

SUPREME COURT'S POWER TO GRANT DIVORCE AND ARTICLE 142

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ABSTRACT

The judiciary is the crown of the entire justice system, which seems to preserve it and effectively help in the functioning of a Democracy. It seems to put up with the ideals of a Democracy. The Supreme Court has efficiently adjudicated cases and prevented the state of lawlessness in our Country. This paper mainly tries to discuss the vital topic relating to the provision of Article 142 which has been utilized by the Apex Court of India to grant Divorce. Whether the Supreme Court has properly exercised the aforesaid provision and the various restrictions concerning it. The two opposing views relating to the grant of Divorce have been critically analyzed and put forward. Further, the concept of Complete Justice has been critically analyzed to bring about the whereabouts of the present contention. The factor of irretrievable breakdown of a marriage can it be reasonably used as a ground for Divorce, and can it break the sacred knot of marriage? Whether the power of the Supreme Court to grant Divorce is discretionary or permanent. Various landmark cases have also been used to illustrate the scope and purview of Article 142.

Keywords: Article 142, Democracy, Judiciary, Supreme Court, Complete Justice, Divorce.

INTRODUCTION

India is a federal state with a democratic setup. It has the prestige of being the largest democracy in the world. The Judiciary is the third pillar of democracy, having a uniform structure in the judicial system. It is to be noted that the Indian Judiciary has a three-tier structure. The Supreme Court is the apex court and is followed by the High Courts and Subordinate Courts. The verdicts given by the Supreme Court are binding on the lower courts. Society is in a continuous process of change, which is necessary to cope with the changing times and fulfill the demands of the people. Along with it, the Judiciary has also undergone massive changes to meet time and people's expectations. Various legal developments like the rights of the transgender, the daughter's right to property, legalizing same-sex marriage, and the increase in the legal age of marriage for girls to 21 years have brought about zestful social reforms. Another groundbreaking verdict was passed by the

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Supreme Court where it said that it can invoke its power granted under Article 142¹ and grant Divorce. However, the Divorce would be granted on the ground of “irretrievable breakdown of marriage”.²The provision contained in Article 142 is a discretionary power that is only exercised by the Supreme Court of India. This unique power of the Supreme Court has been praised as well as questioned. The Scope of Article 142 has been questioned on the grounds of Article 32³ and Article 226⁴ of the Constitution. It was also stated that in deciding the cases the Supreme Court would ensure that ‘complete justice’ is served to both the parties, which is the main aim behind invoking this legislation. This article would essentially focus on the scope of Article 142, the two opposing views about this legislation would be discussed with critical analysis.

SCOPE OF ARTICLE 142

The scope of Article 142 of the Constitution is not limited and is vast. It essentially puts forward that in Article 142(1)⁵ the jurisdiction of the Supreme Court extends over the entire country. The decrees and orders passed by the apex court are enforceable as they are directed to ensure complete justice in any matter which is pending before it. One can easily conclude that the scope of Article 142 extends to both civil as well as criminal proceedings which are pending before the court. The mere fact of absence of legislation, statutes, and provisions cannot limit the power of the Supreme Court to exercise its power under Article 142.

Similarly, Article 142(2)⁶ brings to the forefront that if any provision is made by the Parliament, the Supreme Court has the complete power to check on it. The Court may also pass orders to produce documents if necessary. The Supreme Court can also punish for contempt of itself on any matter. Many researchers have through critical analysis found that Article 142 adopts a three-pronged approach, the first approach is per law, the second approach focuses on the non-existence of law, and the last approach is contrary to law.⁷ Thus, it gives us a whole-some approach to render judgment based upon the point of ensuring

¹The Constitution of India 1950, Article 142

²Manu Sebastian, *Irretrievable Breakdown of Marriage' A Ground To Dissolve Marriage Invoking Article 142 Powers : Supreme Court* (Live Law, 1st May, 2023) <<https://www.livelaw.in/top-stories/irretrievable-breakdown-of-marriage-a-ground-to-dissolve-marriage-invoking-article-142-powers-supreme-court-227617>> accessed 22nd June, 2023

³The Constitution of India 1950, Article 32

⁴The Constitution of India 1950, Article 226

⁵The Constitution of India 1950, Article 142(1)

⁶The Constitution of India 1950, Article 142(2)

⁷Sayalee S. Surjuse, *Exercise of inherent power by the supreme court of India to do complete justice with special reference to divorce matters under the Hindu marriage act – a critical analysis* (Elementary Education Online) (2023)(22)(2)<<https://ilkogretim-online.org/>> accessed 24th June, 2023

‘complete justice’. It conveys to us that the Supreme Court has the power to adjudge a case by interpreting the laws and provisions, and if there is ambiguity about certain provisions the Supreme Court can interpret it in its way to render complete justice. And if certain laws are absent, the Supreme Court can frame new laws to meet the existing situation of lawlessness. Lastly, if a situation arises which seems to be contrary to the general provisions, then the Court can give judgment based upon the ideals of justice, equity, and good conscience.

CONCEPT OF COMPLETE JUSTICE

The concept of ‘Complete Justice’ is supplementary and complementary to the provision of Article 142 of the Constitution which brings to the forefront that cases would not only be decided by law but also according to the essentials of natural justice, which would be the ultimate goals to be achieved.⁸ It directs the judges to decide the cases in the light of their years of experience, equity, and good conscience keeping in par with the ideals of justice. There are numerous instances where the court has exercised the power enshrined in Article 142, like the release of A.G. Perarivalan in former Prime Minister Rajiv Gandhi's assassination case⁹, treating sex workers with dignity, the revival of 90,000 tax notices, and granting divorce based on irretrievable breakdown are such prominent examples.

The principle of Natural Justice is invoked to ensure compliance with the essence of complete justice which is provided in Article 14¹⁰ and Article 21¹¹ of the Indian Constitution. The Latin maxim ‘Nemo judex in causa sua’ is important as the principle of complete justice is inculcated by this maxim which means that an individual cannot be a judge in his case, and seek impartial and neutral judgment.

RESTRICTIONS ON ARTICLE 142

The ambit of Article 142 is vast, it cannot be restricted by different provisions and statutes. However, it must be kept in mind that statutory provisions cannot be utilized to infringe an individual's fundamental rights which have been guaranteed under Part III of the Constitution. Though, it is stated that the power of the Supreme Court concerning this provision cannot be restricted yet it does not mean that the statutory provisions can be

⁸Alok Prasanna Kumar, *the power to do 'complete justice'* (Deccan Herald, 29th May, 2022) <<https://www.deccanherald.com/opinion/the-power-to-do-complete-justice-1113407.html>> accessed 20th June, 2022

⁹What is Article 142? (Insights IAS, 19th May, 2022) <<https://www.insightsonindia.com/2022/05/19/what-is-article-142-3/>> accessed 19th May, 2022

¹⁰The Constitution of India 1950, Article 14

¹¹The Constitution of India 1950, Article 21

altogether ignored. There cannot be an uncontrolled and arbitrary exercise of power. Moreover, it can be said that the Supreme Courts' power in this regard is ipso facto, i.e., by the very fact we can deem that common law provisions do not have any significant impact over it. To be more specific it can be said that the statutory provisions cannot restrict the provisions of the Constitution. Thus, fundamental rights being the throne of democracy cannot be subjected to unreasonable restrictions. It was upheld in the case of Prem Chand Garg v Excise Commissioner, U.P.¹² that 'complete justice' cannot be done at the stake of fundamental rights being curtailed. Another essential which must be satisfied for a particular judgment given is the ratio decidendi of that case. The reasoning behind a judgment differs from case to case, it depends on the facts, circumstances, and prevailing situation. This discussion aims to put forward that there must be rational reasoning behind the judgment, which is very crucial to ensure that the principle of 'complete justice' has been upheld.

"Its power under Article 142 (1) to do complete justice is entirely of a different level and a different quality and that any prohibition or restriction contained in ordinary laws cannot act as a limitation on the Constitutional power of the Supreme Court."

ARTICLE 142 CONCERNING WITH DIVORCE MATTERS

According to Hindu mythology, marriage is a sacred union between two individuals, i.e., a man and a woman. It is a union that has the sanction of society, along with certain mutual rights and obligations of the spouses towards each other. It is the backbone of a healthy society. However, with the flow of time, the institution of marriage has lost its sacramental structure. Nowadays, it is subjected to dissolution and couples are seen opting for divorce in large numbers. In this situation, marriage as a sacramental union has faded its structure, which can be easily understood by the increasing number of divorce cases. The concept of Divorce has been given statutory recognition in various personal laws soon after Independence. The concept of Divorce was inculcated in the Hindu Marriage Act of 1955. Section 13 of the act consists of a provision relating to Divorce. With changing times, the concept of Divorce has undergone massive changes, and separation through mutual consent has been brought to light. Thus, the concept of divorce by mutual consent was added in Section 13B of the Hindu Marriage Act. This essentially states that when the spouses are dissatisfied with their marriage, they can jointly apply for seeking a divorce in a court of law. The marital relation is distorted to such an extent that the spouses are no longer able to live

¹²Prem Chand Garg v Excise Commissioner 1963 AIR 996 1963 SCR Supl. (1) 885

together, and have been living separately for one year or more. Free consent of both parties is equally important in a divorce petition. The Court will always try to safeguard the institution of marriage by various means like providing a cooling off period for a term of a minimum of 6 months and which may extend up to 18 months.

Two sides of a coin have an equal relevance, similarly, the situation persisting now has two angles to discuss. There are indeed certain cases where the cooling-off period plays a very important role to safeguard the institution of marriage. Disappointment prevails if we see the other side of the coin where one can experience the impact of a distorted and broken relationship, adding up to the agony of an individual. The Supreme Court also observed that such relations if unnecessarily prolonged and the process of protracted litigation only led to mental and physical abuse of an individual. Though, the bench realized that it was a case that came under the purview of divorce by mutual consent yet the learned bench decided to exercise powers conferred to it under Article 142 to meet the ends of justice. This situation can be related to the concept of Irretrievable breakdown of marriage which is the present matter of contention.

IRRETRIEVABLE BREAKDOWN OF MARRIAGE & ARTICLE 142

The Supreme Court in the case of *Shilpa Sailesh v Varun Sreenivasan*¹³ has recently held that it can adjudge on a case relating to divorce matters, and dissolve the same if the ground of irretrievable breakdown of marriage is satisfied.¹⁴ More specifically it can be said that the marital relation is such that the spouses are no longer able to live together. It can be based on mutual consent, or one of the spouses seeking the same. The Court would consider both cases, but it is to be kept in mind that it is a discretionary power. Further, in the case of *Nikhil Kumar v Rupali Kumar*,¹⁵ it was held that the cooling off period which is provided to the spouses may be waived off by the court if it deems fit by utilizing the powers conferred to it under Article 142 of the Constitution. The Supreme Court held that the basis of this judgment was not to make a hasty verdict and refrain from promulgating a purposeless relation. Thus, it can be conclusively said that it came under the purview of exceptional circumstances.

¹³*Shilpa Sailesh v Varun Sreenivasan* transfer petition (civil) no. 1118 of 2014

¹⁴Faizan Mustafa, *Extra-judicial divorces are a better option – Muslim law points the way*, (The Indian Express, 5th May, 2023) <<https://indianexpress.com/article/opinion/columns/faizan-mustafa-extra-judicial-divorces-better-option-muslim-law-8587116/>> accessed 23rd June, 2023

¹⁵*Nikhil Kumar v Rupali Kumar* civil appeal no. 4490 of 2016

LANDMARK CASES ON ARTICLE 142

Naveen Kohli v Neelu Kohli

The Supreme Court observed in the case of *Naveen Kohli v Neelu Kohli*¹⁶ that the ground for irretrievable breakdown of marriage should be inculcated as a ground for Divorce under the Hindu Marriage Act, 1955. Since it is a valid ground to seek a Divorce, it can not be ignored. It was instructed by the Court to bring about an amendment and insert an irretrievable breakdown of marriage as a ground for Divorce.

Supreme Court Bar v Union of India

The *Supreme Court Bar v Union of India*¹⁷ is a prominent case law in which the Supreme Court decided that the existing laws cannot be substituted but additional provisions may be included to meet the demands of the changing times. In this case, Vinay Chandra Mishra was found to be making criminal contempt of the Court. The Court decided this case under Article 129 and further invoked Article 142 of the Constitution.

Union Carbide Corporation v Union of India

The *Union Carbide Corporation v Union of India*¹⁸ is also popularly known as the Bhopal Gas Tragedy Case. There was a contention relating to whether Criminal Proceedings could be initiated against Union Carbide Corporation under the ambit of Article 142 and Article 136. The Supreme Court held that to render complete justice, the court can place itself in a higher position. Supreme Court placed itself higher than the Parliament or the Legislature of the States to adjudicate this case.

CONCLUSION

The Supreme Court at all times has been the pillar to serve justice to the people. It has formulated essential provisions whenever needed to prevent society from the fangs of gross irregularity. It is the apex of all the existing justice deliverance institutions existing in our country and can formulate new laws if necessary. The present contention relating to Article 142 of the Constitution attracts both positive and contrasting views from the masses. The existing statutes are not violated and their importance has been devalued. The power exercised by the Supreme Court comes under the purview of Article 142 of the Constitution, which provides the court with discretionary powers and is not arbitrary. From the case laws

¹⁶*Naveen Kohli v Neelu Kohli Appeal (civil) 812 of 2004*

¹⁷*Supreme Court Bar Association v Union of India & Anr on 17 April, 1998*

¹⁸*Union Carbide Corporation v Union of India 1992 AIR 248, 1991 SCR Supl. (1) 251*

we can say that the court has exercised this discretionary power to ensure that an unhealthy relationship is not prolonged. It will only add up to the dissatisfaction among the people if delayed under the wheels of justice.

The Supreme Court did not avoid the perils and hardship suffered by the people and put into the forefront the ground of the “irretrievable breakdown” of marriage. However, the legislature was persistently silent on such a sensitive issue which is ingrained in the lives of billions of people in our country. And such a groundbreaking move of the Supreme Court came to the aid of the citizens. Various researchers present the view that judicial precedents cannot be always a good source for introducing new laws. It can be given the tag of temporary legislation. The fact remains that the Judiciary has utilized the provision contained in Article 142 in appropriate cases, by rendering ‘complete justice’ to the aggrieved ones. So, till the time the legislature comes to the picture, it is the responsibility of the Judiciary to adjudge on this issue. The research paper tries to put forward the crucial role played by the Judiciary at such a juncture. The Judiciary has curtailed various statutory provisions to uphold constitutional provisions, but it came under the scope of its authority conferred upon it. The responsibility conferred on the Judiciary to render complete justice has been very well served.

