

INSTANT DIVORCE UNDER HINDU LAW: A CRITICAL APPRAISAL OF EMERGING TRENDS IN JUDICIAL APPROACH

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Marriage is the foundation of the family and in turn of modern civilized society. This fundamental social institution has great role in determining the character and structure of a family. Stability of the institution of marriage is primarily essential for a healthy society and its development. Undoubtedly, the destruction of even a single marriage unit adversely affects the social fabric of the society. In fact, such destruction is not only a source of extreme anguish for the individual concerned but also the root cause of the social disorder.

Hindus always treated marriage as mystic union of soul and body never to be put to an end. Marriage among Hindus is pious holy tie, a pious tie tied by the Almighty itself. The sacrament aspect of Hindu marriage is still evident in the ceremonial aspect of the marriage as ceremony is still essential feature of Hindu marriage. It is commonly said that the marriages are made in heaven. Only solemnised on earth. Only death could put it at end. Therefore, institution of marriage is believed to ordained and enacted by God. The ancient Hindu scriptures treated marriage as one of the Samskars. A glance at history shows that marriage during the age of Vedic period, Upanishad and Sutras period, later Smriti and Epics period, Digests and Commentaries period was governed by Hindu religion in totality. It is only during British period that law started intervening in the institution of marriage. The element of dissoluble marriage though exists earlier, but taken full-fledged shape during this time only. But no one can deny the fact that divorce has great socio cultural implication. After independence, the Hindu Marriage Act (in shot Act) was passed in 1955 and divorce was given statutory recognition.

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Present Study:

The present study is aimed to examine the philosophy as well as the implementation of the provision of the “Divorce by Mutual Consent” enshrined in Section 13-B of the Act vis-a-vis the approach of the judiciary in India, particularly in the background of the sanctity of the institution of marriage under Hindu law. This paper also critically evaluate the desirability of Apex Court’s zeal to introduce the constitutional provisions into family law by invoking its extraordinary jurisdiction under Article 142 of the Constitution of India to grant instant divorce to the contesting parties before it. Does instant divorce contribute towards building healthy society or it ends in creating sick society? Should divorce be a rule or an exception? These are some burning issues, which are critically analyzed here.

Provisions of Section 13-B of the Hindu Marriage Act:

It would be advantageous to reproduce the provision of Section 13-B of the Act here, which are as follow:

“Section 13-B Divorce by Mutual Consent:

1. Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.
2. On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-Section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied after hearing the parties and after making such inquiry as it think fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.”

On the analysis of above quoted Section, it becomes clear that both the sub-Section of the Section 13-B operate at different point of time. Sub-Section (1) operates at the time

of presenting the petition. According to the requirements of Sub-Section (1), both the parties to the marriage have to present a joint petition to the District Court on the following ground that:

- (i) they have been living separately for a period of one year or more before the presentation of the petition;
- (ii) they have not been able to live together; and
- (iii) they have mutually agreed that the marriage should be dissolved

At this stage, the District Court is not supposed to do anything more than receiving and registering the petition. For a minimum period of six months, the petition remains in abeyance, dormant or torpidity. Then comes into action the provisions of Sub-Section (2) of Section 13-B of the Act. Sub-Section (2) lays down the procedure for deciding the petition. Therefore, after six months but not later than 18 months, after the presentation of the petition, if the petition is not withdrawn in the meantime, the court took cognizance of the petition only on the motion made by both the parties and thereafter the court embarks on an enquiry to be satisfied on the following particulars:

- (i) that the marriage was solemnized between the parties;
- (ii) that the parties were living separately for more than one year before the presentation of the petition;
- (iii) that they have not been able to live together;
- (iv) that they have mutually agreed that the marriage should be dissolved;
- (v) that the consent of either party is not obtained by force, fraud under influence and there is no collusion among the parties as per conditions laid down under Section 23 of the Act.¹

¹ See, Daljit Singh & Manjit Singh, "Divorce by Mutual Consent under the Hindu Marriage Act, 1995: A Plea to Fetter the Assumed Unfettered Powers by the High Courts," Civil & Military Law Journal, Vol. 29, No. 2/112.

Instant Divorce: An Unconventional Approach of High Courts in India:

Unfortunately, some of the High Court in India have devised a new technique of granting divorce under Section 13-B of the Act on the basis of 'Compromise Deeds' or 'Mutual Agreement' without complying with the provision of Section 13-B of the Act.²

As we have noticed above, to pass a decree of Divorce under Section 13-B of the Act, it is the 'mutual consent' of both spouses, which gives jurisdiction to the District Court to pass such decree. 'Mutual compromise' or 'mutual agreement' alone, without complying with other requirements of the Section 13-B of the Act, is not legally sufficient to pass such decree. A Division Bench of the Kerala High Court in Janardhanan vs. Syamala Kumarry³ has rightly held that:

“Section 13-B in the Act is not to be understood as caste blanche granted by parliament to the spouses to dissolve the marriage by mutual agreement. The said provision contain certain other postulates also despite the dominance of mutual agreement factor therein... Mutual agreement by itself is not accepted as a ground for granting decree for divorce”

The Calcutta High Court in A.M. Ghosh Vs. Manakshi Ghosh⁴, speaking through a Division Bench consisting of A.M. Bhattacharjee and Ajit Kumar Nayak, JJ., while observing that solely on the basis of compromise, the court cannot grant decree of divorce by mutual consent under Section 13-B of the Act and mutual consent simpliciter could not be the basis of such decree ruled:

² Jagjit Singh vs Gulwant Kaur, 1978 HLR 696 also reported insdvertently at 1979 HLR 26; Prem Lata vs. Yash Pal, 1985 (I) HLR 148; Major Ranbir Singh vs. Mrs. Nargis Sangha, Cr. M. No. 5309-M of 1980 decided on 3rd August 1982; Rita Sobha vs. Dharampal, 1986 Marr. LJ 179; Jarnail Kaur vs. Bant Ram 1987 (I) HLR 75; Joginder Kaur vs. Mohan singh, 1979 HLR 309; Jagmohan vs. Smt. Sudesh, 1979 HLR 303; Dharamvir vs. Dr. Mrs. Promita, F.A.O. No. 76 of 1978 decided on 19-10-1978; Dr. Surinderpal Kaur vs Mohinder Partap, 1982 Marr.L.J. 187; Lalit Bhatia vs. Kiran Bala, 1985 (2) HLR 372; madan Lal vs. Nirmal Kauta, II (1989) DMC 379; Wing commandar Yitender Chauhan vs. Usha Kiran, 1985 (2) HLR 590; Kuljit Kaur vs. Harjit Singh, II (1989) DMC 451; Gurdev Kaur vs. Malkiat Singh, 1980 HLR 331.

³ II (1990) DMC 128 at p.132.

⁴ I (1990) DMC 146; AIR 1989 SC 215.

“As we have already indicated, even a decree of divorce under the newly added Section 13-B, labeled as “Divorce by mutual consent,” cannot be granted by the court on mutual consent alone, without being satisfied that the parties are living, and could not but live separately for one year or more and things have come to such a pass that they cannot cohabit together”.

High Court is Appellate Court:

But the most important question is that which court has the jurisdiction to pass decree of divorce by mutual consent under Section 13-B of the Act, the District Court, being the court of original civil jurisdiction or the High Court, which is a appellate court in matrimonial cases as per the scheme of the Hindu Marriage Act.

In a quest to grant instant divorce to the contesting parties before it, the High Courts in India started passing decree of divorce under Section 13-B of the Act, even when the cases come before it in appeal. The appeal may have been filed by the petitioner/respondent against the decree of Restitution of Conjugal Rights, Judicial Separation, Nullity or Divorce passed by the trial court i.e District Court under the Act. And, if during the appeal hearings or proceedings, both the spouses enter into an agreement or compromise to get dissolved their marriage, could they be allowed to file an application⁵ in the High Court itself to convert their main original petition into petition for divorce by mutual consent? Should High Court entertain such application at the appellate stage? Could the decree of divorce by mutual consent be passed by the High Court without observing the procedural requirements of Section 13-B (2) of the Act.?

Incidentally, many High Courts started entertaining such application and granted a divorce by mutual consent under Section 13-B of the Act without observing the procedure laid down in under Section 13-B of the Act. And to do so in many cases, the High Courts specifically ‘waived or condoned’ the condition laid down in Section 13-B

⁵ Under Section 151 or Order 6 Rule 17 of the Code of Civil Procedure, 1908.

(2) of the Act.⁶ But interestingly, in all these cases the question of law as to whether, on the basis of compromise, the High Court in appeal can pass the decree of divorce under Section 13-B of the Act without complying with the provision of Section 13-B was not raised and discussed. However, this question was raised for the first time before Justice S. S. Kang of the Punjab & Haryana High Court in Krishna Kehtarpal vs. Satish Lal.⁷ During the hearing in appeal, some cases⁸ were referred wherein the High Court had passed consent decree of divorce in appeals. Admitting so, the learned judge still ruled that the decision of High Courts which ‘do not fulfill the requirements prescribed by Section 13-B and Section 23(1)(C) of the Act, then they do not laid down correct law and need reconsiderations.’ Hence, his lordship preferred to refer the matter to the larger Bench to decide this issue. However, the Division Bench quoting early judgments of its own High Court upheld the jurisdiction of the matrimonial court to pass decree of divorce by mutual consent under Section 13-B of the Act on the basis of compromise entered into between the parties even ‘without strictly following the procedure prescribed by Section 13-B(2)’. Indeed, an unfortunate approach.

But when a Division Bench of the M.P. High Court consisting of B.C. Verma and D.M. Dharmadhikari, JJ. was confronted with the same situation in Sakattar Singh vs. Raj @ Raj Rani”,⁹ it categorically ruled that:

“We are, therefore, of the opinion that the husband and wife, seeking to dissolve their marriage by mutual consent have to initiate proceedings in *the District Court by presenting a petition to it.*”¹⁰

Taking a very realistic approach, the learned Bench further clarified and reinforced their decision by observing that:

⁶ S.K. Subbaraj vs. Indirani, 2001 (I) HLR 481 (Mad); Sandhya Gupta (Smt.) vs. Saibal Prasad Gupta, 2001 (I) HLR 331 (Orissa); Jyotiben vs. Jigneshbhai Jaisukhbhai Oza, 2001 (I) HLR 264 (Guj); Merukaben Pandya vs. Rakeshkumar Jayantilal Trivedi, 2001 (I) HLR 242 (Guj);

⁷ 1987 (I) HLR 36.

⁸ Devinder Singh Talwar vs. Smt. Laveleen Kaur, 1982 M.L.J. 94 (P&H); Jagjit Singh vs. Gunwant Kaur 1978 HLR 696; Ram Asra vs. Piara Ram, 1979 HLR 27.

⁹ (1991) II DMC 199.

¹⁰ Emphasis added.

“Permitting such a petition under Section 13-B of the Act to be filed in the *appellate Court in an appeal* against the decree passed by the District Court in a petition presented under the other provisions of the Act, would apparently mean *depriving the party aggrieved by the decree, of the right of appeal* which the Act otherwise provides”¹¹

It was on 23.4.1990 that the Division Bench has given the above said ruling in Sakattar Singh¹². After about twelve years, recently, the Karnataka High Court has thoroughly examined the above said question in N. Vijaya Raghavan vs. K. Sharada.¹³ The learned Bench consisting of H.N. Tilhari and K.R. Prasad Rao, JJ., forcefully ruled that a petition under Section 13-B of the Act has to be filed before the District Court as envisaged in Section 13-B of the Act itself and cannot be entertained by way of ‘Miscellaneous Application’ in the High Court in appeal, as ‘*High Court is not a District Court*’¹⁴ and ‘*it has no where been provided that the expression “District Court” will include in itself the High Court*’¹⁵. The following wording of their Lordship is very apt to the basic point of not allowing the High Court to entertain divorce petition in appeals and to make realize the honorable judges to remain within the limits of law:

*“But, we live in democracy under a constitution and democracy will flourish if we follow the rule of law. Justice is to be imparted according to law and not according to whims and fancies of any of us. The Section when directs that remedy under Section 13-B can be availed of by moving the District Court, this petition under Section 13-B should have been filed and could be filed only before the original Court i.e., the Court competent to entertain the petition for divorce, meaning thereby the District court or the Family Court.”*¹⁶

Emphatically ruling that petition under Section 13-B has to be filed before District Court only, their Lordship observed:

“The language of the Section per se is very clear and it is a well settled principle of law that when the language of an enactment is very clear and is free from doubt and free from ambiguity, then the

¹¹ Para 2 of the judgment. Emphasis added.

¹² Supra 9.

¹³ AIR 2001 Kant. 300. Decided on 14.3.2001.

¹⁴ Para 6 of the judgment.

¹⁵ Ibid.

¹⁶ Para 7 of the judgment. Emphasis added.

expression used in the Act should be given effect to. Section 13-B provides that such an application or joint petition for dissolution of marriage can be filled before the District Court. The expression is “a petition for dissolution of marriage by a decree of divorce may be presented to the District Court by both the parties”.¹⁷

Interestingly, the same learned Division Bench of the Karnataka High Court was confronted with new devised method to get instant divorce in Mounesh vs. Anasuyamma@Parvathi¹⁸. In this case, at the appellate stage i.e. before the High Court, a compromise was entered into by the parties and taking assistance of Order 23 Rule 3 of the Code of Civil Procedure, 1908, it was pleaded to grant divorce by the High Court as per the compromise. Rejecting the contention and after examining the provision of Order 23 Rule 3 of the Code of Civil Procedure, 1908, and Section 23 of the Indian Contract Act, the learned Bench rightly ruled:

“This alleged compromise, appears from its, perusal to be an attempt of appellant to play fraud with respondent and with the law. It, appears to run against the scheme of the act to provision of law including Section 13 and 13-B of Act *and such compromise, appears to nullify or render nugatory the provisions of Hindu Marriage Act.*”¹⁹

Rightly upholding that ‘*no decree can be passed otherwise than under Section 13-B for divorce on the basis of compromise*’ the learned Division Bench ruled

“That when the law providing of this specific relief, specifies the Court and mode and provides, specific circumstances and conditions in which the specific relief, may be granted and specific jurisdiction may be exercised for then, on the satisfaction thereof only the decree can be passed or relief can be granted.”²⁰

Tracing the object of such provisions, the learned Division Bench further observed:

“Thus when the law has, provided specific modes for exercise of jurisdiction for grant of divorce when the law gives a long rope for survival of marital ties the intendment behind the law is, as far as

¹⁷ Para 5 of the judgment.

¹⁸ 2002 (1) HLR 58.

¹⁹ Ibid para 10. Emphasis added.

²⁰ Ibid para 9

possible reconciliation may be arrived at and the marriage ties may not be allowed to be broken.”²¹

Realising that a Miscellaneous Application to convert the original petition into petition for divorce by mutual consent under section 13-B of the Act on the basis of compromise is out side the jurisdiction of the High Court, Justice Swatanter Kumar of the Punjab & Haryana High Court in Kuldeep Kumar Sharma vs. Usha²² has taken a very healthy approach ‘*by dismissing the application as well as main appeal with liberty to the parties to file a petition under section 13-B of the Hindu Marriage Act before the Court of competent jurisdiction.*’

Form the above discussion, it is evident that some of the High Courts have started realizing the adverse implication of instant divorce and thereby have started emphasizing the need for observing the statuory provisions of Section 13-B of the Hindu Marriage Act.²³

Inconceivable approach of the Apex Court under Section 13-B of the Act vis a vis Article 142 of the Constitution of India:

As per scheme of the Hindu Marriage Act, the Supreme Court of India is the second appellate Court. Unfortunately, in the past one decade, the approach of the Apex Court vis a vis Section 13-B of the Act is not very consistent. It may be noticed that

²¹ Ibid.

²² I (2000) DMC 534

²³ Whether irretrievable breakdown of marriage is ground of divorce under Hindu Marriage Act, is another significant question which attract different approaches by the High Courts. However, recently some High Courts have clearly ruled that this is not a ground of divorce. See recent judgment of Calcutta High Court is Swapan Kumar Ganguly vs. S. Miritikana Ganguly, AIR 2002 Cal. 6, wherein Justice A.K. Banerjee has clearly ruled that “Divorce under Hindu Marriage Act can only be given on any of the ground under Section 13. Allowing divorce on any other ground not mentioned in Section 13 would be an Act without any sanction of law. Such power is only with Apex Court under Article 142. We are afraid we cannot go beyond the law. So long the ground of irretrievable break down of marriage is not made a ground under Section 13 such ground by itself cannot be a ground for divorce.” Justice Samaresh Banerjee, the other learned judge on the Bench in this case preferred to emphasize in this regard by saying that, “no where in the Hindu Marriage Act the legislature in its wisdom has provided that a decree for divorce can be granted if the Court finds that there has been irretrievable breaking down of the marriage between the parties.” The Delhi High Court has also taken the same approach in Sudhir Singhal vs. Neeta Singhal, AIR 2001 Delhi 116. See also Anil Kumar vs. Sunita, I (1998) DNC 345 (Gurj); Gauri Shanker vs. Smt Basane, AIR 1998 Gauhati 48; Smt. Nitu vs. Krishan Lal, AIR 1990 Del. 1.

sometimes the Apex Court was over enthusiastic to broke the marriage tie by invoking its jurisdiction under Article 142 Constitution of India and even by ignoring the statutory provision of Section 13-B of the Act. Now, the significant question which arises for critical examination is that, should the Apex Court invoke the jurisdiction of Article 142 of the Constitution of India to allow divorce under Section 13-B of the Act in appeal or SLP proceedings, against the decree of the trial or High Court passed under other than Section 13-B of the Act?. Is it desirable or at all necessary to do so? Are the provisions of Section 13-B not sufficient or complete in itself to deal with the cases of divorce by mutual consent?

Even at the cost of repetition the views of Justice H. N. Tilhari of the Karnataka High Court²⁴ are reproduced hereunder to remind our self the constraints of law and to bring the point at home:

“But, we live in democracy under a constitution and democracy will flourish if we follow the rule of law. Justice is to be imparted according to law and not according to whims and fancies of any of us.”

When language of Section 13-B of the Act is very clear and free from any doubt and ambiguity that petition for divorce by mutual consent is to be presented in the District Court, what is the necessity to be in so hurry to grant instant divorce under Section 13-B by invoking the provision of Article 142 Constitution of India. It is possible that there may be prolonged litigation among the spouses, but then can't they wait for six to eight months more to be disembarked from the ship of their marriage as per the provision of Section 13-B of the Act, if they have genuinely and legitimately consented to dissolve their marriage.

The new trend of granting divorce by allowing parties to make application to treat their case under Section 13-B of the Act before the Apex Court started with the judgment

²⁴ N. Vijaya Raghavan vs. K. Sharada, AIR 2001 Kant. 300.

of Anjali Hazari vs. Ravindra Kishen Hazari²⁵. But, it is important to note that the Apex Court has not referred to the provision of the Constitution of India in this case

It is in Romesh Chandra vs. Savitri²⁶ that the Supreme Court invoked its inherent jurisdiction under Article 142 of the Constitution of India to dissolve the marriage. It is pertinent to note that in this judgement, the Supreme Court has not even taken the assistance of the provisions of Section 13-B of the Act. In Sneha Prabha vs. Ravinder Kumari,²⁷ and Kiran vs. Sharad Dutt²⁸ the Apex Court again dissolved the marriage exercising its power under Article 142 Constitution of India.

The Supreme Court, in Kanchan Devi vs. Promod Kumar Mittal,²⁹ granted divorce in exercise of its power under Article 142 of the Constitution of India by a decree of divorce during the hearing in Criminal Appeal proceedings before it under Section 125 of the Code of Criminal Procedure, 1973.

In Anita Sabharwal vs. Anil Sabharwal³⁰, Shashi Garg vs. Arun Garg³¹ and Sandhya M. Khandelwal vs. Manoj M. Khandewal,³² the Supreme Court of India has granted divorce by mutual consent under Section 13-B of the Act even during the hearing of the Transfer Petitions under Section 25 of the Code of Civil Procedure, 1908.

Anita Sabharwal vs. Anil Sabharwal³³ is a classic case to be taken notice of. The fact of this case reveals that a divorce petition was filed at Delhi by the husband. The wife, by a petition before the Supreme Court, sought transfer of the case to Mumbai. Although no petition under Section 13-B of the Act was filed in the first matrimonial Court, the Supreme Court taking the original divorce petition on its own file granted divorce by mutual consent under Section 13-B of Act by exercising power under Article

²⁵ (1991) 4 SCC 138; see also Chandrakala Menon (Mrs.) vs: Vipin Menon (Cap.), (1993) 2 SCC 6.

²⁶ AIR 1995 SC 851; (1995) 2 SCC 7.

²⁷ AIR 1995 SC 2170

²⁸ (2000) 10 SCC 243

²⁹ 1997 (1) HLR 446; (1996) 8 SCC 90.

³⁰ (1997) 11 SCC 490

³¹ (1997) 7 SCC 565

³² (1998) 8 SCC 369

³³ Supra 30.

142 of the Constitution of India. Its true that the parties during the hearing of transfer petition under Section 25 of Code of Civil Procedure, 1908 filed compromise deed (under which Rs 7 Lakhs stood paid to the wife) but what was the hurry to dissolve marriage instantly? What facts compelled the Apex Court to withdraw the divorce petition to itself, that too during the transfer proceedings to grant divorce, is not understandable.

Another important judgment of Apex Court which provided new horizons to the concept of divorce in India is in Ashok Hurra vs. Rupa Bipin Zaveri.³⁴ The Division Bench consisting of M.M. Punchhi and K.S. Paripoornam, JJ., concluded that the marriage is dead, both emotionally and practically, thereafter, though it fully realized on the facts of the case that the ingredients of Section 13-B of the Act are not fully met, yet it preferred to grant divorce by mutual consent, and for that it had to exercise its power under Article 142 of the Constitution of India. All this was done by the learned Bench 'in order to meet the end of justice in all the circumstances of the case subject to certain safeguards.' The safeguard ensured by the Bench are to be noticed. A sum of Rs. 10 Lakhs alongwith cost of litigation to the tune of Rs. 50,000 *was ordered to be paid to the wife as condition precedent for the decree of divorce passed by the Supreme Court to take effect.* The Supreme Court further declare and hold that all pending proceedings under Section 497 and 498 read with Section 347 of the Indian Penal Code as well as under Section 494 read with Section 17 of Hindu Marriage Act between the parties *'shall stand terminated but only on payment or deposit of the amount ordered by us in this judgment.'*

The extraordinary quest on the part of the Supreme Court to grant instant divorce by exercising its power under Article 142 of the Constitution of India has bounced back in this case itself. It is aftermath of the decision that it has to face new situation. Now, it is Rupa Ashok Hurra vs. Ashok Hurra³⁵, in which the wife has again approached the Supreme Court and filed a Writ Petition under Article 32 of the Constitution of India

³⁴ 1997 (1) HLR 621; AIR 1997 SC 1266; (1997) 4 SCC 226.

³⁵ AIR 1999 SC 2870

challenging the validity of the earlier judgment of the Supreme Court in Ashok Hurra.³⁶

The petitioner has contented in this Writ Petition that the Supreme Court

‘(H)as exceeded the jurisdiction vested in it under Article 142 of the Constitution and the said judgment, being without jurisdiction, is nullity and the validity of the same can be assailed in a petition under Article 32 of the Constitution.’

The learned Bench³⁷ of the Supreme Court has preferred to refer the matter to the Constitutional Bench for consideration.³⁸ Now, it will be the turn of the Constitutional Bench again to consider the referred questions. Had the Apex Court not exercised its jurisdiction under Article 142 of the Constitution of India to grant instant divorce under Section 13-B of the Act, all these extra consuming situations may not have arisen. Only one party could not have taken so much valuable time of the Highest Court of the land. Therefore, it is undesirable on the part of the Supreme Court of India to grant divorce by exercising its extraordinary jurisdiction under Article 142 Constitution of India.

Sometimes, even the Supreme Court seems to have realized the factual position as is evident from two of its judgments. The first decision is given by a Division Bench consisting of S.B. Majmudar and S.P. Kurdukar, JJ., in Smt. Seema Srinidhi vs. Praveen Kumar,³⁹ wherein during the proceedings of transfer petition in the Supreme Court, the parties filed a copy of the memorandum of settlement alongwith a copy of the petition for dissolution of the marriage under section 13-B (1) and (2) of the Hindu Marriage Act, 1955. In spite of the fact that the parties had agreed to get divorce by mutual consent on the basis of compromise, the Supreme Court had not allowed the said divorce under Section 13-B of the Act. Rather, it allowed the transfer petition with *‘liberty to file petition for divorce by mutual consent under section 113-B of the Hindu Marriage Act before the transferee Court at Delhi wherein appropriate order will then be passed by the District Court at Delhi’*. Indeed, this is the right approach of the Supreme Court.

³⁶ Supra 34.

³⁷ S.C. Agrawal, S. Saghir Ahmed and M. Srinivasan, JJ.

³⁸ The Supreme Court has to examine another controversial question as to whether after revision petition, can there be Writ Petition under Article 32 of the Constitution of India?

³⁹ AIR 1999 SC 1560.

Recently again the Supreme Court took the same approach in Anjana Kishore vs. Puneet Kishore.⁴⁰ Here, during the hearing of a transfer petition before the Supreme Court, the parties reached a compromise and agreed to get divorce by mutual consent. The learned Bench consisting of Dr. A.S. Anand, CJI., R.C. Lahoti and K.G. Balakrishnan, JJ., instead of granting divorce under Section 13-B of the Act invoked its jurisdiction under Article 142 of the Constitution of India, to *direct the parties to file joint petition before the family court for final orders as per the provisions of Section 13-B of the Act.*

It is pertinent to note here that the above approach of the Supreme Court is a departure from its earlier approach in Anita Sabharwal⁴¹, Shashi Garg⁴² and Sandhya M. Khandelwal.⁴³ It is heartening to note that the approach of the Supreme Court taken in Smt. Seema Srinidhi⁴⁴ and Anjana Kishore⁴⁵ is the true construction of the provision of Section 13-B of the Hindu Marriage Act. It is in consonance with the spirit and objective of the provisions of divorce by mutual consent.

Moreover, while discussing the nature and scope of its power under Article 142 of Constitution of India, the Supreme Court has rightly held in Supreme Court Bar Assn. vs Union of India⁴⁶ that *'the provision of Article 142 cannot be used to 'supplant' the substantive law., by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which can be achieved directly. The very nature of the power must lead the Court to set limits for itself within which to exercise those power and ordinarily it cannot disregard a statutory provision governing a subject..'* The Supreme Court again rightly ruled in M.S. Ahlawat vs. State of Haryana⁴⁷, *'that under Article 142 of the Constitution the Supreme Court cannot altogether ignore the*

⁴⁰ 2002 (1) HLR 73

⁴¹ (1997) 11 SCC 490

⁴² (1997) 7 SCC 565

⁴³ (1998) 8 SCC 369

⁴⁴ AIR 1999 SC 1560.

⁴⁵ 2002 (1) HLR 73

⁴⁶ (1998) 4 SCC 409

⁴⁷ AIR 2000 SC 168; 2000 CR LJ 388; (2000) 1 SCC 278.

substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute.'

The Hindu Marriage Act, 1955 is complete in itself and has its own mechanism to pass the decree of Restitution of Conjugal Rights, Judicial Separation, Nullity, Divorce or Divorce by mutual consent. As per Section 19 of the Act, 'every petition under this Act shall be presented to the District Court.' Besides this, Section 13-B which provides the substantive relief of divorce by mutual consent itself provides that '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.' Therefore, as per scheme of the Hindu Marriage Act, 1955 a petition for divorce by mutual consent shall be presented in District Court only. The High Courts as well as the Supreme Court of India, being the appellate courts, should not entertain application etc. to grant instant divorce by mutual consent under Section 13-B of the Act in appeal before it. It is not at all desirable for the Supreme Court of India, which is a lawmaker Court, to invoke its jurisdiction under Article 142 of the Constitution of India to grant instant divorce in appeal under Section 13-B of the Act.

Undoubtedly, the approach of judiciary should be to keep intact the bonds of pious tie of marriage. All efforts should be made to save the marriage from being broken. Divorce should be an exception not the rule. To fulfill the object of the institution of marriage, instead of allowing instant divorce by assuming or presuming jurisdiction, which otherwise also the law, particularly Section 13-B of the Act, does not confer on the High Court or the Supreme Court in appeal, being the appellate courts, a High Court or the Supreme Court should not entertain an application for converting a petition into petition of divorce by mutual consent. It is certainly a praiseworthy approach of some of the High Courts and the Supreme Court, in some cases, to order the parties to file petition under Section 13-B of the Act, before the trial court i.e District Court, being the court of original civil jurisdiction. In fact, this the true construction of the said provisions and is in consonance with the spirit of the notion of the institution of the Hindu marriage.

