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UNMAKING MARRIAGE: *SHILPA SAILESH V VARUN SREENIVASAN* AND THE CASE FOR LEGISLATIVE REFORM

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A. Introduction

Marriage, under Hindu personal laws, has long been regarded as a union that is sacrosanct. The Hindu Marriage Act, 1955 ("HMA") echoed this philosophy by initially offering divorce under very limited grounds of fault based reasons like cruelty, adultery etc. The addition of mutual consent as a ground for divorce in the form of Section 13B in 1976 marked a reformative shift that allowed for a petition for dissolution without the need to establish guilt, when both parties are willing, provided that the couple has been separated for at least one year. It also prescribes a cooling-off period of six months, extendable up to eighteen months, before a second petition for divorce can be filed. [871]

The five-judge Bench in Shilpa Sailesh addressed the issue of whether this period could be waived in circumstances where there is no hope for reconciliation. However, the judgment also underscored broader implications. By acknowledging the irretrievable breakdown of marriage, where a party seeks a divorce despite the opposition of another, as a legitimate ground for divorce, it paved the way for the development of non-fault grounds. The court invoked its power under Article 142 of the Indian Constitution, which bestows upon it extraordinary powers to do "complete justice" in any cause or matter and held that they could use their discretion to grant relief and avoid prolonging the suffering of involved parties.

This case commentary seeks to examine the necessity of irretrievable breakdown of marriage ("IBM") as a legitimate ground for divorce, while also delving into the limitations of doing so without legislative sanction. Further, it also explores India's approach towards balancing individual autonomy within the broader institution of broken marriages.

[871] Bijal Ajinkya and Sachin Bhandawat, 'Mutual Consent Divorce under Hindu Law: Cooling-Off Period and Withdrawal of Consent' (2024) SCC Online Blog Exp 5 https://www.scconline.com/hma accessed 17 October

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B. Facts

The issues before the Supreme Court arose by Transfer Petition due to a series of differing decisions of whether the six-month cooling-off period prescribed under the Hindu Marriage Act, 1955 for divorce of mutual consent can be waived under Section 13-B(2). The differing interpretations regarding the Supreme Court's power to grant the same relief culminated in *Shilpa Shailesh v. Varun Sreenivasan*(2015),[872] where the same issue came up for consideration again. In this case, both parties had been living separately in Pune & Muscat for over six years despite multiple failed attempts at reconciliation. The couple approached the Supreme Court seeking a divorce under Article 142 citing irretrievable breakdown, given the multiple ongoing civil and criminal proceedings against each other. Considering the lengthy process in family courts, the couple pleaded strained relations to end the marriage soon to avoid prolonging suffering. On May 06 2015, the Apex Court granted them a divorce under section 13 of HMA(mutual consent). However in light of the recurring nature of such pleas and an increasing number of instances of the High Courts and family courts waiving the cooling-off period , the Division Bench decided that the issues warranted consideration and clarity in light of public interest. The case was referred to a Constitutional Bench for consideration.[873]

C. Issues

The Constitutional Bench upon consultation with the Attorney General decided on the following issues. Firstly, what is the scope of the Supreme Court's power to do 'complete justice' under Article 142(1) and can it extend to procedural aspects of section 13-B(2) of the HMA. Secondly, whether the court under this section can grant a divorce and dispense with the period and the procedure prescribed under section 13-B. If yes, under what circumstances. Lastly, a pivotal point of contention was whether the court can grant a divorce in exercise of power Article 142(1) when there is complete and irretrievable breakdown of marriage and one party seeks a divorce while another opposes the prayer.

D. Court's Judgment

The Supreme Court's Constitution Bench did not hear conventional arguments from opposing sides. Instead, the court undertook a doctrinal review of existing case laws and statutory provisions to resolve conflicts of precedents and clarify procedure regarding waiver of cooling off period.

To address the issue regarding the scope of Article 142(1) , the Supreme Court relied on prior interpretation of the Article's scope in Golaknath[874] and Union Carbide[875] where the wording was found to bestow upon the court wide powers. However, this is bound by restraint and public policy. The court also recognised that it cannot, in pursuance of this power, ignore substantive statutory provisions. Here, the court read into the ambit of the Article to mean that while it cannot create new legal frameworks, it may relax or exempt parties from procedural laws to achieve equity and ensure justice. Therefore, Article 142(1), being curative in nature, can extend to procedural aspects of Section 13-B(2).

Under issue 2, the court inquired into the legislative intent of mandating the parties to wait a period of six months (maximum) after presenting the first petition. This requirement under the HMA is mandated in addition to the prior condition of living apart for one year to be eligible to file the first petition. The legislature's intent behind mandating the six month period was to allow both parties to introspect and consider the decision to safeguard against hurried divorces.

Here, however, the court identified a specific strain of cases where divorce is unavoidable, and insistence of strict adherence to procedure only breeds misery and pain amongst the parties. In such cases, provision of time, instead

[872] *Shilpa Shailesh v Varun Sreenivasan* (2016) 16 SCC 352.
[873] *Shilpa Shailesh v Varun Sreenivasan* (2023) 14 SCC 321.
[874] *Golak Nath & Ors v. State of Punjab & Anr* AIR 1967 SC 1643.
[875] *Union Carbide Corporation & Ors v Union of India &* Ors (1991) 4 SCC 584.

of allowing for introspection only breeds contempt.

Expanding on the ratio of Amardeep v. Harveen that the cooling-off period could be waived in exceptional cases,[876] the court held that the intent behind the section is not to prolong a marriage and thereby the court retains the discretion to provide relief in the form of a divorce.

By considering factors such as the parties already fulfilling one and a half years separation prior to first petition, failed reconciliation efforts, voluntary settlement of issues like custody, and the likelihood that further waiting would prolong their suffering, the court held that a waiver petition may be instituted one week after the first motion and granted at the discretion of the court.

Article 142 allows the Supreme Court to pass decrees that a family court could, to circumvent unnecessary hardship to parties likely to arise due to lengthy proceedings and procedural delay. Section 13-B places no bar on their ability to do so. However, the court acknowledged that such expansion to its power, must be exercised cautiously and in line with the spirit and substance of the section.

Moving on to the aspects central to this commentary, the Apex Court referred to Section 13(1)(ia) that allows one party to seek divorce from the other on the grounds of mistreatment due to cruelty. Now while the definition of cruelty has expanded over the years[877], it alone has been observed to be an insufficient ground in instances where one party opposes it. Cruelty has been associated with the fault theory, which requires one party to attribute blame to the other, further fostering bitterness and misery in broken marriages.

The court in *Naveen Kohli v Neetu Kohli* opined how establishing grounds of divorce built on faults fails to capture modern realities and serve broken marriages, where guilt has to be proved.[878] The Constitutional Bench in this case also referred to *Owens v Owens* to highlight instances where two pleasant individuals clash together causing suffering in their marital lives and fault in such cases is hard to establish.[879] The court held that such procedural requirements must give way to complete justice, allowing for the dilution of the fault theory. The Bench also clarified that this dissolution on the ground of IBM is not a right, but subject to the discretion of the court where it must be "fully convinced and satisfied" that the marriage is "totally unworkable, emotionally dead and beyond salvation".[880] The court recognised its responsibility to take into consideration complete justice is achieved for both parties.

D. Analysis

Across the various personal laws that govern divorce in India, be it the Hindu Marriage Act (HMA), the Special Marriage Act, or the Indian Divorce Act, irretrievable breakdown of marriage is not a statutorily recognised ground for divorce. While this commentary confines itself to the HMA, this is crucial in demonstrating India's broader reliance on the fault based theory of divorce. Although mutual consent was later introduced through amendments, it does not account for increasingly common instances where marriages have failed, yet one party refuses dissolution and traditional fault grounds such as adultery or cruelty cannot be proven.

The Supreme Court's judgment in Shilpa Sailesh therefore serves as a welcome development as it allows recourse for divorce under these circumstances. The court's recognition of IBM as a legitimate ground for divorce, especially in tense instances where one party opposes it unreasonably marks a progressive shift. However, the judgment on its own stands insufficient to bring about a systemic change.

Any relief sought under this head is so far granted only by the Apex court. Given the

[876] *Amardeep Singh v Harveen Kaur* (2017) 8 SCC 746.
[877] *Naveen Kohli v. Neelu Kohli* (2006) 4 SCC 558.
[878] ibid.
[879] *Owens v Owens* (2018) UKSC 41.
[880] *Shilpa [n 3].*

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source of this power is derived from Article 142 of the Constitution, available exclusively to the Supreme Court, this prevents the lower judiciary from exercising the same power.

While the Supreme court does intervene in extraordinary cases, it also means that regular cases tried at the family court level are unlikely to avail this relief as they are bound by grounds under the HMA. As expounded by the Delhi High Court, this power flows from Article 142, which does not extend to the High Courts, let alone the family courts, making it difficult for couples to approach the upper judiciary.[881]

Consequently a vast number of litigants are barred from seeking this relief. It is both impractical and unfeasible to escalate every broken marriage to the Supreme Court or expect the court to transcend its limited capacity to hear these disputes on this scale.

Shilpa Sailesh technically settled that a marriage may be dissolved on the ground of irretrievable breakdown even when one party opposes it. However this power is only limited to the Supreme Court. In essence, lower courts remain bound by the HMA reinforcing the principle "when legislative provisions specify the grounds for granting a divorce, they constitute the only conditions on which the Court has jurisdiction to grant divorce."[882] Therefore, for reforms with benefits that trickle down to the lower judiciary, legislative intervention is necessary.

The need for legislative reform can be situated within Hrishika Jain's conception of a public ethic of care, which views the family as a social institution performing essential functions of emotional and attitudinal care. Families, through these care practices, sustain the broader social order by privately shouldering the work of social reproduction. [883] Consequent to this idea, marriages that break down beyond repair serve neither as a source of emotional support nor provide care networks. These unions are hollow shells and are marriages in name only. They no longer serve the individual and only cause discord, and its continuation only protects the institution of marriage above all else.

This tension between balancing individual rights and institutional sanctity is clearly reflected in the Family Courts Act, 1984**.** Conceived with the idea of providing an informal, speedy and a conciliatory space for resolving marital disputes, the Act however, is embed with a bias. It favours reconciliation, sometimes prioritising the survival of marriage over the welfare of the parties. [884] The very nature of the court compounded with the lack of legislative provisions for relief in broken marriages confines litigants to their prolonged suffering. This is indicative of India's broader preoccupation with preserving form over substance, further emphasising the need for reform that centres around balancing rights rather than institutional endurance.

A legislative amendment to the HMA recognising IBM as a statutory ground for divorce would thus align with the idea of public ethic of care, one that prioritises individual wellbeing over the preservation of form. It would allow relationships that are beyond repair the chance to end with dignity.

The call for legislative intervention is not new and was echoed as early as 1978 by the 71st Report of the Law Commission of India. The idea saw a revival with the 217th Law Commission Report with it highlighting the limitations of the ground of mutual consent, mainly being if one of the parties does not cooperate, said ground is not available. [885] This culminated in the proposed Marriage Laws (Amendment) Bill, 2010 which suggested the inclusion of section 13C(1) establishing the use of irretrievable breakdown of marriage as a new ground for divorce. Along

[881] *Deepti v Anil Kumar* (2023) SCC OnLine Del 5829.
[882] *Vishnu Dutt Sharma v Manju Sharma* AIR 2009 SC 2254.
[883] Hrishika Jain, 'Making Love Legible: Queering the Indian Legal Conceptions of "Family"' (2023) 10 *Asian Journal of Law and Society* https://www.cambridge.org/core/journals/ accessed 17 October 2025
[884] Flavia Agnes, Family Courts and Gender Justice, in *Family Law Volume II: Marriage, Divorce and Matrimonial Litigation* (Oxford University Press, New Delhi 2011, Chapter 3)
[885] Divya K, 'A Bird's Eye View on Irretrievable Breakdown of Marriage in India with Special Reference to Landmark Judgments' (2021) 3 Indian JL & Legal Rsch 1 https://heinonline.org/HOLaccessed 17 October 2025

with Section 13C(2) which requires the parties to have been living separately for not less than a period of 3 years before the parties had made the petition.[886] However, the Bill lapsed when the Lok Sabha dissolved in 2014.

Opponents of legislative inclusion of IBM, however argue that this ground could be misused to the detriment of the party opposing the divorce. The circumstances that led to the broken marriage may unilaterally be caused by one party who significantly seeks to benefit from the divorce. However, it can be argued that the Constitutional Bench circumvents this problem by constructing this relief as a matter of discretion and not right. It allows the court the ability to look into the facts and circumstances and grant a divorce when it would be pursuant to complete justice for both parties.

The Supreme Court has exercised this caution before, as evidenced by *Lakshmi MC v Prabhavathi* where divorce was under IBM was denied as it served the interest of the party seeking divorce at the detriment of the other.[887] The courts here possess the discretion of when to grant a divorce in the event they are satisfied that its continuance brings no net benefit. The chance for misuse warrants cautious application of IBM and not complete dismissal of the idea.

Furthermore, the equitable potential of allowing for IBM as a ground for divorce can be noted by referring to Supreme court ruling subsequent to Shilpa Sailesh. In *Roopa Soni v Kamalnarayan Soni*, the court exercised Article 142 to dissolve a marriage where the parties had lived apart for 15 years amidst multiple civil and criminal proceedings and severe allegations of adultery. In doing so the court acknowledged the futility of prolonging the misery to the parties and their families.[888]

E. Conclusion

The judgments discussed above hint at the gradual acceptance of non-fault grounds for divorce. However, this commentary seeks to highlight how the effects of the changes are largely felt in the upper echelons of the judiciary and do not trickle down. [889] With Article 142 being the sanctioning force, lower courts cannot use Shilpa Sailesh as precedent due to jurisdictional limitations. Therefore, a systemic change requires legislative intervention and amendments to the HMA. As an increasing number of divorces are granted on this ground, statutory standing would allow the appropriate forums, that is the family courts to address these issues instead of escalating them to the Supreme Court.[890]

The benefits of doing so would also mark a decisive shift away from preserving the institution of marriage even when the couple has little chance of reconciliation. Expanding the scope of non-fault grounds for divorce would also have the effect of acknowledging the realities of distressed individuals in broken marriages. Thereby, avoiding the trade-off between individual autonomy and marital preservation.

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[886] ibid.
[887] *Lakshmi MC v Prabhavathi* (2024) 8 SCC 594.
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