

IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

Transfer Petition (Civil) No. 1118 of 2014

IN THE MATTER OF:

Mrs. Shilpa Shailesh

...Petitioner

Versus

Mr. Varun Sreenivasan

...Respondent

AMICUS BRIEF

SUBMITTED BY INDIRA JAISING, SENIOR ADVOCATE

APPOINTED BY THIS HON'BLE COURT IN THE ABOVE-MENTIONED

PETITION

THE ISSUE:

1. This Hon'ble Court *vide* order dated 20.09.2022 has framed a following question:

“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.”

DEFINITION OF MARRIAGE & LAW GOVERNING THE MARRIAGES

2. Before answering the question as framed by this Hon'ble Court, it is necessary to point out the substance of marriage is a voluntary union and requires consent of both parties. Under some personal laws the consent has to be given explicitly and under others, impliedly.
3. Almost all Statutes dealing with marriage and divorce, namely, *the Special Marriage Act, 1954, the Hindu Marriage Act, 1955, The Divorce Act, 1869, the Parsi Marriage And Divorce Act, 1939; the Dissolution of Muslim Marriages Act, 1939; the Muslim Personal Law (Shariat) Application Act, 1937*, deal with capacity to marry, the procedure prescribed for formation of marriage, and the manner and method of termination of marriage by divorce. However, strangely, none of them define the 'marriage', or/and what happens during the subsistence of a marriage. Before dealing with the question of '***Irretrievable Breakdown of Marriage***', it is necessary to deal with what exactly is marriage?

4. Consortium was defined in *Crabtree v Crabtree 1964 Australian Law Report 820 (10)* as :

"companionship, love, affection, comfort, mutual services, sexual intercourse. All these belong to the married state. Taken together they make up consortium." Consortium has been defined as "a partnership or association; but in the matrimonial sense it implies much more than these rather cold words surest. It involves a sharing of two lives, a sharing of joys and sorrows of each party, of their successes and disappointments. In its' fullest sense it implies a companionship between each of them, entertainment of mutual friends, sexual intercourse all those elements which, when combined. justify the old common law dictum that a man and his wife are one person".

This passage was quoted with approval in *Harmender Kaur v. Harvinder Singh AIR 1984 Del 66*.

5. Recently, a 2-Judge Bench of this Hon'ble Court in *Sivasankaran vs. Santhimeenal 2021 SCC OnLine SC 702* sought to define 'marriage' as follows:

"7. A marriage is more than a seemingly simple union between two individuals. As a social institution, all marriages have legal, economic, cultural, and religious ramifications. The norms of a marriage and the varying degrees of legitimacy it may acquire are dictated by factors such as marriage and divorce laws, prevailing social norms, and religious dictates. Functionally, marriages are seen as a site for the propagation of social and cultural capital as they help in identifying kinship

ties, regulating sexual behaviour, and consolidating property and social prestige. Families are arranged on the idea of a mutual expectation of support and amity which is meant to be experienced and acknowledged amongst its members. Once this amity breaks apart, the results can be highly devastating and stigmatizing. The primary effects of such breakdown are felt especially by women, who may find it hard to guarantee the same degree of social adjustment and support that they enjoyed while they were married.”

WHEN CAN IT BE SAID THAT MARRIAGE IS BROKEN DOWN AND WHAT ARE THE LEGAL CONSEQUENCE OF BREAKDOWN:

6. Pertinently, almost all the statutes dealing with marriage and divorce as indicated above, do provide ‘cruelty’, ‘adultery’ and ‘desertion’ to be a ground for divorce. The grounds for divorce are gender-neutral except that the Dissolution of Muslim Marriages Act, 1939 is available only to Muslim women for historical reasons. Inevitably when one party files a petition for divorce alleging cruelty, desertion, and the other party also levels counter allegations of a similar nature.

7. It is submitted that when one of the parties to the marriage alleges cruelty or desertion by other spouse, it is apparent that the marriage in a sense as indicated by this Hon’ble Court in *Sivasankaran (supra)* is broken down. While a court of law is able to deal with the financial consequences of the breakdown of marriage and with the welfare of children, there is no way of dealing with the mutual expectations of love and affection and amity. At best a court of law can and does

attempt reconciliation in public interest and in the interest of the children of marriage, if any.

8. The word 'breakdown' in the expression '***Irretrievable Breakdown of Marriage***' must be understood in its ordinary meaning namely something that has been rendered asunder. The word '***Irretrievable***' indicates that which has been broken could not be put together. A multiplicity of factors can lead to the breakdown of marriage including *inter-alia* cruelty, adultery and desertion by one or both the parties to the marriage. In other word '***mutual expectation of support and amity***' which is expected during the subsistence of marriage disappear which in-turn led to "***devastating and stigmatizing***" circumstances. In every case where cruelty, desertion and adultery are alleged, it is apparent that there is a breakdown of marriage.

9. The word '*irretrievable*' added to the expression, '*breakdown of marriage*' indicates that the parties have reached a point of no return in the marriage. The only method known to law to examine whether an irretrievable stage has reached is to attempt reconciliation with the intention to ascertain whether broken marriage can be put into a state of consortium. The public policy of law in India and as also in the United Kingdom (UK) is that every efforts should be made to ensure that marriage should not be broken since breakdown affects economic, social status of the parties and also the children, if any. It is for this reason Section 9 of the Family Court Act, 1984 casts a

duty¹ upon the Family Court to make endeavor to assist and persuade the parties in arriving at a settlement. Section 9 reads as follows:

“9. Duty of Family Court to make efforts for settlement.—

(1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

(2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of, any other power of the Family Court to adjourn the proceedings.”

10. It is submitted that the public policy would equally require that if a stage of **‘Irretrievable Breakdown of Marriage’** has been reached, the marriage should no longer be kept together and a decree of divorce be granted in the interest of both parties.

11. The NCRB data indicates that women have been increasingly committing suicide because of bad marriages. During the years 2016-

¹ Also see Order 32-A Rule 3 of the Code of Civil Procedure Code(CPC); Section 23(2) of the Hindu Marriage Act; Section 89 of the CPC

2020 over 37,000 women died due to reasons related bad marriage. Out of this, only 7% died, because of reason of divorce.² Moreover, there are now studies that it is not interest of children to continue in bad marriage.

LAW COMMISSION OF INDIA REPORTS

12. At this juncture it is fruitful to take note that the issue of irretrievable breakdown of marriage has been subject matter for consideration by the Law Commission of India. For the first time in 1978, the Law Commission vide its 71st report recommended that the law be amended to provide ‘irretrievable breakdown of marriage’ as an additional ground of divorce.

13. The Seventy First report of the Law commission noted that the Hindu Marriage Act has been inadequate to deal with cases where the marriage has been proved to be a complete failure. It noted that restricting the ground of divorce to a particular offence or matrimonial disability causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked. In this background, the Law Commission recommended adding section 13C to the Hindu Marriage Act which allows for the addition of the ground of irretrievable breakdown of marriage.

² Nikhil Rampal, “Many more people commit suicide due to bad marriage than divorce, NCRB data shows”, The Print, available at <https://theprint.in/india/many-more-people-commit-suicide-due-to-bad-marriage-than-divorce-ncrb-data-shows/765923/>.

14. The 217th Report of the Law Commission noted that the grant of divorce is not dependent on the volition of the parties but on the Court coming to the conclusion, on the facts pleaded, that the marriage has irretrievably broken down. It further noted that a law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; divorce Courts are presented with concrete instances of human behaviour as bring the institution of marriage into disrepute. Once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interest of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. It further recommended that that immediate action be taken to introduce an amendment in the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 for inclusion of ‘irretrievable breakdown of marriage’ as another ground for grant of divorce. It further noted that court before granting a decree for divorce on the ground that the marriage has irretrievably broken down should also examine whether adequate financial arrangements have been made for the parties and children.

JUDICIAL TRENDS IN THIS COURT

15. In *Naveen Kohli v. Neelu Kohli*, (2006) 4 SCC 558, a 3-Judge bench of this Hon’ble recommended to the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce. (*vide para 91*). This Court in *Naveen Kohli(supra)*

was of the view that:-

“Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties”(vide para 72).

16. Thereafter, the Law Commission *suo motu* took up the study of the subject of the ***‘irretrievable breakdown of marriage’*** and vide its 217st report, again reiterated the need to incorporate irretrievable breakdown of marriage as ground for divorce Hindu Marriage Act, 1955 and the Special Marriage Act, 1954.

17. While there are series of judgments³ of this Hon’ble Court wherein it had granted divorce in exercise of its power under Article 142, it is noteworthy that such judgments have been delivered in the context of hotly debated blame game by both parties to the marriage. One of the overwhelming reasons for such orders have been ***prolonged litigation between the parties, prolonged period of separation, criminal proceedings by parties against each other, allegations of cruelty, desertion, adultery.*** These are all proxy indicators for the breakdown of marriage. It is submitted that in all cases where such orders have

³ See *Ashok Hurra v. Rupa Bipin Zaveri*, (1997) 4 SCC 226; *Savitri Pandey v. Prem Chandra Pandey*, (2002) 2 SCC 73; *Naveen Kohli v. Neelu Kohli*, (2006) 4 SCC 558; *R. Srinivas Kumar v. R. Shametha*, (2019) 9 SCC 409; *Munish Kakkar v. Nidhi Kakkar* (2020) 14 SCC 657; *Sivasankaran vs. Santhimeenal* 2021 SCC OnLine SC 70).

been granted, one of the party has not consented to the decree of divorce.

18. It is submitted that the question of consent is irrelevant for decree of divorce on the ground of '*irretrievable breakdown of marriage*' having regard to existing precedents⁴ that this Hon'ble Court in exercise of its inherent power under Article 142 of the Constitution has granted divorce even in those cases in which one of the parties to the marriage did not consent to it. In substance, such a divorce is based on a determination of the existence of the pre-existing fact, viz. that the parties have reached a stage where the marriage can be salvaged. Therefore, it is not interest of the parties or indeed public interest to carry on the marriage. Such an order in substance is an decree for divorce in various statutes adverted to above.

19. The decision of this Hon'ble Court in *V. Bhagat v. D. Bhagat, (1994) 1 SCC 337*, requires particular attention. In this case, the allegations and pleadings on both the sides were significantly grave in nature. While the husband called his wife an adulteress, the wife called the husband a lunatic. In these circumstances, this Hon'ble Court came to the conclusion that a decree of divorce be granted in an appeal under Article 136 of the Constitution.

20. It is submitted that the decision of this Hon'ble Court in *V. Bhagat (supra)* is a pointer to the fact that very often the nature of allegations in *pleadings* makes it more than clear that the marriage has *irretrievable broken down*. It is noteworthy that in *V. Bhagat case*, this Hon'ble transferred a pending petition for divorce from the High Court to itself and allowed it, without reference to Article 142

⁴ See *R. Srinivas Kumar v. R. Shametha, (2019) 9 SCC 409*; *Munish Kakkar v. Nidhi Kakkar (2020) 14 SCC 657*; *Sivasankaran vs. Santhimeenal 2021 SCC OnLine SC 702*.

of the Constitution. It is, therefore, submitted that decree for divorce can be granted in multiplicity of situations either in appeal or by presentation of consent or under Article 142 of the Constitution. In each of these cases, the decree can be granted on an determination of fact that marriage is broken down in a manner beyond repair, cannot be salvaged, and the ***marriage has broken down irretrievably***. It is, thus, submitted that while granting such a decree the consent of both the parties to the marriage is not relevant.

21. It is apposite to note that this Hon'ble Court in ***V. Bhagat case (supra)*** before closing the case made the following observations:

“21. Before parting with this case, we think it necessary to append a clarification. Merely because there are allegations and counter-allegations, a decree of divorce cannot follow. Nor is mere delay in disposal of the divorce proceedings by itself a ground. There must be really some extraordinary features to warrant grant of divorce on the basis of pleadings (and other admitted material) without a full trial. Irretrievable breakdown of the marriage is not a ground by itself. But while scrutinizing the evidence on record to determine whether the ground(s) alleged is/are made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind. The unusual step as the one taken by us herein can be resorted to only to clear up an insoluble mess, when the court finds it in the interest of both the parties.”

22. The petition for divorce H.M. Case No. 1 of 1986 pending in the Delhi High Court is withdrawn to the file of this Court

and is allowed. The marriage between the parties is dissolved. In the circumstances, the allegations levelled by the petitioner against the wife are held 'not proved'. The honour and character of the respondent wife stands vindicated."

EVOLUTION OF LAW ON IRRETRIEVABLE BREAKDOWN OF MARRIAGE

22. In U.K., The Divorce Reform Act, 1969 introduced the language of '*Irretrievable Breakdown of Marriage*'. Section 1 and 2 of the said Act read as follows:

1. *After the commencement of this Act the sole ground on which a petition for divorce may be presented to the court by either party to a marriage shall be that the marriage has broken down irretrievably.*

2(1) *The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievable unless the petitioner satisfies the court of one or more of the following facts, that is to say-*

(a) *that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;*

(b) *that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with respondent;*

(c) *that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of petition;*

(d) *that the parties to the marriage have lived apart for a continuous period of at least two years immediately*

preceding the presentation of the petition and the respondent consents to a decree being granted;

(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

(2) On a petition for divorce it shall be the duty of court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent.

(3) If the court is satisfied on the evidence of any such fact as is mentioned in subsection(1) of this section, then, unless it is satisfied on all evidence that the marriage has not broken down irretrievably, it shall, subject to section 4 of this Act and section 5(5) of the Matrimonial Causes Act 1965, grant a decree nisi of divorce.

(4) For a purpose of subsection (1)(c) of this section the court may treat a period of desertion as having continued at a time when the deserting party was incapable of continuing the necessary intention if the evidence before the court is such that, had that party not been incapable, the court would have inferred that his desertion continued at that time.

(5) For the purposes of this Act a husband and wife shall be treated as living apart unless they are living with each other in same household.

(6) Provision shall be made by rules of court for purpose

of ensuring that where in pursuance of subsection (1)(d) of this section the petitioner alleges that respondent consents to a decree being granted the respondent has been given such information as will enable him to understand the consequences to him of his consenting to a decree being granted and the steps which he must take to indicate that he consents to the grant of decree.

23. From the reading of Section 1 and 2 of the Divorce Reform Act, 1969, it is apparent that the factors such adultery, behavior in a manner in which *the petitioner cannot reasonably be expected to live with respondent, desertion for at least two years, parties living apart for at least two years, the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition*, were all to be taken into consideration while deciding whether the marriage had ***irretrievable*** broken down. It is, thus, submitted that the above factors are indicative of ***irretrievable breakdown of the marriage.***

24. In 1973, U.K. passed Matrimonial Causes Act 1973. This Act continues to be in force till date. However, on 06.04.2022, the Act of 1973 was further amended *vide* 'The Divorce, Dissolution and Separation Act 2020'. Section 1 & 3 of the amended Act reads as follows:

(1) Subject to section 3, either or both parties to a marriage may apply to the court for an order (a "divorce order") which dissolves the marriage on the ground that the marriage has broken down irretrievably.

(3)The court dealing with an application under subsection

(1) must—

(a)take the statement to be conclusive evidence that the marriage has broken down irretrievably, and

(b)make a divorce order.

25.It is generally believed that the changes made in 2022 departed from the fault theory and move to a regime of ***irretrievable breakdown***. However, it is submitted that ***irretrievable breakdown*** is consequence of the several causes mentioned in the original Act of 1973. It is worth noting that ***irretrievable breakdown of marriage*** is a consequence of pre-existing causes many of which would include adultery, desertion, cruelty, or separation for continuous period.

26.It may be noted that U.K.'s Matrimonial Causes Act 1973 indicates very clearly that the '***irretrievable breakdown of the marriage***' and breakdown on account of cruelty, desertion or abandonment are interchangeable- in that these are factors leading to the breakdown of marriage irretrievable. Hence, a decree for '***irretrievable breakdown of the marriage***' can be granted if the above conditions are seen to exist in the marriage. The period of separation will include the period during which proceeding have been pending in the court. Another very common indicator of breakdown of marriage is when the wife has initiated proceedings under 498A of Indian Penal Code or either party has initiated proceeding for libel and defamation against the other or any other criminal proceeding for cheating or fraud, all of which led to the conclusion that the marriage has broken down.

ROLE ATTRIBUTED TO THE FAULT GROUND

27. It is true that some of the statutes dealing with marriage and divorce contain provisions to the effect that the “Court has to be satisfied that the party is not taking advantage of his or her own wrong for the purposes of getting relief” [*See S23(1) (a) HMA, 1955*].
28. It is submitted that such a provision is often invoked in the context of a husband either wanting a decree of restitution of conjugal rights to defeat a claim of maintenance. In such a situation it may be useful to look into the question whether the husband is taking advantage of his own wrong to defeat the claims of the wife. However, in hotly contested matters seeking divorce on the grounds of cruelty, desertion or adultery, allegations are often mutually exchanged. This Hon’ble Court has held that, while fault may be a factor in deciding to grant or not to grant of decree on the ground of ‘irretrievable breakdown of the marriage’, “*it cannot be blown out of proportion or viewed in isolation,*” in granting a decree of divorce on the ground of ‘irretrievable breakdown of the marriage.’ [*Ashok Hurra v Rupa Bipin Zaveri, (1997) 4 SCC 226, at para 23*]
29. It is also important that before the decree of divorce is granted on the ground of ‘*irretrievable breakdown of the marriage*’ an attempt is made to reconcile the marriage.
30. In view of the foregoing, the answer framed by this Hon’ble Court as quoted hereinabove may kindly be answered accordingly. However, it is submitted that before such decree for divorce is granted on account of the *irretrievable breakdown of marriage*, certain safeguards for the parties to the marriage, in particular, the wife are needed to be ensured by this Hon’ble Court as follows:

- I. A final attempt is made to reconcile the marriage.
- II. A determination is made that the marriage has the irretrievably broken down.
- III. Adequate financial provision more particularly for the wife, which is just, fair and equitable having regard to the various factors such as housing arrangements for the divorce wife and children, if any. Financial arrangements consistent with standard of living to which the husband is accustomed.
- IV. Welfare of children, including their housing, education, provision for marriage, medical expenses, entertainment, extra-curricular activities etc.
- V. Custody of the children, where such custody is not mutually agreed to, in the best interest of the children.
- VI. That no blame is attributed to either party, as a result of the decree of divorce which may impact future civil or criminal proceedings.