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IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

SANJAY KISHAN KAUL; J., SANJIV KHANNA; J., ABHAY S. OKA; J., VIKRAM NATH; J., J.K. MAHESHWARI; J.

TRANSFER PETITION (CIVIL) NO. 1118 OF 2014; MAY 01, 2023

SHILPA SAILESH *versus* **VARUN SREENIVASAN**

Family Law - Irretrievable breakdown of marriage a ground of dissolve marriage invoking powers of the Supreme Court under Article 142 of the Constitution of India - This discretionary power is to be exercised to do 'complete justice' to the parties, wherein this Court is satisfied that the facts established show that the marriage has completely failed and there is no possibility that the parties will cohabit together, and continuation of the formal legal relationship is unjustified. *(Para 42(iii))*

Irretrievable Breakdown of Marriage - Fault theory can be diluted by this Court to do 'complete justice' in a particular case, without breaching the self-imposed restraint applicable when this Court exercises power under Article 142(1) of the Constitution of India - Apportioning blame and greater fault may not be the rule to resolve and adjudicate the dispute in rare and exceptional matrimonial cases - It would be in the best interest of all, including the individuals involved, to give legality, in the form of formal divorce, to a dead marriage, otherwise the litigation(s), resultant sufferance, misery and torment shall continue. *(Para 29)*

Irretrievable Breakdown of Marriage - Illustrative list of factors which are to be considered while granting divorce on this ground. *(Para 33)*

Hindu Marriage Act, 1955; Section 13B(2) - Waiting period for mutual consent divorce can be waived by Supreme Court invoking Article 142 powers - this Court, in view of settlement between the parties, has the discretion to dissolve the marriage by passing a decree of divorce by mutual consent, without being bound by the procedural requirement to move the second motion. This power should be exercised with care and caution - This Court can also, in exercise of power under Article 142(1) of the Constitution of India, quash and set aside other proceedings and orders, including criminal proceedings.

Constitution of India, 1950; Article 32, 226 - The parties should not be permitted to file a writ petition under Article 32 of the Constitution of India, or for that matter under Article 226 of the Constitution of India before the High Court, and seek divorce on the ground of irretrievable breakdown of marriage. *Approved view taken in Poonam v. Sumit Tanwar (2010) 4 SCC 460 (Para 41)*

WITH TRANSFER PETITION (CRIMINAL) NO. 96 OF 2014, TRANSFER PETITION (CRIMINAL) NO. 339 OF 2014, TRANSFER PETITION (CRIMINAL) NO. 382 OF 2014 TRANSFER PETITION (CRIMINAL) NO. 468 OF 2014 AND TRANSFER PETITION (CIVIL) NOS. 1481-1482 OF 2014

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J U D G M E N T

SANJIV KHANNA, J.

Background.

The issues before this Constitution Bench, as adumbrated below, arise primarily from the order dated 12.05.2010 passed in T.P. (C) No. 899 of 2007, ***Neeti Malviya*** v. ***Rakesh Malviya***, wherein a bench of two judges had doubted the view expressed in ***Anjana Kishore*** v. ***Puneet Kishore***[1] and ***Manish Goel*** v. ***Rohini Goel***[2] that this Court, in exercise of the power under Article 142 of the Constitution of India, cannot reduce or waive the period of six months for moving the second motion as stipulated in sub-section (2) to Section 13-B of the Hindu Marriage Act, 1956[3]. Noticing that this Court, some High Courts and even family courts in some States had been dispensing with or reducing the period of six months for moving the second motion when there was no possibility whatsoever of the spouses cohabiting, the following question was referred to a three judges' bench for a clear ruling and future guidance:

"(I) Whether the period prescribed in sub-section (2) of Section 13-B of the Hindu Marriage Act, 1955 can be waived or reduced by this Court in exercise of its jurisdiction under Article 142 of the Constitution?"

However, the question was never decided, since T.P. (C) No. 899 of 2007 was rendered infructuous as the parties, subsequent to the order of reference, had dissolved their marriage by mutual consent.

2. In T.P. (C) No. 1118 of 2014[4], ***Shilpa Shailesh*** v. ***Varun Sreenivasan***, a bench of two judges, *vide* the order dated 06.04.2015[5], issued notice to the Attorney General for India for addressing arguments on the following issues:

"1. The scope and extent of power of this court under Article 142 of the Constitution of India insofar as dispensing with the period of notice under Section 13B of the Hindu Marriage Act, 1955 is concerned.

2. The stand of the Government with regard tostatutory incorporation of irretrievable break-down of marriage as one of the conditions for grant of divorce.

3. Any other incidental and ancillary issue that mayarise may also be addressed by the learned Attorney General."

3. The Attorney General for India, in paragraph 5 of his written submissions, had suggested two additional questions of law, which read thus:

"In view of the decisions of the Hon'ble Court in the above cases, the view of the Hon'ble Court that divorce can be granted on the ground of "irretrievable break-down of marriage" even in the absence of such ground being contemplated by the Legislature may require consideration by the Constitution Bench.

Similarly, the issue as to whether the period prescribed in sub-section (2) of Section 13-B of the Hindu Marriage Act, 1955 can be waived or reduced by this Court in exercise of its jurisdiction under Article 142 of the Constitution also requires consideration by the Constitution Bench."

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[1] (2002) 10 SCC 194. This decision is rendered by a three judges' bench.

[2] (2010) 4 SCC 393.

[3] For Short, 'Hindu Marriage Act'.

[4] Tagged with T.P. (Crl) No. 96 of 2014, T.P. (Crl) No. 339 of 2014, T.P. (Crl.) No. 382 of 2014, T.P. (Crl.) No. 468 of 2014 and T.P. (C) No. 1481 – 1482 of 2014.

[5] T.P. (C) No. 1118 of 2014 along with T.P. (Crl.) No. 382 of 2014, T.P. (Crl.) No. 468 of 2014 and T.P. (C) No. 1481 – 1482 of 2014.

4. T.P. (C) No. 1118 of 2014[6] was effectively disposed of *vide* the order dated 06.05.2015 dissolving the marriage by grant of divorce by mutual consent with the two judges' bench exercising jurisdiction under Article 142 of the Constitution of India. However, in view the conflicting ratio of the judgments of this Court on the applicability of the power and jurisdiction of this Court under Article 142 of the Constitution of India, the two judges' bench of this Court deferred the transfer petition to remain pending for statistical purposes, and formulated the following questions of law to be decided by a three judges' bench:

"4. Notwithstanding the above order passed by us, for the purposes of statistics the present transfer petitions shall remain pending as we are of the view that an issue of some importance needs to be addressed by the Court in view of the huge number of requests for exercise of power under Article 142 of the Constitution that has confronted this Court consequent to settlement arrived at by and between the husband and the wife to seek divorce by mutual consent.

5. The questions are formulated herein below:

1. "What could be the broad parameters for exercise of powers under Article 142 of the Constitution to dissolve a marriage between the consenting parties without referring the parties to the Family Court to wait for the mandatory period prescribed under Section 13B of the Hindu Marriage Act.

2. Whether the exercise of such jurisdiction under Article 142 should not be made at all or whether such exercise should be left to be determined in the facts of every case."

5. Thereafter, *vide* the order dated 29.06.2016, another bench of two judges of this Court, on examining the questions formulated in T.P. (C) No. 1118 of 2014, referred to Article 145(3) of the Constitution of India, and relying on ***Pradip Chandra Parija and Others*** v. ***Pramod Chandra Patnaik and Others***[7], accepted the submission made by the Attorney General for India to refer the questions formulated in T.P. (C) No. 1118 of 2014 for consideration of the Constitution Bench[8]. It was left to the discretion of the Constitution Bench to decide whether it would be inclined to consider the two questions of law indicated by the Attorney General for India.

6. This Constitution Bench, after hearing the parties, *vide* the order dated 20.09.2022, had deemed it appropriate to formulate another question of law, which reads thus:

"We do believe that another question which would require consideration would be whether the power under Article 142 of the Constitution of India is inhibited in any manner in a scenario where there is an irretrievable breakdown of marriage in the opinion of the Court but one of the parties is not consenting to the terms."

7. Accordingly, the following substantial questions of law arise for consideration before us:

(i) The scope and ambit of power and jurisdiction of this Court under Article 142(1) of the Constitution of India;

(ii) Secondly, in view of, and depending upon the findings of this bench on the first question, whether this Court, while hearing a transfer petition, or in any other proceedings, can exercise power under Article 142(1) of the Constitution of India, in view of the settlement between the parties, and grant a decree of divorce by mutual consent dispensing with the period and the procedure prescribed under Section 13-B of the Hindu

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[6] Along with T.P.(Crl.) No. 382 of 2014, T.P.(Crl.) No. 468 of 2014 and T.P.(C) No. 1481 – 1482 of 2014.

[7] (2002) 1 SCC 1.

[8] We are not examining and commenting on the ratio expounded in *Pradip Chandra Parija & Others* (supra).

Marriage Act, and also quash and dispose of other/connected proceedings under the Protection of Women from Domestic Violence Act, 2005[9], Section 125 of the Code of Criminal Procedure, 1973[10], or criminal prosecution primarily under Section 498-A and other provisions of the Indian Penal Code, 1860[11]. If the answer to this question is in the affirmative, in which cases and under what circumstances should this Court exercise jurisdiction under Article 142(1) of the Constitution of India is an ancillary issue to be decided; and

(iii) The third issue, which is of considerable importance, is whether this Court can grant divorce in exercise of power under Article 142(1) of the Constitution of India when there is complete and irretrievable breakdown of marriage in spite of the other spouse opposing the prayer.

Article 142(1) of the Constitution of India.

8. Article 142(1) of the Constitution of India reads:

"**142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.—** (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing 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 manner 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."

This provision, apparently unique as it does not have any counterpart in most of the major written constitutions of the world[12], has its origin in and is inspired from the age-old concepts of justice, equity, and good conscience. Article 142(1) of the Constitution of India, which gives wide and capacious power to the Supreme Court to do 'complete justice' in any 'cause or matter' is significant, as the judgment delivered by this Court ends the litigation between the parties. Given the expansive amplitude of power under Article 142(1) of the Constitution of India, the exercise of power must be legitimate, and clamours for caution, mindful of the danger that arises from adopting an individualistic approach as to the exercise of the Constitutional power.

9. Interpreting Article 142(1) of the Constitution of India, in ***M. Siddiq (Dead) Through Legal Representatives* (*Ram Janmabhumi Temple Case*)** v. ***Mahant Suresh Das and Others*[13]**, the Constitution Bench of this Court has summarised the contours of the power as:

"**1023.** …The phrase 'is necessary for doing complete justice' is of a wide amplitude and encompasses a power of equity which is employed when the strict application of the law is inadequate to produce a just outcome. The demands of justice require a close attention not just to positive law but also to the silences of positive law to find within its interstices, a solution that is equitable and just. The legal enterprise is premised on the application of generally worded laws to the specifics of a case before courts. The complexities of human history and activity inevitably lead to unique contests "such as in this case, involving religion, history and the law — which the law, by its general nature, is inadequate to deal with. Even where positive law is clear, the deliberately wide amplitude of the power under Article 142 empowers a court to pass an order which accords with justice. For justice is the foundation which brings home the purpose of any

[9] For short, 'Domestic Violence Act'.

[10] For short, 'Cr.P.C.'

[11] For short, 'I.P.C.'.

[12] The Constitutions of Bangladesh and Nepal have provisions similar to Article 142 of the Constitution of India, suggesting that they have drawn inspiration from Article 142 of the Constitution of India.

[13] (2020) 1 SCC 1.

legal enterprise and on which the legitimacy of the rule of law rests. The equitable power under Article 142 of the Constitution brings to fore the intersection between the general and specific. Courts may find themselves in situations where the silences of the law need to be infused with meaning or the rigours of its rough edges need to be softened for law to retain its humane and compassionate face..."

Words in the above quotation that *'the equitable power under Article 142 of the Constitution of India brings to fore the intersection between the general and specific'* laws, should be read as making a reference to the classification of equity by Professor C.K. Allen[14] in two principle forms: (i) a liberal and humane interpretation of law in general, so far as that is possible without actual antagonism to the law itself – called equity in general; and (ii) a liberal and humane modification of the law in exceptional cases, not coming within the ambit of the general rule – called particular equity.[15] The words 'cause or matter' in Article 142(1) of the Constitution of India, which particularise and empower this Court to do 'complete justice' in that 'cause or matter', are relatable to particular equity[16]. This is the reason that it has been held that Article 142(1) of the Constitution of India turns the maxim 'equity follows the law' on its head, as this Article in the Constitution of India gives legal authority to this Court to give precedence to equity over law. This power, like all powers under the Constitution of India, must be contained and regulated, as it has been held that relief based on equity should not disregard the substantive mandate of law based on underlying fundamental general and specific issues of public policy. Subject to this limitation, this Court, while moulding relief, can go to the extent of relaxing the application of law to the parties or exempting the parties altogether from the rigours of the law, in view of the particular facts and circumstances of the case.[17] In ***I. C. Golak Nath and Others*** v. ***State of Punjab and Another***[18], K. Subba Rao, CJ., while invoking the doctrine of prospective overruling, held that the power under Article 142(1) of the Constitution of India is wide and elastic, and enables this Court to formulate legal doctrines to meet the ends of justice, and the only limitation thereon is reason, restraint and injustice. Restraint and deference are facets of the Rule of Law, and when it comes to the separation of the role and functions of the legislature, the executive and the judiciary, the exercise of power by this Court to do 'complete justice', being for a 'cause or matter', does not interfere with and encroach on the legislature's power and function to legislate. Clearly, when this Court exercises jurisdiction conferred by Article 142(1) of the Constitution of India to do 'complete justice' in a 'cause or matter', it acts within the four corners of the Constitution of India. The power specifically bestowed by the Constitution of India on the apex court of the country is with a purpose, and should be considered as integral to the decision in a 'cause or matter'. To do 'complete justice' is the utmost consideration and guiding spirit of Article 142(1) of the Constitution of India.

10. In ***Union Carbide Corporation and Others*** v. ***Union of India and Others***[19], this Court laid specific emphasis on the expression 'cause or matter' to observe that 'cause' means any action or criminal proceedings, and 'matter' means any proceedings in the court and not in a 'cause'. The words 'cause or matter', when used together, cover almost

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[14] 'See – C.K. Allen, *Law in the Making (Clarendon Press, Oxford, 1927).*

[15] See – Ninad Laud, *Rationalising "Complete Justice" under Article 142*, (2021) 1 SCC J-30.

[16] As this Court interprets the law and adjudicates specific cases, in many a case, it exercises and applies both equity in general and particular equity. Also see – distinction between 'cause' and 'matter'.

[17] See – *State (Through Central Bureau of Investigation)* v. *Kalyan Singh (Former Chief Minister of Uttar Pradesh) and Others*, (2017) 7 SCC 444.

[18] AIR 1967 SC 1643

[19] (1991) 4 SCC 584.

every kind of proceedings in court, whether civil or criminal, interlocutory or final, before or after judgment. Having held so, this Court observed thus:

"**83.** It is necessary to set at rest certain misconceptions in the arguments touching the scope of the powers of this Court under Article 142(1) of the Constitution. These issues are matters of serious public importance. The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the apex Court under Article 142(1) is unsound and erroneous. In both *Garg* as well as *Antulay cases* the point was one of violation of constitutional provisions and constitutional rights. The observations as to the effect of inconsistency with statutory provisions were really unnecessary in those cases as the decisions in the ultimate analysis turned on the breach of constitutional rights. We agree with Shri Nariman that the power of the Court under Article 142 insofar as quashing of criminal proceedings are concerned is not exhausted by Section 320 or 321 or 482 CrPC or all of them put together. The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment of powers — limited in some appropriate way — is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy. Sri Sorabjee, learned Attorney General, referring to *Garg case*, said that limitation on the powers under Article 142 arising from "inconsistency with express statutory provisions of substantive law" must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression 'prohibition' is read in place of 'provision' that would perhaps convey the appropriate idea. But we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under Article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of "complete justice" of a cause or matter, the apex Court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate to the powers of the Court under Article 142, but only to what is or is not 'complete justice' of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise."

11. Whether this ratio is in conflict with the earlier decisions[20] of this Court, including ***Prem Chand Garg and Another*** v. ***The Excise Commissioner, U.P. and Others***[21], wherein five judges of the Constitution Bench had held that this power under Article 142(1) of the Constitution of India cannot be employed to make an order plainly inconsistent with the express statutory provision or substantive law, much less inconsistent with any Constitutional provisions, was examined by another five judges' bench of this Court in ***Supreme Court Bar Association*** v. ***Union of India and Another***[22], to observe that there

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[20] *A.R. Antulay* v. *R.S. Nayak and Another*, (1988) 2 SCC 602; *Delhi Judicial Service Association, Tis Hazari Court, Delhi* v. *State of Gujarat and Others*, (1991) 4 SCC 406; and *Mohammed Anis* v. *Union of India and Others,* 1994 Suppl. (1) SCC 145. In *Mohammed Anis* , this Court, while elucidating and unfolding the aspect of public policy and when it would operate to limit the power of the Supreme Court, observes that given the nature of power conferred by the Constitution of India on this Court under Article 142 of the Constitution of India, which is of a different quality and level, prohibitions or limitations on provisions contained in ordinary laws cannot *ipso facto* act as prohibitions or limitations on the Constitutional power under Article 142 of the Constitution of India. The decision observes that mere reference to a larger bench does not prohibit this Court in a given case from its exercise of powers conferred under Article 142 of the Constitution of India.

[21] AIR 1963 SC 996.

[22] (1998) 4 SCC 409.

was no conflict of ratios as elucidated in ***Union Carbide Corporation*** (supra) and other cases. It is one thing to state that prohibitions or limitations cannot come in the way of the exercise of jurisdiction under Article 142(1) of the Constitution of India to do 'complete justice' between the parties in the pending 'cause or matter' arising out of that statute, but quite a different thing to say that, while exercising jurisdiction under Article 142(1) of the Constitution of India, this Court can altogether ignore the substantive provisions of the statute dealing with the subject and pass orders concerning an issue which can be settled only through a mechanism prescribed in the statute.[23]These observations were in the context of the powers conferred on the State Bar Councils under the Advocates Act, 1961, which, at the first instance, is empowered to decide whether an advocate is guilty of professional misconduct depending on the gravity and nature of his contumacious conduct. This Court, in ***Supreme Court Bar Association*** (supra), has highlighted that the jurisdiction of the Supreme Court in contempt, and the jurisdiction of the State Bar Councils under the Advocates Act, 1961 are separate and distinct, and are exercisable by following separate and distinct procedures. The power to punish for contempt of court vests exclusively with the courts, whereas the power to punish an advocate for professional misconduct has been vested with the concerned State Bar Council and the Bar Council of India. In this context, we would like to quote the following passages from ***Supreme Court Bar Association*** (supra):

"**47.** The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent "clogging or obstruction of the stream of justice". It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. Punishing a contemner advocate, while dealing with a contempt of court case by suspending his licence to practice, a power otherwise statutorily available only to the Bar Council of India, on the ground that the contemner is also an advocate, is, therefore, not permissible in exercise of the jurisdiction under Article 142. The construction of Article 142 must be functionally informed by the salutary purposes of the article, viz., to do complete justice between the parties. It cannot be otherwise. As already noticed in a case of contempt of court, the contemner and the court cannot be said to be litigating parties.

48. The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice "between the parties in any cause or matter

[23] There is also distinction between existence of power, and proper exercise of power in a given case, which aspect we have subsequently examined in paragraph 20.

pending before it". The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it. Indeed this Court is not a court of restricted jurisdiction of only dispute-settling. It is well recognised and established that this Court has always been a law-maker and its role travels beyond merely dispute-settling. It is a "problem-solver in the nebulous areas" but the substantive statutory provisions dealing with the subject-matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."

12. We must, at this stage, as noticed in ***Union Carbide Corporation*** (supra), draw a distinction between the Constitutional power exercisable by this Court under Article 142(1) of the Constitution of India, and the inherent power of the civil court recognised by Section 151 of the C.P.C. and the inherent power of the High Court under Section 482 Cr.P.C., which provisions empower the civil court in civil cases and the High Court in criminal cases to pass such orders as may be necessary to meet the 'ends of justice' or to prevent abuse of the process of court. The expression 'ends of justice' refers to the best interest of the public within the four corners of the law, *albeit* the courts are not empowered to act contrary to the procedure on the particular aspect of law provided in the C.P.C. and the Cr.P.C. Where the C.P.C. and the Cr.P.C. are silent, the civil court or the High Court,[24]respectively, can pass orders in the interest of the public, for the simple reason that no legislation is capable of contemplating all possible circumstances that may arise in future litigation and consequently provide a procedure for them[25]. Thus, the C.P.C. and the Cr.P.C. should not be read as to limit or otherwise affect the inherent power of the civil court and the High Court, respectively, to make such order as is necessary for the 'ends of justice', or to prevent abuse of the process of the court.[26] The Constitutional power conferred by Article 142(1) of the Constitution of India on this Court is not a replication of the inherent power vested with the civil court under the C.P.C., and the High Court under the Cr.P.C.

13. Given the aforesaid background and judgments of this Court, the plenary and conscientious power conferred on this Court under Article 142(1) of the Constitution of India, seemingly unhindered, is tempered or bounded by restraint, which must be exercised based on fundamental considerations of general and specific public policy. Fundamental general conditions of public policy refer to the fundamental rights, secularism, federalism, and other basic features of the Constitution of India. Specific public policy should be understood as some express pre-eminent prohibition in any substantive law, and not stipulations and requirements to a particular statutory scheme. It

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[24] For Section 151 C.P.C. see – *Jet Ply Wood (P.) Ltd. and Another* v. *Madhukar Nowlakha and Others*, (2006) 3 SCC 699; and *Bhagat Singh Bugga* v. *Dewan Jagbir Sawhney*, 1941 SCC OnLine Cal 247. For Section 482 Cr.P.C. see – *Popular Muthiah* v. *State Represented By Inspector Of Police*, (2006) 7 SCC 296; and *Dinesh Dutt Joshi* v. *State of Rajasthan and Another*, (2001) 8 SCC 570

[25] This statement on legislation is equally true, if not truer, for exercise of power by this Court under Article 142(1) of the Constitution of India.

[26] Earlier judgments of different High Courts in *Bhim Singh* v. *Kan Singh*, 2003 SCC OnLine Raj 326; *Nagen Kundu* v. *Emperor*, 1934 SCC OnLine Cal 12; and *Chhail Das* v. *State of Haryana*, 1974 SCC OnLine P&H 246, relating to the Cr.P.C., hold that the Cr.P.C. is deemed to be exhaustive when covered by a provision, but where a case arises which demands exercise of discretion, which is not within the provisions that the Cr.P.C. specifically provides, it would be reasonable to say that the court has power to make such order as the 'ends of justice' require. Every criminal court, including the court of a Metropolitan Magistrate, has this power, notwithstanding the specific power conferred under Section 482 of the Cr.P.C. on the High Court.

should not contravene a fundamental and non-derogable principle at the core of the statute. Even in the strictest sense[27], it was never doubted or debated that this Court is empowered under Article 142(1) of the Constitution of India to do 'complete justice' without being bound by the relevant provisions of procedure, if it is satisfied that the departure from the said procedure is necessary to do 'complete justice' between the parties.[28] Difference between procedural and substantive law in jurisprudential terms is contentious, *albeit* not necessary to be examined in depth in the present decision[29], as in terms of the *dictum* enunciated by this Court in ***Union Carbide Corporation*** (supra) and ***Supreme Court Bar Association*** (supra), exercise of power under Article 142(1) of the Constitution of India to do 'complete justice' in a 'cause or matter' is prohibited only when the exercise is to pass an order which is plainly and expressly barred by statutory provisions of substantive law based on fundamental considerations of general or specific public policy. As explained in ***Supreme Court Bar Association*** (supra), the exercise of power under Article 142(1) of the Constitution of India being curative in nature, this Court would not ordinarily pass an order ignoring or disregarding a statutory provision governing the subject, except to balance the equities between conflicting claims of the litigating parties by ironing out creases in a 'cause or matter' before it. In this sense, this Court is not a forum of restricted jurisdiction when it decides and settles the dispute in a 'cause or matter'. While this Court cannot supplant the substantive law by building a new edifice where none existed earlier, or by ignoring express substantive statutory law provisions, it is a problem-solver in the nebulous areas. As long as 'complete justice' required by the 'cause or matter' is achieved without violating fundamental principles of general or specific public policy, the exercise of the power and discretion under Article 142(1) is valid and as per the Constitution of India. This is the reason why the power under Article 142(1) of the Constitution of India is undefined and uncatalogued, so as to ensure elasticity to mould relief to suit a given situation. The fact that the power is conferred only on this Court is an assurance that it will be used with due restraint and circumspection.[30]

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[27] Some jurists have opined that the judgments on the powers of this Court under Article 142(1) of the Constitution of India can be divided into three phases. The first phase till late 1980s is reflected in the judgments of *Prem Chand Garg* (supra) and *A.R. Antulay* (supra), which *inter alia* held that the directions should not be repugnant to and in violation of specific statutory provision and is limited to deviation from the rules of procedure. Further, the direction must not infringe the Fundamental Rights of the individual, which proposition has never been doubted and holds good in phase two and three. The second phase has its foundation in the ratio of the judgment of the 11-Judge Constitution Bench of this Court in *I. C. Golak Nath* (supra), dealing with the doctrine of prospective overruling, which held that Articles 32, 141 and 142 are couched in such wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice, the only limitation thereon being reason, restraint and injustice. In *Delhi Judicial Service Association* (supra), this Court observes that any prohibition or restriction contained in ordinary laws cannot act as a limitation on the constitutional power of this Court to issue any order or direction to do 'complete justice' in any 'cause' or 'matter'. Finally, the moderated approach has its origin in *Union Carbide Corporation* (supra), which holds that this Court, in exercising powers under Article 142 and in assessing the needs of 'complete justice' of a 'cause' or 'matter', will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The judgment of *Supreme Court Bar Association* (supra), applies cautious and balanced approach, to hold that Article 142 being curative in nature and a constitutional power cannot be controlled by any statutory provision, but this power is not meant to be exercised ignoring the statutory provisions or directly in conflict with what is expressly provided in the statute. At the same-time, it observes, that this Court will not ordinarily discard a statutory provision governing the subject, except perhaps to balance the equities between the conflicting claims of the parties to "iron out the creases" in a 'cause or matter' before it. [See – Rajat Pradhan, Ironing out the Creases: Reexamining the Contours of Invoking Article 142(1) of the Constitution, (2011) 6 NSLR 1; Ninad Laud, Rationalising "Complete Justice" under Article 142, (2021) 1 SCC J-30; and Virendra Kumar, Notes and Comments: Judicial Legislation Under Article 142 of the Constitution: A Pragmatic Prompt for Proper Legislation by Parliament, 54 JILI (2012) 364]. As observed by us, the ratio as expounded in Union Carbide Corporation (supra) holds good and applies.

[28] See – Prem Chand Garg (supra), paragraph 13.

[29] However, this aspect has been, to some extent, examined in paragraphs 16 to 22 and 30 infra.

[30] See – *Delhi Development Authority* v. *Skipper Construction Co. (P) Ltd. And Another,* (1996) 4 SCC 622.

Hindu marriage and divorce under the Hindu Marriage Act, 1955.

14. Hindu marriage is traditionally considered to be a sacred union; a devout relationship that lasts till eternity. The Hindu Marriage Act provides the right to approach the court for dissolution of Hindu marriage by grant of a decree of divorce on the grounds mentioned in Section 13 thereof. The provisions of the Hindu Marriage Act have undergone considerable changes over a period of time. Section 13(1)(i-a) was enacted by the Marriage Laws (Amendment) Act, 1976[31] to provide for divorce in cases of cruelty. Section 13-B of the Hindu Marriage Act was introduced for providing divorce by mutual consent. Explanation was added to Section 9 of the Hindu Marriage Act, which relates to restitution of conjugal rights, stating that where a question of whether there has been reasonable excuse for withdrawal from society arises, the burden of proving reasonable excuse shall be on the person who has so withdrawn from the society. The effect of the said amendment, as noticed below, partially dilutes the rigours of subsection (1)(a) to Section 23 of the Hindu Marriage Act, which stipulates that the court, while examining whether any ground for granting relief exists, should be satisfied that the petitioner is not, in any way, taking advantage of his/her own wrong or disability for the purpose of such relief.

15. Section 13-B of the Hindu Marriage Act reads as under:

"**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 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

16. Section 13-B(1) of the Hindu Marriage Act states that a decree of divorce may be granted on a joint petition by the parties on fulfilment of the following conditions:

(a) the parties have been living separately for a period of oneyear or more before presentation of the petition;

(b) they have not been able to live together; and

(c) they have mutually agreed that the marriage should be dissolved.

Sub-section (2) to Section 13-B of the Hindu Marriage Act provides that after the first motion is passed, the couple/parties would have to move to the court with the second motion, if the petition is not withdrawn in the meanwhile, after six months and not later than eighteen months of the first motion. No action can be taken by the parties before the lapse of six months since the first motion. When the second motion is filed, the court is to make an inquiry, and on satisfaction that the averments made in the petition are true, a decree of divorce is granted. Clearly, the legislative intent behind incorporating sub-section (2) to Section 13-B of the Hindu Marriage Act is that the couple/party must have time to introspect and consider the decision to separate before the second motion is

[31] Act 68 of 1976, *w.e.f.* 27.05.1976.

moved. However, there are cases of exceptional hardship, where after some years of acrimonious litigation and prolonged suffering, the parties, with a view to have a fresh start, jointly pray to the court to dissolve the marriage, and seek waiver of the need to move the second motion. On account of irreconcilable differences, allegations and aspersions made against each other and the family members, and in some cases multiple litigations including criminal cases, continuation of the marital relationship is an impossibility. The divorce is inevitable, and the cooling off period of six months, if at all, breeds misery and pain, without any gain and benefit. These are cases where the object and purpose behind sub-section (2) to Section 13-B of the Hindu Marriage Act to safeguard against hurried and hasty decisions are not in issue and question, and the procedural requirement to move the court with the second motion after a gap of six months acts as an impediment in the settlement. At times, payment of alimony and permanent lump-sum maintenance gets delayed, while anxiety and suspicion remain. Here, the procedure should give way to a larger public and personal interest of the parties in ending the litigation(s), and the pain and sorrow effected, by passing a formal decree of divorce, as *de-facto* the marriage had ended much earlier.

17. Analysing the provisions of sub-section (2) to Section 13-B of the Hindu Marriage Act, this Court in ***Amardeep Singh*** v. ***Harveen Kaur***[32] went into the question of whether the cooling off period of six months is mandatory or discretionary. It was held that the cooling off period can be waived by the court where the proceedings have remained pending for long in the courts, these being cases of exceptional situations. It was held thus:

"**14.** The learned Amicus Curiae submitted that waiting period enshrined under Section 13-B(2) of the Act is directory and can be waived by the court where proceedings are pending, in exceptional situations. This view is supported by the judgments of the Andhra Pradesh High Court in *K. Omprakash v. K. Nalini*, Karnataka High Court in *Roopa Reddy v. Prabhakar Reddy*, Delhi High Court in *Dhanjit Vadra v. Beena Vadra* and Madhya Pradesh High Court in *Dineshkumar Shukla v. Neeta*. Contrary view has been taken by the Kerala High Court in *M. Krishna Preetha v. Jayan Moorkkanatt*. It was submitted that Section 13-B(1) relates to jurisdiction of the court and the petition is maintainable only if the parties are living separately for a period of one year or more and if they have not been able to live together and have agreed that the marriage be dissolved. Section 13-B(2) is procedural. He submitted that the discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation and parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13-B(2). Thus, the court should consider the questions:

(i) How long parties have been married?

(ii) How long litigation is pending?

(iii) How long they have been staying apart?

(iv) Are there any other proceedings between the parties?

(v) Have the parties attended mediation/ conciliation?

(vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or any other pending issues between the parties?

xx xx xx

[32] (2017) 8 SCC 746.

19. Applying the above to the present situation, we are of the view that where the court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13-B(2), it can do so after considering the following:

(i) the statutory period of six months specified in Section 13-B(2), in addition to the statutory period of one year under Section 13-B(1) of separation of parties is already over before the first motion itself;

(ii) all efforts for mediation/conciliation including efforts in terms of Order 32-A Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

(iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

(iv) the waiting period will only prolong their agony.

The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the court concerned."

The time gap is meant to enable the parties to cogitate, analyse and take a deliberated decision. The object of the cooling off period is not to stretch the already disintegrated marriage, or to prolong the agony and misery of the parties when there are no chances of the marriage working out. Therefore, once every effort has been made to salvage the marriage and there remains no possibility of reunion and cohabitation, the court is not powerless in enabling the parties to avail a better option, which is to grant divorce. The waiver is not to be given on mere asking, but on the court being satisfied beyond doubt that the marriage has shattered beyond repair. The judgment in ***Amardeep Singh*** (supra) refers to several questions that the court would ask before passing an order one way or the other. However, this judgment proceeds on the interpretation of Section 13-B(2) of the Hindu Marriage Act, and does not examine whether this Court can take on record a settlement agreement and grant divorce by mutual consent under Section 13-B of the Hindu Marriage Act in exercise of the power under Article 142(1) of the Constitution of India.

18. We must acknowledge that this Court has very often entertained applications/prayers for divorce by mutual consent under Section 13-B of the Hindu Marriage Act, and passed a decree of divorce without relegating or asking the parties to move a joint motion before the trial court. In such cases, other pending proceedings between the parties, civil and criminal, are appropriately dealt with in terms of the settlement, and are decreed, quashed or closed accordingly. This situation arises when proceedings are pending in this Court against an interim or a final order passed in a judicial proceeding, or on a transfer petition being filed before this Court. The parties may mutually agree to dissolve the marriage, *albeit* on many occasions they enter into settlements, often through mediation or on being prompted by the Court. In matrimonial matters, settlement, and not litigation, is the preferable mode of dispute resolution.[33]

19. Exercise of jurisdiction under Article 142(1) of the Constitution of India by this Court in such cases is clearly permissible to do 'complete justice' to a 'cause or matter'. We should accept that this Court can pass an order or decree which a family court, trial court or High Court can pass. As per Article 142(1) of the Constitution of India, a decree passed

[33] See – Section 89 of the C.P.C. and Section 9 of the Family Courts Act, 1984.

or an order made by this Court is executable throughout the territory of India.[34] Power of this Court under Articles 136 and 142(1) of the Constitution of India will certainly embrace and enswathe this power to do 'complete justice', even when the main case/proceeding is pending before the family court, the trial court or another judicial forum. A question or issue of lack of subject-matter jurisdiction does not arise. Settlements in matrimonial matters invariably end multiple legal proceedings, including criminal proceedings in different courts and at diverse locations. Necessarily, in such cases, the parties have to move separate applications in multiple courts, including the jurisdictional High Court, for appropriate relief and closure, and disposal and/or dismissal of cases. This puts burden on the courts in the form of listing, paper work, compliance with formalities, verification etc. Parallelly, parties have to bear the cost, appear before several forums/courts and the final orders get delayed causing anxiety and apprehension. In this sense, when this Court exercises the power under Article 142(1) of the Constitution of India, it assists and aids the cause of justice.

20. However, there is a difference between existence of a power, andexercise of that power in a given case. Existence of power is generally a matter of law, whereas exercise of power is a mixed question of law and facts. Even when the power to pass a decree of divorce by mutual consent exists and can be exercised by this Court under Article 142(1) of the Constitution of India, when and in which of the cases the power should be exercised to do 'complete justice' in a 'cause or matter' is an issue that has to be determined independent of existence of the power. This discretion has to be exercised on the basis of the factual matrix in the particular case, evaluated on objective criteria and factors, without ignoring the objective of the statutory provisions. In ***Amit Kumar*** v. ***Suman Beniwal*** [35], this Court has held that reading of sub-sections (1) and (2) to Section 13-B of the Hindu Marriage Act envisages a total waiting period/gap of one and a half years from the date of separation for the grant of decree of divorce by mutual consent. Once the condition for waiting period/gap of one and a half year from the date of separation is fulfilled, it can be safely said that the parties had time to ponder, reflect and take a conscious decision on whether they should really put the marriage to end for all times to come. This period of separation prevents impulsive and heedless dissolution of marriage, allows tempers to cool down, anger to dissipate, and gives the spouses time to forgive and forget. At the same time, when there is complete separation over a long period and the parties have moved apart and have mutually agreed to separate, it would be incoherent to perpetuate the litigation by asking the parties to move the trial court. This Court in ***Amit Kumar*** (supra) has observed that, in addition to referring to the six factors/questions in ***Amardeep Singh*** (supra), this Court should ascertain whether the parties have freely, on their own accord, and without any coercion or pressure arrived at a genuine settlement which took care of the alimony, if any, maintenance and custody of children, etc.

21. In our opinion, Section 13-B of the Hindu Marriage Act does not impose any fetters on the powers of this Court to grant a decree of divorce by mutual consent on a joint application, when the substantive conditions of the Section are fulfilled and the Court, after referring to the factors mentioned above, is convinced and of the opinion that the decree of divorce should be granted.

22. The legislature and the courts treat matrimonial litigations as a special, if not a unique, category. Public policy underlying the legislations dealing with family and

[34] See – the Supreme Court (Decrees and Orders) Enforcement Order, 1954 (C.O.47).

[35] (2021) SCC Online SC 1270.

matrimonial matters is to encourage mutual settlement, as is clearly stated in Section 89 of the C.P.C., Section 23(2) of the Hindu Marriage Act, and Section 9 of the Family Courts Act, 1984. Given that there are multiple legislations governing different aspects, even if the cause of dispute is identical or similar, most matrimonial disputes lead to a miscellany of cases including criminal cases, at times genuine, and on other occasions initiated because of indignation, hurt, anger or even misguided advice to teach a lesson. The multiplicity of litigations can restrict and block solutions, as a settlement has to be holistic and comprehensive, given that the objective and purpose is to enable the parties to cohabit and live together, or if they decide to part ways, to have a new beginning and settle down to live peacefully. Therefore, in ***B.S. Joshi and Others*** v. ***State of Haryana and Another***[36], this Court, notwithstanding that Section 320 of the Cr.P.C. does not permit compounding of an offence under Section 498A of the I.P.C., has held that the High Court, exercising the power under Section 482 of the Cr.P.C., may quash prosecutions even in non-compoundable offences when the ends of justice so require. This view has been affirmed by the three judges' bench in ***Gian Singh*** v. ***State of Punjab and Another***[37] and reiterated by another three judges' bench in ***Jitendra Raghuvanshi and Others*** v. ***Babita Raghuvanshi and Another***[38]. The reason is that the courts must not encourage matrimonial litigation, and prolongation of such litigation is detrimental to both the parties who lose their young age in chasing multiple litigations. Thus, adopting a hyper-technical view can be counter-productive as pendency itself causes pain, suffering and harassment and, consequently, it is the duty of the court to ensure that matrimonial matters are amicably resolved, thereby bringing the agony, affliction, and torment to an end. In this regard, the courts only have to enquire and ensure that the settlement between the parties is achieved without pressure, force, coercion, fraud, misrepresentation, or undue influence, and that the consent is indeed sought by free will and choice, and the autonomy of the parties is not compromised. The latter two decisions in ***Gian Singh*** (supra) and ***Jitendra Raghuvanshi and Others*** (supra) observe that the inherent power on the High Court under Section 482 of the Cr.P.C. is wide and can be used/wielded to quash criminal proceedings to secure the ends of justice and prevent abuse of the process of the court, *albeit* it has to be exercised sparingly, carefully, and with caution. This Court, in ***State of Madhya Pradesh*** v. ***Laxmi Narayan and Others***[39], has set out guidelines as to when the High Court may exercise jurisdiction under the inherent powers conferred under Section 482 of the Cr.P.C. for quashing non-compoundable offences in terms of Section 320 of the Cr.P.C. In view of the above legal position and discussion, this Court, on the basis of settlement between the parties, while passing a decree of divorce by mutual consent, can set aside and quash other proceedings and orders, including criminal cases and First Information Report(s), provided the conditions, as specified in the aforementioned judgments, are satisfied.

Grant of divorce on the ground of irretrievable breakdown of marriage in exercise of jurisdiction and power under Article 142(1) of the Constitution of India.

23. This brings us to the last question of whether this Court, in exercise of power under Article 142(1) of the Constitution of India, can grant a decree of divorce when, upon the prayer of one of the spouses, it is satisfied that there is complete and irretrievable

[36] (2003) 4 SCC 675.
[37] (2012) 10 SCC 303.
[38] (2013) 4 SCC 58.
[39] (2019) 5 SCC 688.

breakdown of marriage, notwithstanding the opposition to such prayer by the other spouse?

24. Section 13(1)(i-a) of the Hindu Marriage Act, enacted by Act No. 68 of 1976 with effect from 25th May 1976, reads thus:

"**13 Divorce.-** (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

xx xx xx

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

xx xx xx"

This provision often has to be read with clause (a) to Section 23(1) of the Hindu Marriage Act, the substantive portion of which was enacted as a part of the main enactment *vide* Act No. 25 of 1955, and reads:

"**23. Decree in proceedings. —** (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that—

(a) any of the grounds for granting relief exists and the petitioner [40]*[except in cases where the relief is sought by him on the ground specified in sub-clause (a), subclause (b) or sub-clause (c) of clause (ii) of Section 5]* is not in anyway taking advantage of his or her own wrong or disability for the purpose of such relief, and xx xx xx"

The legal effect of Section 13(1)(i-a) read with Section 23 (1) (a) of the Hindu Marriage Act, it has been interpreted, invokes the 'fault theory', an aspect which we shall subsequently examine. First, we would like to delineate the meaning of the term 'cruelty', which expression has not been defined in the Hindu Marriage Act.

25. In ***N.G. Dastane*** v. ***S. Dastane***[41], as early as 1975, a three judges' bench of this Court, after referring to the provisions of the Indian Evidence Act, 1972, held that the fact is said to be established if it is proved by a preponderance of probabilities, that is, the court believes it to exist or considers its existence so probable that a prudent man ought to, under the circumstances of a particular case, act upon the supposition that it exists. Often, the belief regarding the existence of a fact is founded on balance of probabilities, that is, the court is to weigh the various probabilities to discern the preponderance in favour of the existence of a particular fact. Holding that the proceedings under the Hindu Marriage Act are civil proceedings, and referring to the provisions of Section 23 of the Hindu Marriage Act, it was held that the word 'satisfied' must connote satisfaction on 'preponderance of probabilities' and not 'beyond a reasonable doubt'. On the meaning of 'cruelty' as a ground for dissolution of marriage, reference was made to the High Court's reliance on D. Tolstoy's passage in *The Law and Practice of Divorce and Matrimonial Causes*. Therein, 'cruelty' has been defined as wilful and unjustified conduct of such character as to cause danger to life, limb or health, bodily or mentally, or as to give rise to a reasonable apprehension of such danger. However, this Court felt that D. Tolstoy's passage, which cites ***Horton*** v. ***Horton***[42], is not enough to show that the spouses find life together impossible even if there results injury to health. Accordingly, this Court elucidated that if the danger to health arises merely from the fact that the spouses find it impossible to live together and one of the parties is indifferent towards the other, the charge of cruelty

[40] The bracketed portion was enacted *vide* Act No. 68 of 1976 with effect from 27.05.1976.

[41] (1975) 2 SCC 326.

[42] [1940] P.187.

may perhaps fail. However, harm or injury to health, reputation, the working-career or the like, would be important considerations in determining whether the conduct of the defending spouse amounts to cruelty. The petitioner has to show that the respondent has treated them with cruelty so as to cause reasonable apprehension in their mind that it will be harmful or injurious to live with the contesting spouse. In today's context, two observations, while a court enquires into the charge of cruelty, are of some significance. First, the court should not philosophise on the modalities of married life. Secondly, whether the charge is proved or not cannot be decided by applying the principle of whether a reasonable man situated similarly will behave in a similar manner. What may be cruel to one may not matter to another, and what may not be cruel to an individual under one set of circumstances may be extreme cruelty under another set of circumstances. Cruelty is subjective, that is, it is person, background, and circumstance specific.

26. ***V. Bhagat*** v. ***D. Bhagat***[43], which was pronounced in 1993, 18 years after the decision in ***N.G. Dastane*** (supra), gives a life-like expansion to the term 'cruelty'. This case was between a husband who was practicing as an Advocate, aged about 55 years, and the wife, who was the Vice President in a public sector undertaking, aged about 50 years, having two adult children – a doctor by profession and an MBA degree holder working abroad, respectively. Allegations of an adulterous course of life, lack of mental equilibrium and pathologically suspicious character were made against each other. This Court noticed that the divorce petition had remained pending for more than eight years, and in spite of the directions given by this Court, not much progress had been made. It was highlighted that cruelty contemplated under Section 13(1)(i-a) of the Hindu Marriage Act is both mental and physical, *albeit* a comprehensive definition of what constitutes cruelty would be most difficult. Much depends upon the knowledge and intention of the defending spouse, the nature of their conduct, the character and physical or mental weakness of the spouses, etc. The sum total of the reprehensible conduct or departure from normal standards of conjugal kindness that causes injury to health, or an apprehension of it, constitutes cruelty. But these factors must take into account the temperament and all other specific circumstances in order to decide that the conduct complained of is such that a petitioner should not be called to endure it. It was further elaborated that cruelty, mental or physical, may be both intentional or unintentional. Matrimonial obligations and responsibilities vary in degrees. They differ in each household and to each person, and the cruelty alleged depends upon the nature of life the parties are accustomed to, or their social and economic conditions. They may also depend upon the culture and human values to which the spouses assign significance. There may be instances of cruelty by unintentional but inexcusable conduct of the other spouse. Thus, there is a distinction between intention to commit cruelty and the actual act of cruelty, as absence of intention may not, in a given case, make any difference if the act complained of is otherwise regarded as cruel. Deliberate and wilful intention, therefore, may not matter. Paragraph 16 of the judgment in ***V. Bhagat*** (supra) reads as under:

"**16.** Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of

[43] (1994) 1 SCC 337.

the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."

The Division Bench of this Court in ***V. Bhagat*** (supra) has also observed that while irretrievable breakdown of marriage is not a ground for divorce, specific circumstances may have to be borne in mind while ascertaining the type of cruelty contemplated by Section 13(1)(i-a) of the Hindu Marriage Act. These observations, with which we agree, give a different connotation to the 'fault theory', as to dilute the strict legal understanding of the term 'cruelty' for the purpose of Section 13(1)(i-a) of the Hindu Marriage Act. This interpretation is situation, case and person specific.

27. In ***Ashok Hurra*** v. ***Rupa Bipin Zaveri***[44], decided in 1997, this Court was confronted with a situation where the marriage had fallen apart and the couple had separated in 1983. They did not have any specific issue, but difference of opinion had cropped up between the parties. Further, even after residing separately for thirteen years, the parties were not agreeable to a divorce by mutual consent. This was in spite of the fact that the husband had remarried and had a child. This Court was of the view that considering the cumulative effect of various factors and the marriage being dead, no useful purpose, both emotionally and practically, would be served in postponing the inevitability and prolonging the agony of the parties or their marriage and, therefore, the curtain should be rung down. This Court, therefore, exercised the power under Article 142(1) of the Constitution of India to grant a decree of divorce, though the conduct of the husband, it was observed, was blameworthy as he had remarried and conceived a child during the pendency of the proceedings. This decree of divorce by mutual consent was made conditional on payment of Rs.10,00,000/- by the husband to the wife. Only on payment or deposit of the amount in the Court, all proceedings, including those under Section 494 of the I.P.C., were to stand terminated.

28. In ***Naveen Kohli*** v. ***Neelu Kohli***[45], a three judges' bench of this Court referred to the opinion of Lord Denning, L.J. in *Kaslefsky v. Kaslefsky*[46] that if the door of cruelty were opened too wide, the courts would be granting divorce for incompatibility of temperament, but this temptation must be resisted, lest the institution of marriage is imperilled. At the same time, the bench felt that the concept of legal cruelty has changed according to the advancement of social concepts and standards of living. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the spouse and allegation of unchastity are all factors that lead to mental or legal cruelty. While doing so, this Court affirmed that a set of facts stigmatized as cruelty in one case may not be so in another, as cruelty largely depends on the kind of lifestyle the parties are accustomed to or their social and economic conditions. Similarly, intention, it was observed, was immaterial as there can be cruelty even by unintentional conduct. Moreover, mental cruelty is difficult to establish by direct evidence and is to be deciphered by attending to the facts and circumstances in which the two partners in matrimony had been living. On the question of irretrievable breakdown of marriage, which is not a ground for divorce under the Hindu Marriage Act, reference was made to the fault theory, which is hinged on an accusatorial principle of divorce. Excessive reliance on fault as a ground for divorce, the

[44] (1997) 4 SCC 226.
[45] (2006) 4 SCC 558.
[46] (1950) 2 All ER 398.

judges' opined, encourages matrimonial offences, increases bitterness and widens the ongoing rift between the parties. Once serious endeavours for reconciliation have been made, but it is found that the separation is inevitable and the damage is irreparable, divorce should not be withheld. An unworkable marriage, which has ceased to be effective, is futile and bound to be a source of greater misery for the parties. The law of divorce built predominantly on assigning fault fails to serve broken marriages. Under the fault theory, guilt has to be proven, and therefore, the courts have to be presented with concrete instances of adverse human behaviour, thereby maligning the institution of marriage. Public interest demands that the marriage status should, as far as possible, be maintained, but where the marriage has been wrecked beyond the hope of salvage, public interest lies in recognising the real fact. No spouse can be compelled to resume life with a consort, and as such, nothing is gained by keeping the parties tied forever to a marriage which has, in fact, ceased to exist. In ***Naveen Kohli*** (supra), the parties had been living separately for more than a decade, and civil and criminal proceedings had been initiated. Therefore, the Court held that the marriage should be dissolved, as wisdom lies in accepting the pragmatic reality of life. The Court should take a decision which would ultimately be conducive to the interest of both the parties. The Court also directed the payment of Rs.25,00,000/- towards permanent maintenance to the wife.

29. In 2018, the Supreme Court of the United Kingdom, in ***Owens*** v. ***Owens***[47], had the occasion to analyse and evaluate the fault theory as a ground for divorce, which requires one spouse to make allegations on the conduct of the other. The judgment notes that the courts invariably face a daunting task in finding the truth of why the marriage has collapsed. Apportioning blame is an inherently difficult task, given the fact that the court has to find faults in the conduct of the spouses, expecting them to have neither heroic virtues nor selfless abnegation. As subjectivity is involved, the courts find it difficult to evaluate the gravity or otherwise of the conduct complained of and find the truth. Lord Wilson, with whom Lord Hodge and Lady Black agreed, had referred to the three-fold test to interpret Section 1(2)(b) of the Matrimonial Causes Act 1973 (of England and Wales) to establish whether the marriage had been irretrievably broken down in such a way that the petitioner cannot reasonably be expected to live with the respondent; (i) by reference to the allegations of behaviour in the petition, to determine what the respondent did or did not do; (ii) to assess the effect which the behaviour had upon the particular petitioner in the light of the latter's personality and disposition and of all circumstances in which it occurred; and (iii) to make an evaluation whether as a result of the respondent's behaviour and in the light of its effect on the petitioner, an expectation that the petitioner should continue to live with the respondent would be unreasonable[48]. Lady Hale, in her judgment, observed that searching and assigning blame is not vital, as the ground of divorce is based on conduct, and not fault or fact finding to ascertain the party to be blamed. On the other hand, cumulative effect of a great number of small incidents indicative of authoritarian, demeaning and humiliating conduct over a period of time would constitute a good ground for divorce. Such conduct can destroy the trust and confidence required to sustain a marriage. Further, the effect of the spouse's behaviour, rather than the behaviour itself, should make it unreasonable to expect the other spouse to cohabit; this is the question to be answered.

30. We have referred to the judgment in ***Owens*** (supra), which applies the then law in England and Wales, not as a precedent, but to highlight that even two perfectly gentle and

[47] (2018) UKSC 41.

[48] These tests, with suitable modification, can well be applied in cases under Section 13(1)(i-a) of the Hindu Marriage Act.

pleasant individuals having incompatible and clashing personalities can have a miserable and morose married life. In such cases, fault theory in the pure form requiring apportionment of guilt and blame, is a difficult, if not an impossible task, whereas in practical reality the situation is appalling and unnerving. The marriage is irretrievably broken down and dead. We would not read the provisions of the Hindu Marriage Act, their underlying intent, and any fundamental specific issue of public policy, as barring this Court from dissolving a broken and shattered marriage in exercise of the Constitutional power under Article 142(1) of the Constitution of India. If at all, the underlying fundamental issues of public policy, as explained in the judgments of ***V. Bhagat*** (supra), ***Ashok Hurra*** (supra), and ***Naveen Kohli*** (supra), support the view that it would be in the best interest of all, including the individuals involved, to give legality, in the form of formal divorce, to a dead marriage, otherwise the litigation(s), resultant sufferance, misery and torment shall continue. Therefore, apportioning blame and greater fault may not be the rule to resolve and adjudicate the dispute in rare and exceptional matrimonial cases, as the rules of evidence under the Evidence Act are rules of procedure. When the life-like situation is known indubitably, the essence and objective behind section 13(1)(i-a) of the Hindu Marriage Act that no spouse should be subjected to mental cruelty and live in misery and pain is established. These rules of procedure must give way to 'complete justice' in a 'cause or matter'. Fault theory can be diluted by this Court to do 'complete justice' in a particular case, without breaching the self-imposed restraint applicable when this Court exercises power under Article 142(1) of the Constitution of India, as elucidated in the judgments referred to above.[49]

31. At this juncture, we would refer to two judgments authored by one of the members of this bench (Sanjay Kishan Kaul, J.) in ***Munish Kakkar*** v. ***Nidhi Kakkar***[50] and ***Sivasankaran*** v. ***Santhimeenal***[51]. In ***Munish Kakkar*** (supra), the parties had been engaged in multifarious litigations, including divorce proceedings, for almost two decades. Yet, they opposed divorce by mutual consent. The respondent - wife was based in Canada, to where she had shifted, and was statedly taking medication for depression. The appellant husband complained of loneliness and lack of co-habitation, causing mental and physical torture. Several attempts to mediate, and efforts made by counsellors, psychologists, the *panchayat* and even the courts did not yield results. In these circumstances, this Court exercised the power under Article 142(1) of the Constitution of India, recognising the futility of a completely failed and broken down marriage. While observing that there was no consent of the respondent - wife for grant of divorce, the Court felt that there was no willingness on her part either to live with the appellant - husband. What was left in the marriage were bitter memories and angst, which increased with the passage of time, as the respondent - wife was reluctant to let the appellant husband live his life by getting a decree of divorce. In view of the aforesaid position, this Court exercised the power under Article 142(1) of the Constitution of India to do 'complete justice' between the parties. It was also directed that the appellant - husband would continue to pay the specified amount per month to the respondent - wife, which amount could be enhanced or reduced by taking recourse to appropriate proceedings.

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[49] Explanation to Section 9 of the Hindu Marriage Act, which reads, "*Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society*", partially mitigates the rigors to Section 23(1)(a) of the Hindu Marriage Act and, consequently, the fault theory.

[50] (2020) 14 SCC 657.

[51] 2021 SCC OnLine SC 702.

32. In ***Sivasankaran*** (supra), the marriage had taken place in February 2002, and after about a year, divorce proceedings were initiated and the decree of divorce was passed in 2008 under Section 13(1)(i-a) of the Hindu Marriage Act. The appellant husband had remarried within six days of the passing of the decree of divorce. The respondent - wife filed an appeal and the dispute had remained pending till it reached this Court. Attempts to resolve the dispute through mediation and settlement between the parties bore no fruit. The respondent - wife was resistant to accept the decree of divorce, even though she was aware that the marriage was but only on paper. Observations on the difficulty faced by women in the form of social acceptance after a decree of divorce, and also the need to guarantee financial and economic security were elucidated. However, this Court, relying on the earlier decisions in ***Munish Kakkar*** (supra) and ***R. Srinivas Kumar*** v. ***R. Shametha***[52], observed that there was no necessity of consent by both the parties for exercise of powers under Article 142(1) of the Constitution of India to dissolve the marriage on the ground of irretrievable breakdown of marriage, *albeit* the interest of the wife is also required to be protected financially so that she may not have to suffer financially in future and she may not have to depend upon others. Accordingly, this Court passed a decree of divorce by exercising the jurisdiction under Article 142(1) of the Constitution of India.

33. Having said so, we wish to clearly state that grant of divorce on the ground of irretrievable breakdown of marriage by this Court is not a matter of right, but a discretion which is to be exercised with great care and caution, keeping in mind several factors ensuring that 'complete justice' is done to both parties. It is obvious that this Court should be fully convinced and satisfied that the marriage is totally unworkable, emotionally dead and beyond salvation and, therefore, dissolution of marriage is the right solution and the only way forward. That the marriage has irretrievably broken down is to be factually determined and firmly established. For this, several factors are to be considered such as the period of time the parties had cohabited after marriage; when the parties had last cohabited; the nature of allegations made by the parties against each other and their family members; the orders passed in the legal proceedings from time to time, cumulative impact on the personal relationship; whether, and how many attempts were made to settle the disputes by intervention of the court or through mediation, and when the last attempt was made, etc. The period of separation should be sufficiently long, and anything above six years or more will be a relevant factor. But these facts have to be evaluated keeping in view the economic and social status of the parties, including their educational qualifications, whether the parties have any children, their age, educational qualification, and whether the other spouse and children are dependent, in which event how and in what manner the party seeking divorce intends to take care and provide for the spouse or the children. Question of custody and welfare of minor children, provision for fair and adequate alimony for the wife, and economic rights of the children and other pending matters, if any, are relevant considerations. We would not like to codify the factors so as to curtail exercise of jurisdiction under Article 142(1) of the Constitution of India, which is situation specific. Some of the factors mentioned can be taken as illustrative, and worthy of consideration.

34. Towards the end, for the sake of completeness and to avoid confusion and debate on the ratio we have expounded, we would like to examine a few decisions, in which this Court had refused to exercise jurisdiction under Article 142(1) of the Constitution of India or dispense with the period of six months for moving the second motion. In ***Manish Goel*** (supra), a division bench of this Court has held that power and jurisdiction under Article

[52] (2019) 9 SCC 409.

136 of the Constitution of India, though couched in the widest possible terms and plenary in nature, is discretionary. Thus, extraordinary care and caution must be exercised, and unless it is shown that exceptional and special circumstances exist to demonstrate that substantial and grave injustice has been rendered, this Court should not review/interfere with the decision appealed against. Article 136 of the Constitution of India should not be used to shortcircuit the legal procedure prescribed. The power under Article 142(1) of the Constitution of India was summarised to observe that generally, this Court would not pass an order in contravention or ignorance of a statutory provision, or merely on sympathetic grounds. However, the bench did not specifically examine the question of whether the period prescribed under Section 13-B of the Hindu Marriage Act is mandatory or directory in nature, and if directory, whether the same could be dispensed with by the High Court in exercise of its writ/appellate jurisdiction.[53] Further, the two judges' bench did not exercise extraordinary jurisdiction under Article 142(1) of the Constitution of India, observing that it was not a case where there was any obstruction to the stream of justice, or there was injustice to the parties requiring the court to grant equitable relief. The contingencies to exercise of power under Article 142(1) of the Constitution of India were not established.

35. In ***Hitesh Bhatnagar*** v. ***Deepa Bhatnagar***[54], one of the parties had withdrawn the consent before the stage of second motion, and therefore, the decree of divorce could not be passed. The bench relied on the earlier judgment in ***Sureshta Devi*** v. ***Om Prakash***[55], wherein it has been held that in a case of divorce by mutual consent, a party may withdraw the consent at any stage before the decree of divorce is passed. This ratio has been approved by a three judges' bench in ***Smruti Pahariya*** v. ***Sanjay Pahariya***[56]. Consequently, following these judgments, ***Hitesh Bhatnagar*** (supra) opines that a decree of divorce cannot be passed as the second motion, which is a requirement in law, was never moved by both the parties. It is also observed that nonwithdrawal of consent within 18 months, the period stipulated in sub-section (2) to Section 13-B of the Hindu Marriage Act, has no bearing as this period of 18 months is specified only to ensure quick disposal of cases of divorce by mutual consent. Sub-section (2) to Section 13-B of the Hindu Marriage Act does not specify the time period for withdrawal of consent. Plea to grant divorce on the ground of irretrievable breakdown by invoking Article 142 of the Constitution of India was not entertained, *albeit* observing that this can be granted only in situations where the Court is convinced beyond any doubt that there is absolutely no chance in the marriage surviving and that it had broken beyond repair. Nevertheless, the bench deemed it appropriate to state that they have not finally expressed any opinion on the issue of the power under Article 142 of the Constitution of India *vis-à-vis* dissolution of marriage.

36. In ***Shyam Sundar Kohli*** v. ***Sushma Kohli alias Satya Devi***[57], the bench had refused to grant divorce on the ground of irretrievable breakdown of marriage, but also observed that only in extreme circumstances would this Court dissolve the marriage on this ground.

37. In ***Darshan Gupta*** v. ***Radhika Gupta***[58], the ground of cruelty had not been established. Thereafter, the two judges' bench, on examination of Section 13(1) of the Hindu Marriage Act, observed that it is founded on 'matrimonial offence theory' or 'fault

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[53] See – *Manish Goel* (supra), paragraph 23.
[54] (2011) 5 SCC 234
[55] (1991) 2 SCC 25.
[56] (2009) 13 SCC 338.
[57] (2004) 7 SCC 747.
[58] (2013) 9 SCC 1.

theory', and as a *sequitur*, the person who is at fault and commits cruelty cannot raise the accusing finger on the other spouse on the basis of those very allegations and seek dissolution of marriage thereon. This case was peculiar as the person seeking divorce, as per the findings, was clearly at fault and to be blamed. The plea of irretrievable breakdown of marriage was raised and rejected as not postulated in the statutory provisions. Reliance placed on ***Gurbux Singh*** v. ***Harminder Kaur***[59], to urge that divorce should be granted in exercise of power under Article 142 of the Constitution of India, was not accepted as the bench could not be persuaded on the ground and facts of the case to justify exercise of the power. The bench observed that the concept of justice varies depending upon the interest of the party. The Hon'ble judges held that "*it is questionable as to whether the relief sought…on the ground of irretrievable breakdown of marriage is available…*". Thus, in this case, the judgment did not give any firm opinion and finding on the questions that we have answered with reference to the jurisdiction and power of this Court under Article 142(1) of the Constitution of India.

38. In ***Neelam Kumar*** v. ***Dayarani***[60], reference was made to ***Satish Sitole*** v. ***Ganga***,[61] wherein the marriage was dissolved in exercise of the power under Article 142 of the Constitution of India on the ground of its irretrievable breakdown, but the submission was not accepted in ***Neelam Kumar*** (supra) on the reason that there was nothing to indicate that the respondent was, in any way, responsible for the breakdown of marriage. It was observed that in ***Vishnu Dutt Sharma*** v. ***Manju Sharma***[62], this Court has held that irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act. However, ***Vishnu Dutt Sharma*** (supra) did not determinatively enunciate on the jurisdiction under Article 142(1) of the Constitution of India. The judgment in ***Neelam Kumar*** (supra) acknowledges that in ***Satish Sitole*** (supra), this Court did exercise jurisdiction under Article 142(1) of the Constitution of India to dissolve the marriage, as it was in the interest of the parties. In the facts of ***Neelam Kumar*** (supra), the bench was not inclined to accede to the request of granting divorce in exercise of the power conferred by Article 142(1) of the Constitution of India.

39. The judgment in ***Savitri Pandey*** v. ***Prem Chandra Pandey***[63] refers to an earlier decision of this Court in ***Jorden Diengdeh*** v. ***S.S. Chopra***[64], in which the two judges' bench had suggested a complete reform of the law of marriage and for a uniform law applicable to all, irrespective of religion and caste, as well as the need to introduce irretrievable breakdown of marriage as a ground for divorce. ***Jorden Diengdeh*** (supra) observes that no purpose would be served by continuing a marriage that has completely and signally broken down, but the legislature has not thought it proper to provide for the said ground. This Court in ***Savitri Pandey*** (supra) held that there could be cases where on facts, the marriage has become dead on account of contributory acts of commission and omission by the parties, as in the case of ***V. Bhagat*** (supra). At the same time, the bench felt that the sanctity of marriage cannot be left at the whims of one of the annoying parties.

40. In view of our findings recorded above, we are of the opinion that the decisions of this Court in ***Manish Goel*** (supra), ***Neelam Kumar*** (supra), ***Darshan Gupta*** (supra),

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[59] (2010) 14 SCC 301.
[60] (2010) 13 SCC 298.
[61] (2008) 7 SCC 734.
[62] (2009) 6 SCC 379.
[63] (2002) 2 SCC 73
[64] (1985) 3 SCC 62

Hitesh Bhatnagar (supra), ***Savitri Pandey*** (supra) and others have to be read down in the context of the power of this Court given by the Constitution of India to do 'complete justice' in exercise of the jurisdiction under Article 142(1) of the Constitution of India. In consonance with our findings on the scope and ambit of the power under Article 142(1) of the Constitution of India, in the context of matrimonial disputes arising out of the Hindu Marriage Act, we hold that the power to do 'complete justice' is not fettered by the doctrine of fault and blame, applicable to petitions for divorce under Section 13(1)(i-a) of the Hindu Marriage Act. As held above, this Court's power to dissolve marriage on settlement by passing a decree of divorce by mutual consent, as well as quash and set aside other proceedings, including criminal proceedings, remains and can be exercised.

41. Lastly, we must express our opinion on whether a party can directly canvass before this Court the ground of irretrievable breakdown by filing a writ petition under Article 32 of the Constitution. In ***Poonam*** v. ***Sumit Tanwar***[65], a two judges' bench of this Court has rightly held that any such attempt must be spurned and not accepted, as the parties should not be permitted to file a writ petition under Article 32 of the Constitution of India, or for that matter under Article 226 of the Constitution of India before the High Court, and seek divorce on the ground of irretrievable breakdown of marriage. The reason is that the remedy of a person aggrieved by the decision of the competent judicial forum is to approach the superior tribunal/forum for redressal of his/her grievance. The parties should not be permitted to circumvent the procedure by resorting to the writ jurisdiction under Article 32 or 226 of the Constitution of India, as the case may be. Secondly, and more importantly, relief under Article 32 of the Constitution of India can be sought to enforce the rights conferred by Part III of the Constitution of India, and on the proof of infringement thereof. Judicial orders passed by the court in, or in relation to, the proceedings pending before it, are not amenable to correction under Article 32 of the Constitution of India.[66] Therefore, a party cannot file a writ petition under Article 32 of the Constitution of India and seek relief of dissolution of marriage directly from this Court. While we accept the said view, we also clarify that reference in ***Poonam*** (supra) to ***Manish Goel*** (supra) and the observation that it is questionable whether the period of six months for moving the second motion can be waived has not been approved by us.

Conclusion.

42. In view of the aforesaid discussion, we decide this reference by answering the questions framed in the following manner:

(i) The scope and ambit of power and jurisdiction of this Court under Article 142(1) of the Constitution of India.

This question as to the power and jurisdiction of this Court under Article 142(1) of the Constitution of India is answered in terms of paragraphs 8 to 13, *inter alia*, holding that this Court can depart from the procedure as well as the substantive laws, as long as the decision is exercised based on considerations of fundamental general and specific public policy. While deciding whether to exercise discretion, this Court must consider the substantive provisions as enacted and not ignore the same, *albeit* this Court acts as a

[65] (2010) 4 SCC 460.

[66] See – *Sahibzada Saiyed Muhammed Amirabbas Abbasi & Others* v. *State Of Madhya Bharat (Now Madhya Pradesh) & Others*, AIR 1960 SC 768; *Ujjam Bai* v. *State of Uttar Pradesh*, AIR 1962 SC 1621; and *Naresh Shridhar Mirajkar and Others* v. *State of Maharashtra and Another*, AIR 1967 SC 1.

problem solver by balancing out equities between the conflicting claims. This power is to be exercised in a 'cause or matter'.

(ii) In view of, and depending upon the findings of this bench on the first question, whether this Court, while hearing a transfer petition, or in any other proceedings, can exercise power under Article 142(1) of the Constitution, in view of the settlement between the parties, and grant a decree of divorce by mutual consent dispensing with the period and the procedure prescribed under Section 13-B of the Hindu Marriage Act, and also quash and dispose of other/connected proceedings under the Domestic Violence Act, Section 125 of the Cr.P.C., or criminal prosecution primarily under Section 498-A and other provisions of the I.P.C. If the answer to this question is in the affirmative, in which cases and under what circumstances should this Court exercise jurisdiction under Article 142 of the Constitution of India is an ancillary issue to be decided.

In view of our findings on the first question, this question has to be answered in the affirmative, *inter alia*, holding that this Court, in view of settlement between the parties, has the discretion to dissolve the marriage by passing a decree of divorce by mutual consent, without being bound by the procedural requirement to move the second motion. This power should be exercised with care and caution, keeping in mind the factors stated in ***Amardeep Singh*** (supra) and ***Amit Kumar*** (supra). This Court can also, in exercise of power under Article 142(1) of the Constitution of India, quash and set aside other proceedings and orders, including criminal proceedings.

(iii) Whether this Court can grant divorce in exercise of power under Article 142(1) of the Constitution of India when there is complete and irretrievable breakdown of marriage in spite of the other spouses opposing the prayer?

This question is also answered in the affirmative, *inter alia*, holding that this Court, in exercise of power under Article 142(1) of the Constitution of India, has the discretion to dissolve the marriage on the ground of its irretrievable breakdown. This discretionary power is to be exercised to do 'complete justice' to the parties, wherein this Court is satisfied that the facts established show that the marriage has completely failed and there is no possibility that the parties will cohabit together, and continuation of the formal legal relationship is unjustified. The Court, as a court of equity, is required to also balance the circumstances and the background in which the party opposing the dissolution is placed.

43. For the foregoing reasons, Transfer Petition (Civil) No. 1118 of 2014, Transfer Petition (Criminal) No. 382 of 2014, Transfer Petition (Criminal) No. 468 of 2014, and Transfer Petition (Civil) Nos. 1481-1482 of 2014 are disposed of, as *vide* order dated 06.05.2015, a division bench of this Court has already dissolved the marriage between the parties by invoking Article 142(1) of the Constitution of India.

44. Transfer Petition (Criminal) Nos. 96 and 339 of 2014 may be listed before the regular bench in the second week of May, 2023 for appropriate orders and directions.