Jus Corpus Law Journal
Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

Case Comment: Shilpa Sailesh v Varun Sreenivasan

Rishov Dam[a]

[a]Symbiosis International University, Pune, India

Received 19 June 2023; *Accepted* 17 July 2023; *Published* 19 July 2023

INTRODUCTION

The Indian Constitution perceives a unique place for the Judiciary among all the organs of the state. This is because it confers the unique power to do "Complete Justice" irrespective of the condition if required to go beyond the contours of the separation of power. The question is what is Complete Justice? It is a situation where there is a relative vacuum between constitutional and statutory justice as a consequent outcome of the contradiction between constitutional silence and legislative intent. In such a scenario, as a final interpreter, the court may find itself in a situation where this contradiction or legislative vacuum needs to be cured or mitigated to soften the rough edges in order to adhere to its humane and compassionate character and as opined by Bhagwati CJ "*to infuse life and blood into the skeleton of legislative provisions*". It is widely interpreted that denial sought by the traditional notion of a court being only the finder and not the maker of law constitutes obscured vision.[1] The court may use any of its wide-ranging plenary power under Articles 141, 142, 32 and 226 to pass any order such that it resolves such contention and enables justice to the aggrieved in the highest regard.[2] Such an order will be

[1] *Golak Nath v State of Punjab* (1967) AIR 1643
[2] *University of Kerala v Council Principals College* Civ App No 887/2009

enforceable throughout the country in such manner as prescribed by law.[3] However, usage of such contemplation is only rested if it does not encroach on the field reserved for the legislature[4] and is not arbitrary or inconsistent with provisions of any statute laid down.[5] The question now lies in whether the scope of such an application includes civil matters, especially those pertaining to family and marriage in particular, in its ambit. These laws are usually governed by either personal or special laws. This paper, through the lenses of the case Shilpa Sailesh v Varun Sreenivasan,[6] will try to concur whether the usage of such plenary powers under Article 142 vis a vis Section 13(B) of the Hindu Marriage Act[7] is a wide violation and implied state incursion over individual's autonomy or it is perfectly justified constitutionally envisioned expression in regards to preserve individual's life and dignity.

FACTS OF THE CASE

The husband (31 years old) is a businessman based in Pune and the Wife (27 years old) acting as a director in a family business, at the time of proceeding was residing in Muscat (Sultanate of Oman). Arising a dispute in their marital relationship led to both parties filing a divorce petition in court. The court upon hearing at first chance, following Section 13 (B) of the Hindu Marriage Act (1955) directed both parties to wait for the mandatory period of 6 months and strive to settle the matter amicably on their own. The parties' abided court's direction, sat for a settlement and agreed that they do not have an issue in consenting that there was an irretrievable breakdown of the marriage. They filed a joint application before the court incorporating the terms and outcome of the settlement. Henceforth, jointly prayed to the court to invoke jurisdiction under Art 142 of the Constitution to dissolve their marriage so as to - First, allow them to avoid the cumbersome requisite of relying on the jurisdictional ambit of family court by invoking provisions of Hindu Marriage Act (1955) which is time-consuming considering family courts

[3] Constitution of India 1950, art 142
[4] *Union of India v State of Maharashtra* (2019) MANU SC 1351
[5] *AR Antulay v R S Nayak* (1998) 4 SCC 409
[6] *Shilpa Shailesh v Varun Sreenivasan* (2023) SCC OnLine SC 544
[7] Hindu Marriage Act 1955

are clogged with the huge volume of similar cases. Second, enable the respective parties to start their life afresh of their own choice and dignity.

LEGAL ISSUES

- Whether the exercise of such broad powers under Article 142 of the Constitution in order to dissolve the marriage between two consenting parties is acceptable or not.
- Whether the overriding effect it has on the statutory will i.e.in this case, mandatory period as envisaged under Section 13-B of HMA is affirmative or not.
- Whether such plenary jurisdiction shall be used routinely or facts of the case be the determinant of its usage or not.

OBSERVATION OF SUPREME COURT

The court is of the opinion that the present case provides a substantial question of law that arises for consideration. Article 142 is unique in the sense that no other written constitution in the world confers such powers, it provides a conclusive end to exhaustible cause or matter i.e. a judgment under this Article delivered ends the litigation. It reflects the inspired origin of the age-old concept of justice, equity, and good concise. The court cautions against its individualistic exercise. It brings forth two principles – Equity in general and Particular equity. Former deals with the humane interpretation of the law without antagonizing it while the latter deals with modification of law in special circumstances. The court also emphasizes cause or matter and apparent distinguishment between them – the cause is any action or criminal proceeding while the matter is any proceeding in the court.[8] The court also observed that the plenary powers under Article 142 are inherent in nature and exhibit a complementary tendency towards the legislative will, as exemplified by those powers specifically conferred by various statutes. The court recognizes that Hindu marriage is a sacred union and both legislature and courts place matrimonial litigation as a unique subject whereas wide-ranging public policy questions are involved. Therefore, a statute like Section 13-B of HMA provides a time gap for the parties of the suit to cogitate, analyze, and take a deliberative decision. But this object need

[8] *Union Carbide Corp v Union of India* (1992) AIR 248

not be superimposed in disintegrated marriage nor Section 13-B impose any fetters on the power of the court to grant a decree of divorce by mutual consent when substantive conditions of sections are followed. The court also observes that there is exist a legal effect when Section 13 (1) (i-a) is read with Section 23 (1)(a), invokes a fault theory – that it is normal for even two individuals having perfectly pleasant yet incompatible personality to have miserable and morose married life.[9] This the court termed as 'Matrimonial offense theory or Irretrievable breakdown theory". Grant of divorce on the ground irretrievable breakdown of marriage is not a matter of right but a discretion of the court to be exercised in great caution. To avoid confusion the court outlines certain observations – in a case of divorce by mutual consent, a party may withdraw their consent at any stage before the decree of divorce is passed.[10] Only in extreme condition court will employ Article 142 to dissolve a marriage.[11] Parties regardless of the irretrievable breakdown of a marriage cannot relay writ powers under Articles 32 or 226 to seek a divorce, because such powers are only for the purpose of redressal from the superior tribunal or forum for an aggrieved decree passed by competent jurisdiction.[12] The court observed that there is a need for uniformity and complete reform in marriage laws in India.[13]

DECISION

The Court advocated for a departure from the procedure as well as substantive laws while deciding whether to exercise discretion in consideration of cause or matter pertaining to fundamental general and specified public policy. It held that the court can exercise discretion for passing a dissolving decree for a mutually consented and proposed divorce petition, relieving it from the procedural requirement to be moved in the second round. The court while doing so can also quash or set aside any aligned proceedings and orders, be it civil or criminal. It also held that the prima facie determinant for passing such a decree is the satisfaction of the court, that the facts established, envisage the marriage to be at point no return, and the court

[9] *Owen v Owen* [2018] UKSC 41
[10] *Sureshta Devi v Om Prakash* (1991) 2 SCC 25
[11] *Shyam Sundar Kohli v Sushma Kohli* (2004) 7 SCC 747
[12] *Savitri Pandey v Prem Chand Pandey* (2002) 2 SCC 73
[13] *Poonam v Sumit Tanwar* (2010) 4 SCC 460

must behave as a court of equity in balancing out the circumstances in which party opposing such dissolution acts.

ANALYSIS

Section 13-B of the Hindu Marriage Act contemplates two stages – the first stage of essentialities that parties must fulfill and the second manner in which the court will exercise its jurisdiction. The object of the cooling period is for the parties to avoid knee-jerk decisions and give them a chance to inculcate the possibility of reconciling. The first question that lies is whether such a period can be waived by either of the parties or not. Previous judicial precedents have recognized that everyone has the right to ordinarily waive off a voluntary *right in personam* unless subjected to limitation imposed by the concerned statute and shall not be opposed to public policy. Next, on the question of whether Article 142 enables the Judiciary to waive off such rights if the aforementioned conditions are met, a comparative analysis regarding the constitutionality of the term Justice might be helpful in this regard. What is Justice? A prompt definition of the term is not possible, so we can try and look into *what is Not Justice*. Here, I would like to cite the help of the verdict Maneka Gandhi v Union of India (1978)[14] in which the Honorable Supreme Court gave a very beautiful definition of life – *'Life is living with choice and dignity'*. Hence anything that impedes this realization, in my opinion, is not Justice. Now when it comes down to the constitutionality of attaining such 'choice and dignity' concerned, the Preamble of the Constitution[15] envisages that independent India would work on the objective of attaining justice in all its forms – socially, politically, and economically. Furthermore, Article 38 makes it fundamental to the governance by directing the State to "…ensure Welfare"[16], a term synonymous with the word justice. But the question still looms which organ would ensure it? The answer is provided in Article 142 of Part V (Union) of the Constitution, where the word 'complete justice'[17] is used yet again. A comprehensive reading of the abovementioned provisions provides us with positive inference regarding the possible intent of the founding

[14] *Maneka Gandhi v Union of India* (1978) SC 597
[15]Constitution of India 1950, art 142
[16] Constitution of India 1950, art 38
[17] Constitution of India 1950, art 142

fathers - they wanted Independent India to attain justice in all its form by directing the state to ensure welfare, and the organ which was bestowed with the duty to ensure the applicability of this direction, not mere but in its 'complete' form is the judiciary, more specifically the Supreme Court of India. Hence in my opinion waiving off a *right in personam* like a six-month cooling period in divorce is well within the contours of Article 142, if it is a choice made in consensus, and if such waiving would ensure individual dignity. In India, however, despite repeated judicial reminders, the legislature is seemingly adamant about refusing the idea of divorce based on no particular fault of either of the spouse, arguing that such acceptance will - First open floodgates of litigation, Second it will give rise to divorces based on minor discontent and Third it would undermine women where right to maintenance and matrimonial property is not recognized.[18]

CONCLUSION

An analysis of the case in all its enclosures has brought us to the following learnings and understandings – Orders of divorce under Article 142 can be passed only by apex courts and not vested to any other court. The process of waiver under Section 142 is of limited nature i.e. the same cannot be applied in inconsistency with the law laid down by the legislature. While waiving the cooling period under Section 13-B of HMA, through the employment of Article 142, distinguishment must be drawn between irretrievable breakdown marriages and normal divorces on a case-by-case basis. It should be employed immediately where there has been an obstruction to justice and injustice to be undone. The power under Section 142 is not a vested right to the party as it cannot be invoked under Article 32 but instead controlled by Article 136 making it restrictively accessible and its usage vastly a domain of judicial discretion.[19]

[18] Achal Gupta, 'Divorce by Mutual Consent and Contempt of Court' (*SCC Online*, 09 November 2020) <https://www.scconline.com/blog/post/2020/11/09/divorce-by-mutual-consent-and-contempt-of-court/> accessed 17 June 2023

[19] Virendra Kumar, 'Varying Judicial responses to Dissolution of Marriage by Mutual Consent Under Hindu Marriage Act 1955 – A crisis of Constitutional Culture' (2010) 52(2) JILI <https://www.jstor.org/stable/43953496> accessed 17 June 2023