise of its powers under Article 142 of the Constitution. The said power is not vested with any other court."

60 See *supra* notes 19 and 20, and the accompanying analysis of *Harpreet Singh Popli* and *Priyanka Singh*.

61 *Supra* note 10, para 8.

62 See, *Vineet Narain* v. *Union of India* (1998) 1 SCC 226.

could be waived by the designated court upon application being made to it on the ground that the marriage has broken down irretrievably or the case is one of exceptional hardship to the petitioner or to the respondent, or to the both, as the case may be. Such a modest legislative measure would obviate the need for the parties to come to the Supreme Court only for the purpose of seeking a waiver under section 13-B(2) of the said Act. However, such an added proviso, it needs emphasis, is not likely to affect the power of the Supreme Court in any way under article 142 of the Constitution for doing 'complete justice' on other counts.

The other way is to legislate the notion of 'complete breakdown of marriage' that has hitherto been, invariably always, the underlying basis for waiving the wait-period of six months in exercise of special power under article 142 of the Constitution. This notion became crystallized legislatively under the reformed English law in the form of, what is termed as, 'theory of irretrievable breakdown of marriage' as the basis of granting divorce decree. In the language of "British Law Commission on Reform of the Grounds of Divorce," principally the objective of irretrievable breakdown of marriage is two-fold: "One, to buttress rather than undermine the stability of marriage; and two, when regrettably a marriage has irretrievably broken down, to enable the empty shell to be destroyed with maximum fairness and humility."

If the principle of 'irretrievable breakdown of marriage' is understood to mean that divorce could be granted in case where there is no possibility of retrieving a marriage, then such a principle is not entirely new as it already exists, albeit impliedly, in the present provisions of the Act of 1955. In this respect, one needs only to recapitulate the provision of section 23(2) of the Act, which commends the court "in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about reconciliation between the parties." If the court fails to achieve this objective, then it could consider the dissolution of marriage under section 13 of the Act, which spells out specifically the 'fault' grounds, including the principal ones such as adultery, cruelty, desertion, *etc.*, on the basis of which the petitioner alleges that he or she being innocent and it is only the other spouse who has committed the matrimonial offence.

The basic functional flaw in making 'fault' grounds as the basis for granting divorce decree lies in the assumption that one party (the petitioner) is innocent and the other party (the defendant) is guilty,[63] and if both are guilty then the marriage continues despite its complete breakdown! In reality, in an intimate relationship of marriage, either both are guilty, or both are innocent, the difference being only of

63 Under s. 23(1)(a) of the Hindu Marriage Act, 1955, in any proceeding under the Act, whether defended or not, the court is obliged to ensure that "any of the grounds for granting relief exists and the petitioner (excepting in certain cases) is not in any way taking advantage of his or her own wrong, or disability for the purpose of such relief."

degrees. Attempt was made to salvage the situation, at least partly, through the insertion of a new section 13(1A) by the amending Act of 1964.[64] Under this section, a petition for dissolution of marriage is permitted at the instance of "either party to marriage" if "there has been no resumption of cohabitation" or "restitution of conjugal rights" between the parties for two years (reduced to one year after the 1976 amendment) or upwards after passing of a decree for judicial separation or restitution of conjugal rights in a proceedings to which they were parties.

The implication is that prior to the 1964-amendment, only the decree holder, the so-called the 'innocent' party, had the right to move the court for divorce against the decree debtor, the so-called 'guilty' party. Extending the same right to the spouse hitherto considered 'guilty', amounts to introducing the 'breakdown' principle, but by still remaining within the domain of 'fault theory'. This indeed is the limited application of 'breakdown' principle, inasmuch as it is still obligatory for one of the parties caught in marital conflict first to invoke the notion of 'fault theory' by urging the court to grant him the decree of judicial separation or restitution of conjugal rights.

The principle of "irretrievable breakdown of marriage" operates on non-adversary plane. It instantly avoids the sad spectacle of washing dirty linen in public, and thereby undermining the institution of marriage in general and creating a psychological trauma for the family in particular, especially for the children of the marriage. Having its preoccupation with judging the viability of the marriage itself rather than mere apportioning the fault of the spouses, the concomitant conditions of the breakdown principle are more conducive to reconciliation and family settlement.

For realising the potential value of the principle of "irretrievable breakdown of marriage," The Marriage Laws (Amendment) Bill, 2010 is on the anvil. It seeks to amend the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 by introducing therein, *inter alia*, irretrievable breakdown of marriage as "a ground of divorce." It further seeks to do away with the requirement of six months wait period after the date of presentation of petition under sub section 1 of section 13 B of the Hindu Marriage Act, 1955. This legislative venture is in consonance with the recommendations made earlier by the Law Commission of India, first in its 71st Report (1978) on "Hindu Marriage Act, 1955 – Irretrievable Breakdown of Marriage as a Ground of Divorce," and thereafter in its 217th Report (2009) on "Irretrievable Breakdown of Marriage – Another Ground for Divorce."

Furthermore, on the same lines a three-judge bench of the Supreme Court in *Naveen Kohli* v. *Neelu Kohli*[65] had also recommended to the Union of India to seriously consider the incorporation of breakdown principle as "a ground" for the grant of divorce decree.

64 Inserted by s. 2 of the Amending Act 44 of 1964 (w.e.f. 20-12-1964).

65 AIR 2006 1675.

In sum, the principle of "irretrievable breakdown of marriage" bears a distinctive perspective, which is unique both functionally and in principle. It is qualitatively quite different from the perspective hitherto adopted under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954, which is essentially based upon 'fault principle.' If the 'breakdown principle' is quite distinct from the 'fault principle' both in objective and operation, the critical question that comes to the fore is, how could "irretrievable breakdown of marriage" as "*a* ground of divorce," or "*another* ground for divorce" when introduced by partly amending the two Acts co-exist within the framework of 'fault principle'?

Indeed, it was this realization that seems to have prompted the British Parliament to adopt "irretrievable breakdown of marriage" not as 'a' ground but the 'sole' ground of divorce. Therefore, at this opportune moment in the light of the pragmatic prompt by the Supreme Court for proper legislation by Parliament what is truly needed is to go in for restructuring of the basic premise of the two Acts in which all the existing grounds of divorce based on fault principle shall be replaced by one single principle of "irretrievable breakdown of marriage" as '*the* ground of divorce,' instead of 'a ground' or 'one of the grounds.' However, in this process of re-structuring the existing grounds shall not become totally redundant. Thenceforth they shall continue to serve by reminding, in the language and thought borrowed from the Report of the Moral and Social Welfare Board of the Church of Scotland presented to the General Assembly on May 2, 1969, cited with tacit approval by the three-judge bench of the Supreme Court in *Naveen Kohli* case, "Matrimonial offences are often the outcome rather than the cause of the deteriorating marriage."

There is no gainsaying that proper legislation by Parliament, in place of transitory or sporadic 'judicial legislation', is an integral part of administration of justice. It helps citizens in providing access to justice at the grass root level. In search of justice, one is not compelled to rush to the apex court every time and follow the circuitous course to get divorce decree by converting the initial petition into that of by mutual consent. In short, proper legislation strengthens the rule of law with all its essential attributes of certainty, uniformity, transparency, impartiality, *et al.*

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