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Role of judiciary on Article 142 of the constitution- A; Pragmatic appraisal

Hari Shankar Gautam

Department of Law, K.N.I.P.S.S, Sultanpur.

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ABSTRACT

This paper is concerned with the provision of Article 142 for the Constitution. Here attempt has been made to explore the extensive knowledge through the latest decision of the deliberately Supreme Court in the case of Devendra Singh Nagola vs Minakshi Nagia (2012) SC. The Constitution of this article made in "varying judicial responses to dissolution of marriage by mutual consent under the Hindu Marriage Act under article 142 S.C. can make order to do complete justice.

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Introduction

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 the 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 manners 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 of 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 essentially in varied situations and circumstances² on the prime consideration 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 situation 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 provision dealing with a subject and thereby achieve something indirectly which cannot be achieved directly'.⁴

However, in its own demarcated domain '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 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 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 *Divider 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 constitutional, the Supreme Court could negate, nullify or ignore the express provision of statutory six month; wait period

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

⁶ *Ashok Kumar Gupta v. State of U.P.* (1997) SCC 201.

⁷ *Supreme Court Bar Association v. Union of India* (1988) 4 SCC 409.

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

⁹ *A.R. Antulay v. R.S. Nayak* (1998) 2 SCC 602

¹⁰ Civil Appeal No. 5946 of 2012 decided on Aug. 22, 2012.

¹¹ S. 13-B of the Hindu Marriage Act of 1955 (Act 25 of 1955).

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

² *Mahmud Hasan v. State of UP* (1997) 3 SCC 138.

³ *Union of India v. Damani and Co.*, 1980 Supp SCC 707.

⁴ *State of Punjab v. Bakeshing* (1998) 8 SCC 222.

and thereby contravene and counteract the specified vision 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 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 disputable¹⁴ 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 compromise arrived at between the parties.¹⁶ In this respect, the further add on stipulation of the Supreme Court was:¹⁷

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 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 13b[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, 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 of *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 applications²³ 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 (U.P.) 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*.

In the category of third version fall such cases as *Manish Goel V. Robini 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 1995, 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 observation made by the constitution benches of the Supreme

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 *Prithvi Pal Singh v. Union of India* (1982) 3 SCC 140.

¹⁴ *Virendra Kumar*, "Varying judicial responses to dissolution of marriage by mutual consent under the Hindu Marriage Act, of 1955.

¹⁵ *Anjana Kishore v. Puneet Kishore*.

¹⁶ *Supra* note.

¹⁷ *Supra* note.

¹⁸ *Ibid*.

¹⁹ *R.V. Raveendran and G.S. Singh vi J.*

²⁰ *Transfer Petition (C) No. 400 of 2009.*

²¹ *Ibid*. para 6.

²² *Manmeet Kaur v. Harpreet Singh S 125 Cr.P.C. (pending in the Family Court).*

²³ *I.A. No. 3 of 2009.*

²⁴ *Id*. para 2.

²⁵ *Jai Singh v. Union of India. AIR 1977 SC 898.*

²⁶ *Anil Kumar Jain v. Maya Jain (2009) 10 SCC 415.*

Court²⁷ proclaiming that the court 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. Raksh 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 Hosangabad, Madhya Pradesh). In the process, however, they landed at the Delhi High Court mediation Centre or amicable settlement of their matrimonial disputes. All this ultimately resulted in proceedings before the Supreme Court *Lok Adalat*, 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 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 this 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 payed that all the case filed by the wife against the husband "be quashed in view 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* (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 case, 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. Rajgopalam Prabhu* the wife agreed to release the husband from matrimony on receipt 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 as 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 stand adopted by different benches 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 grounds³⁵ under article 136³⁶ or article 142³⁷ of the constitution," such law, so settled, should be clear and become operational instead of being dept 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 case following it even without its specific citation as a indication of relying on it authority³⁹ 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

²⁷ See infra notes, 39. 40.

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

²⁹ See Supra note 15.

³⁰ See Supra note 25.

³¹ See Supra note 26.

³² See Supra note 28.

³³ (2010)12 SCC.537, Per Dalveer Bandari and Deepak Verma. JJ (hereinafter *S.G. Rajgopalan*)

³⁴ The S.C. cases in order (i) Criminal Case no. 54/2008, (ii) Petition No. 887 of 2008.

³⁵ Supra note 3.

³⁶ Art. 136 (1)

³⁷ See Supra note 1.

³⁸ *Union of India v. Karnail Singh* (1995) 2 SCC 728.

³⁹ Supra notes 19 and 20.

five judges of the Supreme Court in *Prem Chand Gar 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 Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant status law.

This observation from *Prem Chand Garg*, along with the similar approaches adopted in two other decision 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 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 here in no basis in law which can form edifice or building up a superstructure.

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 artfully 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 become necessary for this court to involve its power 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 decision⁴⁹ in the case of *Kiran v. Sharad Dutt*.⁵⁰ In this case,

after living separately for many 11 years after initiating proceedings under section 13 of his 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 in to 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 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 union that appropriate case 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 power in favors 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 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 agree 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. 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,

⁴⁰ *Laxmidas Morarji v. Bebrose Darab Madan* (2009).

⁴¹ *Supreme Court Bar Association v. Union of India*, AIR 1998 SC 1895.

⁴² See *Supra* nos 25-26.

⁴³ *Manish Goel* (para 11).

⁴⁴ *A.R. Antulay v. R.S. Nayak* (1988) 2 SCC 602.

⁴⁵ See *Supra* note 10.

⁴⁶ *A.R. Antulay v. R.S. Nayak* (1988) 2 SCC 602.

⁴⁷ *Id.* para 9.

⁴⁸ *Ibid.* Emphasis added.

⁴⁹ *Ibid.*

⁵⁰ (2000) 10 SCC 243.

⁵¹ *Supra* note 10.

⁵² *Id.* para 11.

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 passé 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 provision 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) 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 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 decree o 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, 1995. In the considered opinion of the apex court, "this is one of those cases where we may 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 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 direct that the marriage between them shall stand dissolved by mutual consent.

A perusal of te 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 stipulate 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 exercise "for doing complete justice", that does not in any way negate the provisions of existing law. It rather 'supplement', in certain situation even 'complement', 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 case"⁵⁸ under article 142 of the Constitution, impliedly it means that such a waiver-decision would not come within the ambit of the law declare 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 raise 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 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 141of the constitution,⁶⁰ and, thereby empowering, May obliging, all the courts in India to exercise the discretion of waiver on similar ground while granting divorce decree on the round 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 if the constitution create confusion and, thereby, seriously affect the rule of law. In fact in the intern 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 3-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

⁵⁷ Satish Singh v. Ganga, Air 2008 SCC3093

⁵⁸ Devinder Singh Narula.

⁵⁹ Ibid. para 10.

⁶⁰ SEe Supra note 19 and 20.

⁶¹ Supra note 10. para 8.

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

⁵³ Id. para 12.

⁵⁴ Id. para 13.

⁵⁵ Ibid.

⁵⁶ Id. para 13.

Act, 1955, to the effect that the mandatory period of six months 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 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 provision 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' ground, 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 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 of "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', in as much 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 realizing 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 Kobi v. Neelu Kobi*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.

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' round but the 'sole' round of divorce. Therefore, at its opportune moments in the light of the pragmatic prompt by the Supreme out 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

⁶³ under s. 23(1) (a) of the Hindu Marriage Act. 1955.

⁶⁴ S. 2 of the Amending Act 44 of 1964.

⁶⁵ AIR 2006 1675.

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, this process of restructuring the existing grounds shall not become totally redundant. Thenceforth they shall continue 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 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.*