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# NOTES AND COMMENTS

## VARYING JUDICIAL RESPONSES TO DISSOLUTION OF MARRIAGE BY MUTUAL CONSENT UNDER THE HINDU MARRIAGE ACT, 1955: A CRISIS OF CONSTITUTIONAL CULTURE*

TWO RELATED questions instantly come to the fore. In a given conflict situation, should two courts while dealing with the same issue have different responses leading to two opposite decisions? In two different cases, bearing similar fact situation, should two courts dealing with the same issue differ in their decision-making? If the answer is in the affirmative, wouldn't the varying judicial responses militate against the rule of law?

### I Power of waiving statutory period

For examining the varying judicial responses in respect of dissolution of marriage by mutual consent under the Hindu Marriage Act, 1955 (Act of 1955), one may recapitulate the related provisions in the first instance. These are the provisions contained in section 13B of the Act[1] as distinguished from section 13 laying down the conventional grounds on which any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce.[2]

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* Based on lectures delivered at Chandigarh Judicial Academy to Additional District and Sessions Judges drawn from the States of Punjab and Haryana and Union Territory of Chandigarh during the year 2010. The views expressed in this article are solely of the author and not necessarily of the Chandigarh Judicial Academy where he holds the position of the Director (Academics).

1. Inserted by s. 6 of the amending Act 68 of 1976, with effect from May 27, 1976.

2. Sub-s. (1) of s. 13 of the Act lays down the grounds that are based on fault and non-fault basis such as adultery, cruelty, desertion, conversion, unsound mind, leprosy, venereal disease, renunciation, *etc*. Sub-s. (1-A) of s. 13 introduced by the amending Act of 1964 incorporates provision of irretrievable breakdown of marriage, but only indirectly. Under the provisions of this sub-section, either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground - (*i*) that there has been no resumption of cohabitation as between the

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**Purport of section 13B of the Hindu Marriage Act, 1955**

Section 13B of the Act of 1955 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.

A bare perusal of the provisions of section 13B of the Act of 1955 shows that granting divorce decree by mutual consent is conditioned by a number of stipulations. Apart from the conditions spelled out in section 23, which apply generally in any proceedings under the Act of 1955,[3]

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parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or (*ii*) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

Under sub-s. (2) of s. 13 of the Act, wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground of,—

(*i*) pre-1955 polygamous marriage;

*(ii)*unnatural offences, rape, sodomy or bestiality; or

*(iii)* non-resumption of cohabitation after the provision of maintenance under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974), repudiation of marriage by the wife under certain conditions.

3. See *infra* notes 60 and 61 and the accompany text.

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there is an express prohibition contained in sub-section (2) of section 13B of the Act, which bars the parties to marriage even to make the motion "earlier than six months after the presentation of the petition" under sub-section (1) of the Act. In this backdrop, one question has recently come up in a transfer petition before a bench of two judges in *Neeti Malviya* v. *Rakesh Malviya*:[4] 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 13B of the Act of 1955.

**Fact-matrix of *Neeti Malviya***

In *Neeti Malviya*, 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, they landed at the Delhi High Court Mediation Centre for amicable settlement of the matrimonial disputes. All this ultimately resulted in proceedings before the Supreme *Lok Adalat,* where the settlement was struck on two counts: one, the husband shall pay Rs 65 lacs 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 13B of the Act of 1955. The Supreme Court hesitated to answer this plain question in a straight manner. The reason being the impediment placed before it by a three-judge bench decision in *Anjana Kishore* v. *Puneet Kishore*,[5] whose correctness came to be somewhat suspected in later decisions of the Supreme Court, *albeit* obliquely.[6]

**Holding of three-judge bench of the Supreme Court in *Anjana Kishore***

In *Anjana Kishore*, the Supreme Court, while considering the transfer petition directed the parties to file a joint petition before the family court under section 13B of the Act for grant of decree of divorce by mutual

4. (2010) 6 SCC 413, *per* D.K. Jain and C.K. Prasad JJ. Hereinafter cited as *Neeti Malviya*.

5. (2002) 10 SCC 194, *per* Dr. A.S. Anand, CJI and R.C. Lahoti and K.G. Balakrishnan JJ. (Hereinafter *Anjana Kishore*).

6. See *infra* notes 16 and 17 and the accompanying text.

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consent, along with a copy of compromise arrived at between the parties.[7] Further stipulation of the Supreme Court was:[8]

> 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 13B 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, "as looking at the facts and circumstances of the case emerging from pleadings of the parties and disclosed during the course of hearing," the court was satisfied of the need of making such a direction "to do complete justice" in the case.[9]

**Holdings of the Supreme Court in *Harpreet Singh Popli* & *Priyanka Singh* seemingly following *Anjana Kishore***

*Anjana Kishore* seems to have been followed in *Harpreet Singh Popli* v. *Manmeet Kaaur Popli*,[10] by the division bench of the Supreme Court when it observed:[11]

> Accordingly, H.M.A. Petition NO. 51 of 2009, pending on the file of the District Judge, Tis Hazari Courts, Delhi is withdrawn

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7. *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, U.P. 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 totaling to Rs. 7,00,000 (Rupees seven lacs) 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.

8. *Id.*, para 3.

9. *Ibid.*

10. 2009 (14) SCALE 113, *per* R.V. Raveendran and G.S. Singhvi JJ.

11. *Id.*, para 6.

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> to this Court and a decree of divorce by mutual consent is passed in terms of Section 13B of the Act by waiving the requirement of six months period specified in sub-section (2) thereof.

In this case, there was no reference either to article 142 of the Constitution or to the three-judge bench decision in *Anjana Kishore*. 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, *etc.* and in return all the proceedings hitherto initiated by the wife against the husband were quashed.[12]

*Priyanka Singh* v. *Jayant Singh*[13] was another transfer petition before the division bench of the Supreme Court which seems to have been decided on the analogy of *Anjana Kishore*. In this case, on May 15, 2009, the parties made a joint application for grant of divorce by mutual consent. Since the averment necessary for making out a case under section 13B of the Act of 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[14] for dissolution of marriage by stating therein: "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."[15]

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12. The proceedings initiated by the wife during a couple of months from October 30, 2008 to January 28, 2009 included: (i) FIR No. 443/2008 (Crime No. 564/2008) dated 30th October, 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 husband and his family members.

13. 2009 (14) SCALE 115, *per* R.V. Raveendran and G.S. Singhvi JJ.

14. 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.

15. *Id.* (para 2).

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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.

In this case, while decreeing divorce by mutual consent, there was no mention either of the issue of waiver under sub-section (2) of section 13B of the Act of 1955, or of the three-judge bench decision in *Anjana Kishore.*

**Holdings of the Supreme Court in *Manish Goel* & *Smt. Poonam* seemingly departing from *Anjana Kishore***

In *Manish Goel* v. *Rohini Goel,*[16] and *Smt. Poonam* v. *Sumit Tanwar*,[17] the division benches of the Supreme Court showed reluctance to invoke their extraordinary power under article 142 to waive the statutory period of six months' wait under section 13-B(2) of the Act of 1955, although they did not rule out the possibility of using such a power.

**Predicament of the Supreme Court in *Neeti Malviya***

In *Neeti Malviya*, the Supreme Court, in view of the predicament posed by the observations made by the division benches in *Manish Goel* and *Smt. Poonam*, adopted the strategy of making a reference to a three-

16. AIR 2010 SC 1099, *per* Aftab Alam and Dr. B.S. Chauhan JJ decided on February 5, 2010. (Hereinafter *Manish Goel*). In *Manish Goel*, parties got married on July 23, 2008 and separated on October 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 November, 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) 6 SCC 120.

17. AIR 2010 SC 1384, per Aftab Alam and Dr. B.S. Chauhan JJ. (decided by Supreme Court on March 22, 2010). (Hereinafter *Smt. Poonam*). For similar result, see also *Anil Kumar Jain* v. *Maya Jain* (2009) 10 SCC 415.

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judge bench of the court:[18]

> [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, coupled with the fact that the decisions in Anjana Kishore 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.

The avowed purpose of making the reference was to seek clarification afresh whether the exercise of extraordinary power by the Supreme Court was warranted in view of the clear and categorical language of the legislature forbidding the 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.

## II Critique-cum-lessons to be learnt

Till the position is clarified by the larger bench of the Supreme Court, the moot point is: What stance the subordinate judiciary should adopt? For this purpose, in the meanwhile, one may derive the following inferences from the holdings of the Supreme Court itself in various other cases that may serve as critique as well lessons to be learnt for the time being.

**First critique-cum-lesson**

The power of waiver is limited only to the Supreme Court. In *Anil Kumar Jain* v. *Maya Jain*,[19] the Supreme Court held:

> [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.

The implication of this statement is that in *Anjana Kishore*, the Supreme Court had not laid down any principle of waiver or reduction as such to be followed by the High Courts and subordinate courts in deciding petitions under section 13B of the Act. The waiver was permissible only

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18. Cited in *Manish Goel*.
19. (2009) 10 SCC 415, cited in *Manish Goel* at 337, para 8.

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"under the directions" of the Supreme Court.

However, there are some inherent functional draw backs in this approach. One of these is that limiting this power only under the direction of the Supreme Court seems to imply that the apex court is the only court for deciding petitions under section 13B of the Act of 1955 whenever the issue of waiver arises![20]

**Second critique-cum-lesson**

The power of waiver to be exercised by the Supreme Court under article 142 of the Constitution is itself limited in as much as the same cannot be exercised in contravention of or inconsistently with the law laid down by the legislature, as expounded in numerous decisions of the constitution benches of the apex court itself. In *Prem Chand Garg* v. *Excise Commissioner, UP*,[21] for instance, a constitution bench of five judges of the Supreme Court, *inter alia*, stated:[22]

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20. For another implication, whether such a decision of the apex court would come within the ambit of art. 141 of the Constitution, see *infra*.

21. AIR 1963 SC 996.

22. In *Manish Goel*, a bench of two judges of the Supreme Court, while refusing to exercise power under art.142 of the Constitution, observed that courts are meant to enforce law and, therefore, they are not expected to issue a direction in contravention of law or to direct the statutory authority to act in contravention of law. For this proposition, the bench cited the above observation from *Prem Chand Garg*, along with two other decisions of the constitution benches, namely *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, holding that under art. 142 of the Constitution, the Supreme Court "cannot 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." See *Manish Goel* (para 11). Similar view has been reiterated in *A.R. Antulay* v. *R.S. Nayak* (1988) 2 SCC 602; *Bonkya alias 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*, 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.

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> 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 makes the three-judge bench decision in *Anjana Kishore* highly suspect because it overrides the substantive provision of section 13B of the Act of 1955.

**Third critique-cum-lesson**

The case of waiver under section 13B(2) of the Act of 1955 needs to be distinguished from cases in which the Supreme Court dissolved irretrievably broken down marriages in the exercise of powers under article 142 of the Constitution 'even if the facts of the case do not provide a ground in law on which divorce could be granted.'[23]

However, the case for waiving of statutory period of six months does not fall in that category of overwhelming number of cases in view of the clear and categorical language of the provision contained in sub-section (2) of section 13B of the Act of 1955.

**Fourth critique-cum-lesson**

The exercise of power under article 142 is an exceptional power to be exercised "where there has been any obstruction to the stream of justice" or "injustice to the parties," which is required to be undone instantly.

This of course is not the stance in case of waiver under section 13B(2) of the Act of 1955. In *Manish Goel*, the Supreme Court stated

23. See *Romesh Chander* v. *Savitri*, AIR 1995 SC 851; *Kanchan Devi* v. *Promod Kumar Mittal*, AIR 1996 SC 3192; *Anita Sabharwal* v. *Anil Sabharwal* (1997) 11 SC 490; *Ashoka Hurra* v. *Rupa Bipin Zaveri*, AIR 1997 SC 1266; *Kiran* v. *Sharad Dutt* (2000) 10 SCC 243; *Swati Verma* v. *Rajan Verma*, AIR 2004 SC 161; *Harpit Singh Anand* v. *State of West Bengal* (2004) 10 SCC 505; *Jimmy Sudarshan Purohit* v. *Sudarshan Sharad Purohit* (2005) 13 SCC 410; *Durga P. Tripathy* v. *Arundhati Tripathy*, AIR 2005 SC 3297; *Naveen Kohli* v. *Neelu Kohli*, AIR 2006 SC 1675; *Sanghamitra Ghosh* v. *Kajal Kumar Ghosh* (2007) 2 SCC 220; *Rishikesh Sharma* v. *Saroj Sharma* (2007) 2 SCC 263; *Samar Ghosh* v. *Jaya Ghosh* (2007) 4 SCC 511 and *Satish Sitole* v. *Ganga*, AIR 2008 SC 3093. *Cf. Chetan Dass* v. *Kamla Devi*, AIR 2001 SC 1709 and *Vishnu Dutt Sharma* v. *Manju Sharma* (2009) 6 SCC 379, in which the Supreme Court held that in case the legal ground for grant of divorce is missing, exercising power under art. 142 tantamounts to legislation which is not permissible in law.

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categorically that the statutory period of six months for filing the second petition under section 13B(2) of the Act has been prescribed for providing opportunity to parties to reconcile and withdraw petition for dissolution of marriage, and that there exists no question of "general public importance." In the absence any such contingency, there is no room for the court to exercise its extraordinary jurisdiction under article 142 of the Constitution.[24]

**Fifth critique-cum-lesson**

The exercise of powers under article 142 is controlled by restricting access to the Supreme Court through article 136 of the Constitution. Article 136 empowers the Supreme Court to grant special leave to appeal in its discretion 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. It confers "an extra-ordinary jurisdiction" upon the Supreme Court, which cuts short the regular course of action. However, there is no vested right of a party to approach the Supreme Court for the exercise of such a vast discretion. This can be resorted to only when the court feels "so warranted to eradicate injustice."[25] Thus, by reason of being special power, the same is to be exercised "with great care and due consideration" after "taking into consideration all binding precedents otherwise such an order would create problems in the future."[26]

**Sixth critique-cum-lesson**

Invocation of the power under article 142 of the Constitution by approaching the apex court under article 32 of the Constitution is totally misplaced**.** This is what has been recently held by the Supreme Court in *Smt. Poonam* v. *Sumit Tanwar*.[27] In this case, the parties got married on November 11, 2008 according to Hindu rites in Delhi. However, soon after their marriage on December 2, 2008, they separated. The application for dissolution of marriage was filed on September 9, 2009 before the family court. The said application was disposed of *vide* order dated November 25, 2009, asking the parties to wait for six months. From the facts thus abstracted, it is evident that the parties did not even fulfill the

24. *Manish Goel* (para 18).
25. *Manish Goel* (para 4).
26. *Ibid.*
27. (2010) 4 SCC 460 (Hereinafter *Smt. Poonam).*

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condition laid down in section 13B(1) of the Act that requires a statement to the effect that they have been living separate and apart for a period of at least one year or more. How did the family court entertain their petition for consideration is another aspect to ponder over!

The family court, while accepting their application, observed:

> 7. In view of Section 13B(2) of the Hindu Marriage Act, the marriage between the parties cannot be dissolved straightaway in the present case. As per the statutory requirement, parties are advised to make further efforts for reconciliation in order to save their marriage. In case they are unable to do so, the parties may come up with the petition of second motion under Section 13B(2) of the Hindu Marriage Act as per law. The present petition under Section 13B(1) of the Hindu Marriage Act is hereby allowed and stands disposed of….

The Supreme Court deprecated the irresponsible conduct of the parties as well as their counsel by observing:[28]

> Thus, it is not a case that there had been any delay in disposal of the case by the Family Court. The petition has been filed without any sense of responsibility either by the parties or their counsel. Such a practice is tantamount to not only disservice to the institution but it also adversely affects the administration of justice. Conduct of all of them has been reprehensible.

## III An appraisal of section 13B of the Hindu Marriage Act, 1955

A close reading of the provisions of section 13B of the Act of 1955, shows that divorce decree by mutual consent is not really a divorce decree by mere consent of the parties. In effect, it is with the consent of the court. It becomes operational "with effect from the date of the decree" granted by the court and not from the date of filing of the petition "by both the parties to a marriage together."

To this extent, the expression 'divorce by mutual consent' seems to be a misnomer. Literally speaking, it seems to imply that as there is 'marriage by mutual consent' by taking seven steps around the sacred fire, say, in clockwise direction, so is the 'divorce by mutual consent' as if

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28. *Id.*, para 20.

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taking seven steps in anti-clockwise direction!

The purpose of the provisions of section 13B of the Act is not to make divorce easy. Compared to the provisions of section 13 of the Act,[29] the conditions for the grant of decree under section 13B are rather more stringent. There is a general stipulation under section 14 of the Act, which prohibits the presentation of any petition for divorce within one year of marriage. Sub-section (1) of section 14 in most emphatic language states:

> Notwithstanding anything contained in this Act, it shall not be competent for any Court to entertain any petition for dissolution of marriage by a decree of divorce, unless at the date of the presentation of the petition one year has elapsed since the date of the marriage.

The rigor of the stipulation of one year waiting could, however, be relaxed if in view of the court upon application made by the parties to it and the case is found to be "one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent."[30] This stipulation of at least one year waiting, which is of general application in all divorce proceedings under the Act, including the ones under sections 13 and 13B of the Act, is so strong that if it has been pronounced by reason of any misrepresentation or concealment of the nature of the case, the court may make its pronouncement "subject to the condition that the decree shall not have the effect until after the expiry of one year from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed."[31]

Apart from this, while considering relaxation of the period of one-year wait, "the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said one year."[32]

In terms of time duration of waiting, the condition in the case of divorce by mutual consent is still more stringent. Under sub-section (1)

29. See *supra* note 2.
30. See 'Proviso' appended to sub-s. (1) of s. 14 of the Act of 1955.
31. *Ibid.*
32. Sub-s. (2) of s.14 of the Act of 1955.

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of section 13B of the Act, there is an additional period of at least one-year separation that must have elapsed before filing a joint petition for dissolution of marriage. This must be further supported by a clear averment that during this period of separation, "they have not been able to live together and that they have mutually agreed that the marriage should be dissolved."[33]

Sub-section (2) of section 13B of the Act further adds a period of six months waiting after the date of the presentation of the period referred to in sub-section (1), which is the subject of judicial controversy on the point whether this statutory period could be waived by the apex court in exercise of its extraordinary jurisdiction under article 142 of Constitution.

## IV Two emerging conclusions

In the light of the preceding discussion, at least two conclusions instantly come to the fore. The first emerging conclusion, which becomes evident in the light of the analysis of post-three-judge bench decision of the Supreme Court in *Anjana Kishore*, is that painstaking attempts have been made to circumscribe its impact in various judicial decisions of the apex court itself.[34] The singular reason for making such attempts, including the reference to three-judge bench in *Neeti Malviya*, is that *Anjana Kishore* has negated the express legislative intent reflected in the provisions of section 13-B(2) of the Act of 1955. Can the court do so unless it is the case of involving the constitutionality of a statutory provision? Without the case of such an eventuality, negation of legislative intent through interpretation is not in consonance with the established cannons of judicial decision-making.

The second cognate conclusion that should engage attention relates to the functional perspective of judicial decision-making. In this perspective, by acting on the first principles of statutory construction, it is suggested that before negating the express statutory provision, as has been done by the three-judge bench decision in *Anjana Kishore*, one should explore the nature of the provision contained in section 13B(2) in the first instance. That is, whether the said provision is mandatory or merely directory. And such a question is required to be answered by the court itself by

33. Sub-s. (1) of s. 13B of the Act of 1955.

34. See various rulings of the Supreme Court benches in numerous cases, "Critique-cum-lessons," in section II, *supra*.

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exploring "the real intention of the legislature" in the light of "the whole scope of the statute."[35]

In this respect, in view of the clear and categorical statutory provisions manifesting the legislative intent, it would be erroneous to contend that the singular objective of the provision of divorce by mutual consent is to make divorce easy. It is farther from truth. In fact, if the relative evaluation is made in terms of making divorce easy or difficult by mutual consent, the scale is bound to tilt in favour of the latter.

Contextually, it would be worthwhile to look into the "Statement of Objects and Reasons" of the Amendment Act 68 of 1976 that inserted the new provision of section 13B in the Act of 1955 on the analogy of the corresponding provision contained in section 28 of the Special Marriage Act, 1954. One of the objectives of this amendment is stated to be "to liberalise the provisions relating to divorce." But the critical question is, in what respect(s) divorce by mutual consent has been liberalized?

It needs noticing that under section 28 of the Special Marriage Act, 1954, the period of waiting as envisaged under section 13B(2) of the Act of 1955, was of one year. In this way, it was felt that "when the parties have chosen to move the Court for divorce by mutual consent, it is not necessary to make them wait for a further period of one year to obtain relief."[36] Thus, liberalization of divorce by mutual consent has been effected only to this extent, and not in terms of waiving the stipulated period of six months as prescribed under sub-section (2) of section 13B of the Act of 1955.[37]

## V The juxtaposition of section 13B under the Hindu Marriage Act, 1955

One may also examine the juxtaposition of section 13B of the Act of 1955 in the light of "the whole scope of the statute," as exhorted by the Supreme Court in *H.N. Rishbud.*[38] If one has to cull the singular objective of the Act of 1955 in the form of a single abstracted statement, 'it is the preservation of the institution of marriage as far as possible'. Perhaps in

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35. See *H.N. Rishbud* v. *State of Delhi*, AIR 1955 SC 196 at 200. (Hereinafter *H.N. Rishbud).*

36. See the "Statement of Objects and Reasons" of the Amendment Act 68 of 1976.

37. Similar reduction of period from one year to six months was effected under s. 28 of the Special Marriage Act, 1954.

38. *Supra* note 35.

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the most explicit and articulate language, this intent-objective is spelled out in sub-section (2) of section 23, which controls the grant of relief in any proceedings under the Act. It reads:

> Before proceeding to grant any relief under this Act, it shall be the duty of 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 a reconciliation between the parties.

In the exploration of this legislative intent, a bold initiative taken by Punjab and Haryana High Court came up before the two-judge bench of the Supreme Court in *Jagraj Singh* v. *Birpal Kaur*.[39] The fact matrix of the case reveals that the parties were married in the year 1993. The following year, a son was born to them, who did not survive. In the meanwhile, the husband left for Brunei, Darussalam, and the wife joined him there. However, not finding any gainful employment even in the capacity of a pharmacist (she being holder of M.B.B.S. degree from Russia), she returned to India and started living with her parents. Relations between the two became strained in due course of time, and in the year 2002 she petitioned for divorce on grounds of desertion and cruelty under the relevant provisions of the Act of 1955. The district judge, finding that the husband had neither treated the wife with cruelty nor deserted her, dismissed her petition. On appeal by the wife, the husband appeared before the High Court not in person but through the special power of attorney (SPA).

Being acutely aware of its bounden duty under section 23(2) of the Act of 1955, the High Court directed the husband to appear before the court in person. On the stipulated date, the wife was present, but the husband was conspicuous by his absence. The SPA assured the court that "the husband would positively remain present in the court on the next date of hearing."[40] However, when the husband did not show up twice at the subsequently adjourned hearings, the peeved judges of the High Court passed non-bailable warrants "to be executed through the Ministry of External Affairs, Government of India" on the address given by the husband's SPA in a foreign country.[41]

This unprecedented order of the High Court was challenged before the Supreme Court by the husband through his SPA, contending that

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39. AIR 2007 SC 2083, *per* C.K. Thakker and Lokeshwar Singh Panta JJ.
40. *Id.* at 2085, para 5.
41. *Ibid.*

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"the personal appearance of the party to the proceeding is not mandatory,"[42] and that the court had no jurisdiction to issue non-bailable warrant under the Act of 1955.[43] This led the apex court to examine *for the first time* the ambit of the court's duty under section 23(2) of the Act of 1955.

Emphasizing the need for maintaining the institution of marriage, C.K. Thakker J (for himself and Lokeshwar Singh Panta J) discerned[44] that "conjugal rights are not merely creature of statute but inherent in the very institution of marriage;" the matrimonial disputes should not be allowed to be driven to a "bitter legal finish;" "every possible effort must be made so as to restore the conjugal home and bring back harmony between the husband and wife;" and the court must endeavour by directly involving the parties in such a manner so that "possible irritations and misapprehensions should not be allowed to vitiate the [conjugal] atmosphere." Hence, the approach of a court of law in matrimonial matters should be "much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire."[45] It is with this objective that the court must make attempt to bring about reconciliation "irrespective of the stage" of the case under section 23(2).[46] The court "should not give up the effort of reconciliation merely on the ground that there is no chance for reconciliation,"[47] or one party or the other says that there is no possibility of living together.

The apex court did recognize the fact that living together was highly "personal to the parties." Nevertheless, in its attempt to rehabilitate the couple, the court was obliged to determine the reasonability of their not reconciling, and this could not be done without having first hand interaction with the couple concerned.[48] This indeed was the basis for issuing non-bailable warrant to the recalcitrant husband for ensuring his presence in the instant case.

However, the Supreme Court added, and in the author's view rightly so, a new dimension to the reconciliation approach when it granted *interim* stay against the non-bailable warrant issued by the High Court till

42. *Id.*, para 8.
43. *Ibid.*
44. *Id.* at 2086, para 14.
45. *Id.*, para 15.
46. *Id.* at 2087, para 17.
47. *Id.*, para 19.
48. *Id.*, para 18.

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the next date of hearing.[49] This was done for overcoming "the grievance and apprehension" of the husband that he might be arrested the moment he landed in India. When the husband's counsel still insisted on his original plea that no such order could be passed by the High Court in matrimonial proceedings, the Supreme Court sternly stated that if in spite of protection granted by it, "the husband is bent upon to disobey and flout the order passed by the Court, which is in consonance with Section 23(2), he cannot claim as of right the equitable relief from this Court."[50] Accordingly, the appeal was dismissed "with costs."[51]

Thus, it is merely a misgiving that the courts are not concerned and obligated to save the sanctity of the institution of marriage. Most recently, a division bench of the Supreme Court in *Sanjeeta Das* v. *Tapan Kumar Mohanty*[52] strongly disapproved the granting of divorce decree by a division bench of the Calcutta High Court merely on the ground that the husband was willing to shell out a sum of ten lacs rupees "as life term maintenance of the appellant (wife) and for the expenses of marriage of their daughter Kumari Ayushi Mohanty (Richi), in consideration of the dissolution of his marriage with the appellant by a decree of divorce and compounding of a criminal case against him by the appellant."[53] Cryptic response of the apex court in this fact situation was: "The law does not permit the purchase of a decree of divorce for consideration, with or without the consent of the other side."[54] "[T]he consent of the parties is of no relevance in the matter."[55] "No court can assume jurisdiction to dissolve a Hindu marriage … simply on the basis of the consent of the parties *de hors* the grounds enumerated under section 13 of the Act, unless of course the consenting parties proceed under section 13B of the Act."[56] Accordingly, the Supreme Court found the order of the High Court "completely unsustainable,"[57] inasmuch as the apex court judges were "unable to put any meaning to the order of the High Court."[58]

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49. *Id.* at 2088-89, para 26.
50. *Id.* at 2089, para 27.
51. *Id.*, para 28.
52. (2010) 10 SCC 222, *per* Aftab Alam and R.M. Lodha JJ.
53. *Id.*, para 4.
54. *Id.*, para 5.
55. *Id.*, para 7.
56. *Ibid.*
57. *Id.*, para 8.
58. *Id.*, para 5. In the result, the appeals have been allowed "with costs, quantified at Rs. 15,000/- (rupees fifteen thousand only)," *id.*, para 9.

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The proviso carved out by the Supreme Court in *Sanjeeta Das*, namely, "unless of course the consenting parties proceed under section 13B of the Act,"[59] requires clarification. Here the element of 'consent' within the ambit of the expression, 'divorce by mutual consent' as a resolution of ancillary matters does not impinge upon the substantive provision whether divorce decree by mutual consent is to be granted or not in the court's discretion. In fact, section 13B of the Act of 1955 opens with an overriding provision, "Subject to the provisions of this Act." This simply means that all the arresting provisions scattered in various sections of the Act, including the provisions of section 23, come into play. In sub-section (1) of section 23 of the Act, one of the most explicit pre-condition is that the court, in any proceeding under the Act, shall consider the granting of relief if it is "satisfied" irrespective of the fact "whether defended or not" that "any of the grounds for granting relief exists and the petitioner … is not in anyway taking advantage of his or her own wrong or disability for the purpose of such relief."[60] Turning specifically to the case in which divorce is sought on the ground of mutual consent, the court is required to ensure that "such consent has not been obtained by force, fraud or undue influence."[61]

Thus, in *Sanjeeta Das*, even if the proceedings would have been initiated under section 13B, instead of section 13 of the Act of 1956, the inducement of the wife to agree to divorce by tempting her to receive in return a sum of ten lacs, would not have made the divorce decree valid in the eyes of law.

## VI Crisis of 'constitutional culture' requires resolution

Since the three-judge decision of the Supreme Court in *Anjana Kishore*, granting the decree of divorce by mutual consent by waiving the six-month statutory period of waiting,[62] the solemnity and the binding character of the institution of marriage has become somewhat suspect. On all accounts, since this decision militates against the clear legislative intent of section 13B of the Act of 1955, its propounding principle needs

59. See *supra* note 52.
60. Sub-s. (1)(a) of s. 23 of the Act of 1955.
61. See clause (bb) of sub-s. (1) of s. 23 of the Act of 1955, which was inserted by s. 16 of the amending Act 68 of 1976, with effect from May 27, 1976.
62. See "Purport of Section 13-B of the Hindu Marriage Act, 1955," section I, *supra*.

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reconsideration. Mere circumscribing its impact, as the author has shown in the critique,[63] would not suffice. It has already given rise to, unwittingly perhaps, a new, modish, unseemly trend of 'shopping for divorce' by offering huge amount of cash money as a return consideration for a divorce decree by the so-called, 'mutual consent'. This slant gets encouragement and renewed fillip when such a course of dissolving marriage is judiciously sanctified on the specious plea of granting divorce decree by mutual consent. To wit, one may consider a very recent order of the apex court in *S.G. Rajgopalan Prabhu* v. *Veena*.[64]

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 lacs "in full and final settlement of claims of respondent – Mrs. Veena Rao (wife)." A pay order for a sum of Rs. 40 lacs 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 of the settlement."[65] 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."

A plain reading of the provisions of section 13B of the Act of 1955 reveals that granting a divorce decree instantly is simply impermissible. But, this is how the apex court has done in certain cases including particularly the three-judge bench in decision in *Anjana Kishore*. This, in turn, has created, what one may call in the micro-universe of section 13-B, 'a crisis of constitutional culture.'

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 both in shape and substance. Both the cases had landed

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63. See "A few critique-cum-lessons to be learnt," section III, *supra.*

64. Transfer Petition (Crl.) No. 637 of 2009, decided on July 26, 2010, *per* Dalveer Bhandari and Deepak Verma JJ. (Hereinafter referred to as *S.G. Rajgopalan Prabhu.*)

65. 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 PC, being No. 553 of 2009, pending before the 3rd judicial magistrate court, Gandhinagar (Gujarat).

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in the Supreme Court *via* transfer petitions. In both the cases, parties were fabulously rich in money. In terms of the 'compromise', in order to get instant divorce by mutual consent, 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 qualitatively different on the touchstone of the Constitution.

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," especially for the subordinate courts who are obliged to apply the principles as enunciated by the apex court under article 141 of the Constitution, 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 the different benches of the apex court, thus, create uncertainty, defy uniformity, and pre-empt predictability, and thereby impair the whole realm 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 under article 136 or article 142 of the Constitution, "such law, so settled, should be clear and become operational instead of being kept vague, so that it could become a binding precedent in all similar cases to arise in future."[66] For quality adjudication, therefore, it is imperative to remain wedded to the core values of certainly, uniformity and predictability that constitute the inalienable components of 'constitutional culture' in a civil society.

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

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