



IRRETRIEVABLE BREAKDOWN OF MARRIAGE AS A GROUND OF DIVORCE: A CRITICAL ANALYSIS

*Pradyumna Tiwari**

ABSTRACT

The marriage in the Indian society is considered as a sacrament and the spouses are required to maintain this marital knot during their life. However, sometimes the marriage between the parties does not sustain. In these circumstances, Hindu Marriage Act provides for ground of divorce, however, the grounds are majorly based on the fault of one of the parties. Sometimes, there may be situations where the marriage is not workable at all and that is not due to fault of either party. Such situation is described as Irretrievable Breakdown of Marriage and it has not been statutorily recognised as ground of divorce by the legislature till now. However, the Hon'ble SC has in catena of judgements has granted divorce to the parties on the ground of irretrievable ground of marriage in order to complete justice and to mitigate the sufferings of the parties. However, at the international level the prevailing situation is somewhat different as it has been recognised by various countries as a ground of divorce. In view of peculiar socio-cultural factors prevailing in Indian society, this work discusses whether irretrievable breakdown of marriage should be statutorily recognised as a ground of dissolution of marriage between the parties. It also discusses the reasoning behind the supreme court judgements granting divorce on this ground and what is the stance of the government in this regard. It also discusses the challenges and the way forward in recognising such a ground for dissolution of marriage between the parties.

I. Introduction

“When two people decide to get a divorce, it isn't a sign that they ‘don't understand’ one another, but a sign that they have, at least, begun to.”

- *Helen Rowland¹*

The concept of marriage under Hindu Law is considered as a sacrament and a holy union among two individuals. Under the traditional Hindu Law, divorce was not recognized as the marriage was considered as union of two individuals for life long term. The practice of divorce was deprecated by the society. However, with the passage of the time and advancement of the society, divorce came to be accepted among the people in society. The legislature codified the law relating to the marriages among Hindus in the form of The Hindu Marriage Act, 1955. It provided for the grounds of divorce under section 13 of the Act.

* Law Researcher, District Judge (commercial court), Shahdara District, Karkardooma court, Delhi. BALLB, Vivekananda Institute of Professional Studies (affiliated to GGSIPU).

¹ Irretrievable Breakdown of Marriage in India, India, *available at*: <https://www.lexology.com/library/detail.aspx?g=e4a294ac-cbf3-491e-bcf7-8e13c6034465> (last visited on 28th August, 2025).

Originally, the Act provided for the grounds of divorce on the basis of fault of one of the parties which are known as fault-based grounds (proceeded on the fault-based theory of divorce). The parliament by inserting Section 13(1A) of the Hindu Marriage Act, vide Act no. 44 of 1964, has introduced a glimpse of theory of breakdown of marriage. It provides that where there has been no resumption of cohabitation between the parties within one year of passing of decree of Judicial Separation or restitution of conjugal rights then the either party can present petition for divorce².

Thus, for an elaborate discussion, it would be appropriate to discuss the various theories of divorce. The discussion of the various theories would facilitate in understanding the significance of irretrievable breakdown of marriage.

Even as of date, the irretrievable breakdown of marriage has not been recognized as ground of divorce by the legislature. Thus, the courts can not statutorily grant the decree of divorce on the ground that the marriage between the parties has been broken down irretrievably. Therefore, this work will discuss as under which provision and procedure the courts can grant the divorce under Irretrievable breakdown of marriage.

II. Theories Of Divorce and Their Statutory Recognition

Theories of divorce provides for the different reasons which are attributable to the divorce among husband- wife. Primarily there are three theories of divorce:

- a. Fault Theory of Divorce
- b. Consent Theory of Divorce
- c. Irretrievable Breakdown Theory

However, initially during vedic ages marriage was considered as indissoluble and an unbreakable bond between husband and wife. According to the Hindu Dharmashastras, marriage was considered as a holy and indissoluble union for the performance of religious duties³. With the passage of time, due to evolving societal landscape and other changes such

² (1A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground— (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

³ Harsimran Kaur Bedi, “The Concept of Marriage under Hindu law and its changing dimensions” Winter Issue *ILI Law Review* 110 (2022).

as industrialisation, urbanisation etc. the concept that marriage being sacred and indissoluble has changed. It has led to evolution of above said theories of divorce.

Fault Theory of Divorce

As the name of the theory suggests, it focuses on the fault of one of the parties to the marriage. As per fault theory, if one of the spouses is at fault then the other party become entitled to apply to the court seeking decree of divorce. The Hindu Marriage Act primarily recognises fault-based theory as a ground of divorce. It provides for various grounds for applying to the court for decree of divorce. These grounds are as follows:

Voluntary Sexual Intercourse with person other than spouse during continuance of marriage

This ground of divorce was not available when the Act was originally enacted. It was added in 1976 by way of Marriage Laws (Amendment) Act, 1976. Earlier adultery was an offence under section 497 of Indian Penal Code. However, the same has been struck down and declared unconstitutional in the case of *Joseph Shine vs Union of India*⁴. However, the effect of that judgement is that the offence has been decriminalized but it is still available as a ground of divorce of marriage. The roots of this provision can be traced back to the thought that spouse(s) must be loyal to each other and that spouses must maintain the dignity and sanctity of the marriage.

Cruelty

Cruelty as a ground for divorce encompasses within its ambit both mental and physical cruelty. What constitutes cruelty can not be defined as it depends upon totality of facts and circumstances involved. In the cases pertaining to cruelty as ground of divorce, it is the fault of one party who subjects the other party to cruelty, which entitles the other party to approach the court and to seek the decree of divorce.

Desertion

It means that one of the spouse(s) has left the conjugal society of the other which affords the aggrieved spouse to approach the court. In the cases of desertion, it is the fault of one spouse who deserts the other and leaves the conjugal society of the other and this desertion becomes ground for the deserted spouse to approach the court for decree of divorce. However, to prove

⁴ AIR 2018 SC 4898

the ground of desertion other requirements are also required to be fulfilled, which are not discussed here for sake of brevity.

Conversion

Conversion as a ground for divorce implies that one party converts his/ her religion to another religion then the other spouse can approach the court for dissolution of divorce.

Insanity

As a ground of divorce, it provides that when one party has been incurably of unsound mind or has been suffering either continuously or intermittently from a mental disorder to such an extent that petitioner cannot be expected reasonably to live with respondent.

Suffering from Venereal Disease

If one of the spouse is suffering from venereal disease with communicable form then the other spouse can apply to the court for decree of divorce.

Renunciation

If the spouse has completely renounced the world by becoming a hermit or sanyasi (i.e. by entering into religious order), then the other party can approach the court seeking divorce. The renunciation of world by a spouse is taken as a ground of divorce by the other party.

When one of the spouse has not been heard alive for 7 years

The petitioner can file a petition for divorce when the other spouse has not been heard alive for 7 years or more by those who would have naturally heard of him as alive. Though it is a ground of divorce, but in such cases, the party who seeks divorce has the burden to prove the fact that the other spouse has not been heard alive.

Apart from the above- mentioned grounds of divorce, the wife is entitled to divorce on following additional grounds as provided in Section 13(2) of the Hindu Marriage Act viz, Pre-Act Polygamous marriage, Husband being guilty of rape, sodomy or bestiality, non-resumption of cohabitation for one year after passing of award of maintenance in favour of wife and repudiation of marriage. These grounds are exclusively available to wife.

Consent Theory/ No Fault Theory

This theory is based on the idea that when two consenting adults marry each other and they are of the view that the marriage is not working between them and are mutually of the

view that both the spouses should seek dissolution of marriage then it is in the interest of the spouses and the society that the marital ties between the parties should be dissolved. It is based on the view that when the parties to the marriage, being sane, adult and having understanding of the consequences of their actions have mutually decided to sever their marital ties then it is not in interest of the society/ parties themselves to pursue series of litigation and to make their marital ties averse. Thus, the legislature has in consonance with the mutual consent theory has inserted Section 13B of The Hindu Marriage Act vide amendment act of 1976.

Irretrievable Breakdown of Marriage

According to this theory of dissolution of marriage, the marriage between the parties can be dissolved if the marital tie between the parties have been broken down irretrievably and there is nothing remaining in the marriage. It is considered that poorly fitted marriages are the major human and institutional challenge. Therefore, it is in the interest of the society that such marriages which is not effective between the parties should not be forced to be continued with that relationship as it will assuage the sufferings of the parties. It is not discussed here as it will be discussed hereinafter in this work.

III. Irretrievable Breakdown Of Marriage As Ground Of Divorce

Irretrievable Breakdown of Marriage as a ground of divorce is not statutorily recognised as a ground of divorce by the parliament under HMA/ SMA. However, the courts have recognised it through precedents and have dissolved the marriage. Through this research work, the author would like to examine the jurisprudential reasoning behind the grant of divorce by the courts.

The Law Commission in its 71st Report titled as “The Hindu Marriage Act 1955- Irretrievable Breakdown of Marriage As A Ground of Divorce” has observed that once the parties have separated and the separation continues for a longer period of time then the marriage can be presumed to have been broken down and that it would not be proper to preserve the unworkable marriage as it would be source of misery between the parties.

In the said report the law commission while supporting for irretrievable breakdown of marriage as a ground for divorce, has stated that the since the nature of family is changing and the family is becoming more egalitarian and more democratic, this has led to more cogent reason for introducing irretrievable breakdown as a ground for divorce.

The traces of Irretrievable breakdown of marriage can be found in Section 13(1A) of The Hindu Marriage Act which provides that if the party does not comply with decree of restitution of conjugal rights for a period of one year, then it affords a ground for seeking divorce. Similarly, if the parties have suffered a decree of judicial separation and they have not resumed the cohabitation for a period of one year then also party can seek divorce on this ground.

The law commission in its report has also dealt with one argument that no one shall be allowed to take advantage of one's own wrong. The law commission has compared this argument with Section 13(1A)(ii) of HMA wherein the party not complying with the decree of restitution of conjugal rights for one year can approach the court seeking divorce on the same ground. Thus, it was stated that the party which was at wrong can have advantage of its own fault.

The law commission in its report has stated that the parties have not to be merely averring irretrievable breakdown of marriage rather it has to be substantiated by it. It was observed as follows:

“Moreover, the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one's offspring. Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage -"breakdown"-and if it continues for a fairly long period, it would indicate destruction of the essence of marriage- "irretrievable breakdown.”

The law commission has also suggested amendments in the Hindu Marriage Act for incorporating Irretrievable breakdown of marriage as a ground of divorce. However, these recommendations have not been accepted by the legislature till now.

Thus, it becomes pertinent for us to examine as to how courts are granting the divorce when the marriage has been broken down irretrievably and under what circumstances the court can dissolve the marriage under irretrievable breakdown of marriage. For proper understanding of the issue, it is necessary to examine various judicial precedents.

The reference of the Hon'ble SC to irretrievable breakdown of marriage can be traced to case of *V Bhagat vs Mrs. D Bhagat*⁵. In this case, the husband has filed a petition of divorce against wife alleging that the wife is living an adulterous life. On the other hand, wife in her written statement has made several allegations including lack of mental equilibrium. Pursuant to this, the husband amended the plaint and sought decree of divorce on the basis of mental cruelty in response to the allegations put forth by the wife in her written statement. It was observed by the court that despite of such allegations between the parties, the wife wants to live with the husband and thus, the SC observed that she has resolved to live in agony and want to make life of husband a miserable hell as well and therefore, the Hon'ble SC was of the opinion that the marriage between the parties is broken down irretrievably and there are no chances of reconciliation and, therefore, the marriage of the parties was dissolved under article 142 of Constitution of India. However, it was categorically observed that irretrievable breakdown of marriage is not a ground per se but it has to be kept in mind while deciding a matrimonial dispute and whether the ground as alleged is made out or not. The relevant observation of the supreme court is re-produced as follows:

“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 break-down of the marriage is not a ground by itself. But while scrutinising the evidence on record to determine whether the ground(s) alleged is 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.”

Thus, the court held that there is no purpose in keeping two discordant people together as it will not only increase their mental agony and pain rather it will also be against the public interest at large.

The Hon'ble SC again in *Ashok Hurra vs Rupa Bipin Zaveri*⁶ observed that in totality of facts and circumstances of the case, the marriage between the parties was effectively dead and that there is no chance of revival of the emotional relationship between the parties and

⁵ (1993) SUPP. 3 S.C.R.

⁶ [1997] 2 S.C.R 875

years have been lapsed since the litigation was started. Thus, the Hon'ble SC in the exercise of powers under article 142 of Constitution of India granted a conditional decree of divorce conditional upon the fact that husband complies to the condition set forth by the court towards the safeguard of the wife. At this stage, it is pertinent to note that in this case, the Id. Single judge of high court has granted a decree of divorce but that was set aside by a division bench on the ground that there is no power akin to Article 142 available with the HC and thus, the decree proceeded on irretrievable breakdown of marriage was set aside.

A brief reference can be made to the case of *Chandrakala Menon vs Vipin Menon*⁷ for understanding the approach in cases where the marriage has been broken down irretrievably and justice would be served only by deciding all the disputes between the parties. In this case, the father had custody of the daughter and was ordered to handover the custody of the child to the Mr. Nambiar (maternal grandfather). However, he did not do so rather sought for an adjournment. Therefore, the Id. Magistrate order that custody be given to Mr. Nambiar and if he does not do so, he will be proceeded to declare as proclaimed offender. This order was challenged before the HC and the said order was quashed and the present appeal was against the order of the high court. Meanwhile a mutual petition for divorce was filed by the parties and the same was pending. The Hon'ble SC was of the opinion that since the marriage between the parties have been broken down irretrievably and the parties have been living separately since more than one year therefore, the court exercised the power and dissolved their marriage as the marriage was broken down irretrievably.

Now coming to one of the celebrated judgement on this issue, *Naveen Kohli vs Neelu Kohli*⁸. In this case, there was a series of litigation between the parties including criminal litigation and that the parties were living separately for a long period of time. The Hon'ble SC has very elaboratively discussed about the irretrievable breakdown of marriage. It has been observed by the Hon'ble SC that though Irretrievable breakdown of marriage has not been made a ground of divorce under HMA but with the passage of time there are large number of cases involving marriage which are virtually non existent and until and unless irretrievable breakdown of marriage is introduced divorce can not be granted. The relevant observation of the Hon'ble SC is as follows:

⁷ (1993) 2 SCC 6

⁸ (2006) 3 SCR 53

“We have been principally impressed by the consideration that 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 interests 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. The marriage becomes a fiction; though supported by a legal tie. By refusing to sever that tie the law in such cases do not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.”

The Hon’ble SC observed that looking into the peculiar features of the case that the marriage has been broken down irretrievably and there is no possibility of the reconciliation. The Hon’ble SC has granted divorce to the parties due to peculiarity of facts and circumstances of case. While granting divorce, the SC has recommended the insertion of irretrievable breakdown of marriage as a ground of divorce. The emphasis of the Hon’ble Supreme court on the introduction of the irretrievable breakdown of marriage is a welcome step in recognising the agony which the party suffers and the bittering consequences which will be faced by the individuals as well as society at large. However, the Hon’ble SC has while granting the divorce to the parties has ensured that no injustice is caused to the wife and has directed husband to pay a permanent alimony. Thus, the divorce if granted under irretrievable breakdown of marriage is granted with enough safeguard.

At this juncture, it is pertinent to refer to case of *Vishnu Dutt Sharma vs Manju Sharma*⁹ wherein a 2 judge bench of the Hon’ble SC was faced with the situation whether the courts can grant a divorce on the ground of irretrievable breakdown of marriage. The Hon’ble SC observed that since there is no express ground of irretrievable breakdown of marriage u/s 13 of HMA, therefore, granting a divorce on the ground of irretrievable ground of divorce would amount to amending of the act which is a function of legislature. The relevant observation of the Hon’ble SC is as follows:

“12. On a bare reading of Section 13 of the Act, reproduced above, it is crystal clear that no such ground of irretrievable breakdown of the marriage is provided by the legislature for granting a decree of divorce. This Court cannot add such a ground to Section 13 of the Act as that would be amending the Act, which is a function of the legislature.

⁹ (2009) 3 SCR 891

13. *Learned counsel for the appellant has stated that this Court in some cases has dissolved a marriage on the ground of irretrievable breakdown. In our opinion, those cases have not taken into consideration the legal position which we have mentioned above, and hence they are not precedents. A mere direction of the Court without considering the legal position is not a precedent. If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts. Hence, we do not find force in the submission of the learned counsel for the appellant”*

However, in this case, the Hon’ble SC has however, not considered the pragmatic conditions which can occur in the discordant married life of two individuals. Moreover, the Hon’ble SC has not considered the exercise of discretionary power under article 142 of The Constitution of India. If seen from a strict interpretation then such an interpretation is correct as judiciary can not be said to add a new ground under the Act. However, if seen from the perspective of doing complete justice between the parties, the Hon’ble SC overlooked the consequences of keeping two discordant individuals together. Be that as it may, the perplexity has now been solved by Hon’ble SC in judgement in *Shilpa Shailesh vs Varun Sreenivasan* which is discussed in the latter part of this work.

It is worthwhile to mention here that despite the recommendation of the Law Commission in 1978 and 2009, irretrievable breakdown of marriage has not been statutorily recognised by the parliament. It is also pertinent to mention here that the Marriage Laws (Amendment) Bill of 2013 which seeks to introduce Irretrievable breakdown of marriage as ground of divorce has never seen the light of day despite being passed by the Rajya Sabha¹⁰.

It has also been held that the Hon’ble SC in exercise of powers under article 142 of Constitution of India can dissolve the marriage between the parties even if no ground for divorce is made out as contemplated by the Act. However, this power can be exercised when the marriage between the parties is completely dead, unworkable and beyond salvage and has broken down irretrievably. The relevant part of the observation is as follows:

¹⁰ K. Srinivas vs K. Sunita [2014] 11 S.C.R. 298

“6. Now so far as submission on behalf of the respondent-wife that unless there is a consent by both the parties, even in exercise of powers under Article 142 of the Constitution of India the marriage cannot be dissolved on the ground of irretrievable breakdown of marriage is concerned, the aforesaid has no substance. If both the parties to the marriage agree for separation permanently and/or consent for divorce, in that case, certainly both the parties can move the competent court for a decree of divorce by mutual consent. Only in a case where one of the parties do not agree and give consent, only then the powers under Article 142 of the Constitution of India are required to be invoked to do the substantial Justice between the parties, considering the facts and circumstances of the case. However, at the same time, 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.

7. This Court, in a series of judgments, has exercised its inherent powers under Article 142 of the Constitution of India for dissolution of a marriage where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted. In the present case, admittedly, the appellant-husband and the respondent-wife have been living separately for more than 22 years and it will not be possible for the parties to live together. Therefore, we are of the opinion that while protecting the interest of the respondent-wife to compensate her by way of lump sum permanent alimony, this is a fit case to exercise the powers under Article 142 of the Constitution of India and to dissolve the marriage between the parties.¹¹”

The Hon’ble SC has also observed that since the institution of marriage is a pious one and it is governed not only by the legislations but also by the societal norms as so may new relationships stem from the marriage, thus, irretrievable breakdown of marriage can not be accepted as a straight jacket formula for relief of divorce under article 142 of Constitution of India. The relevant observation of the supreme court in the case of *Dr. Nirmal Singh Panesar vs Mrs. Paramjit Kaur Panesar @ Ajinder Kaur Panesar*¹² is as follows:

“18. However, in our opinion, one should not be oblivious to the fact that the institution of marriage occupies an important place and plays an important role in the society. Despite the increasing trend of filing the Divorce proceedings in the courts of law, the institution of

¹¹ *R. Srinivas Kumar v. R. Shametha* (2019) 12 SCR 873; *Munish Kakkar v. Nidhi Kakkar* (2019) 15 SCR 169

¹² (2023) 14 SCR 871

marriage is still considered to be a pious, spiritual, and invaluable emotional life-net between the husband and the wife in the Indian society. It is governed not only by the letters of law but by the social norms as well. So many other relationships stem from and thrive on the matrimonial relationships in the society. Therefore, it would not be desirable to accept the formula of “irretrievable break down of marriage” as a strait-jacket formula for the grant of relief of divorce under Article 142 of the Constitution of India.”

Whether the marriage has been irretrievably broken down is a matter of facts and circumstances of the case and there are several factors which are to be considered while examining it includes, period of cohabitation, last resided together, nature and gravity of allegations made etc. The relevant part of the observation of the Hon’ble SC in *Kiran Jyot Maini vs Anish Pramod Patel*¹³ is as follows:

“The factors to be considered in such examination are such as, period of cohabitation after marriage, when they had last cohabited, nature and gravity of allegations made by the parties, orders passed in previous or pending legal proceedings, attempts at reconciliation or settlement and their outcomes, period of separation and such other similar considerations.”

On the basis of the above cases, it can be clearly said that though irretrievable breakdown of marriage is not a ground which is statutorily recognised under the HMA, however, the supreme court has granted divorce on this ground between the parties under article 142 of The Constitution of India in doing complete justice between the parties. However, this debate whether the divorce can be granted under Irretrievable ground of divorce or not has been settled by the judgement of Hon’ble SC in the case of *Shilpa Sailesh vs Varun Sreenivasan*¹⁴.

Shilpa Sailesh vs Varun Sreenivasan: Clearing the clouds over the Irretrievable Breakdown of marriage as ground of divorce

A five judge bench of the Hon’ble SC in this case was hearing a reference made in different cases and had formulated questions upon the following aspects:

- a. What is scope and ambit of power and jurisdiction of this court under Article 142(1) of The Constitution of India;
- b. Whether this court while hearing a transfer petition under Article 142 of Constitution of India in view of settlement between the parties grant a decree of divorce by

¹³ (2024) 7 SCR 942

¹⁴ (2023) 5 SCR 165

mutual consent dispensing waiving off period of 6 months and can quash and dispose off the cases pending under DV Act, Section 125 CrPC, or under 498-A IPC. If the answer to this question is in affirmative then in which cases and under what circumstances this court can exercise under article 142 of constitution.

c. Thirdly and most importantly, is whether this court can in exercise of power under article 142 of constitution of India grant a decree of divorce when there is irretrievable breakdown of marriage in spite of spouse opposing the prayer of divorce.

As far as the first issue is related, the Hon'ble SC has observed that the power is discretionary and is not a matter of right. It finds its origin in the old age concept of 'justice, equity and good conscience'. The SC observed that while exercising the jurisdiction under Article 142 of Constitution of India can not supplant the law but it acts as a *problem solver in the nebulous areas*. However, this power has to be used with due *restraint and circumspection*.

Since the second issue is not relevant to present work, it is not discussed in great details. However, for purposes of reference, the Hon'ble SC held that it can quash other proceedings in view of settlement between the parties.

Now addressing the important aspect of the suit i.e. whether courts can grant decree of divorce if there is irretrievable breakdown of marriage between the parties. In this regard, the court examined various legal precedents to hold that the grant of divorce on the ground of Irretrievable breakdown of marriage is a discretionary relief and can only be granted after considering facts and circumstances of each case and ensuring that 'complete justice' is done between the parties. However, the court laid down a caveat that for dissolving the marriage between the parties on ground of irretrievable breakdown of marriage, the court has to be satisfied and convinced that marriage between the parties is totally unworkable, emotionally dead and beyond salvage and there is no hope for reconciliation.

The Hon'ble SC also laid down some factors which the courts can consider while granting the divorce on ground of Irretrievably Breakdown of Marriage:

- i. Period of cohabitation between the parties and when the parties have last resided together i.e. period of separation
- ii. Nature and gravity of allegations made by the parties against each other.
- iii. Orders passed in different legal proceedings
- iv. Cumulative effect of same on the personal relationship of the parties.

v. Attempts towards reconciliation made by the parties; if so then how many and when was the last effort made etc.

The Hon'ble SC has not laid down an exhaustive list of factors as it is merely illustrative. However, the court said that the factors determining whether the marriage has been broken down irretrievably has to be seen in light of socio-economic conditions of the parties, educational qualifications of the parties, whether there has been any child out of wedlock; if yes how the parties wish to resolve the issues as to the child/ children's custody, maintenance and economic matters of the children. Thus, the fact whether divorce can be granted on the ground of irretrievable breakdown of marriage is a matter of facts and circumstances involved in each case and there can not be any straight jacket formula for deciding it.

After discussing various precedents, the Hon'ble SC held that the power under Article 142 of Constitution of India can be exercised to grant divorce on the ground of irretrievable breakdown of marriage to do 'complete justice' and this power is not fettered by the doctrine of fault and blame as applicable to the petitions for divorce under section 13(i)(i-a) of Hindu Marriage Act.

However, the Supreme Court has also expressed its view on the issue whether decree of divorce can be passed under exercise of jurisdiction under article 32/ 226 of the constitution. The Hon'ble SC held that the parties can not be allowed to bypass the statutory provisions and the correct remedy is to approach superior forum for its redressal. Moreover, the Hon'ble SC has held that judicial orders are not amenable to jurisdiction under writ jurisdiction, thus, a party can not file a writ petition and seek divorce directly from this court as it would amount to circumvent the established procedure.

In the context, it would be appropriate to discuss whether the power to dissolve the marriage on the ground of irretrievable breakdown of marriage is available to other courts i.e. High Court or family courts. The answer to this question lies in the fact that the Hon'ble SC is exercising such power in order to do 'complete justice' and to prevent parties from prolonged suffering and to put quietus to series of litigation between the parties. Such a power is one of extraordinary nature and its corresponding or analogous provision could not be found in other statutes. Thus, even the high court or the family court could not exercise this power to dissolve the marriage on the ground that marriage has been broken down irretrievably. In this regard,

reference can be made to *Deepti vs Anil Kumar*¹⁵ wherein Hon'ble Delhi HC has categorically held that the power to dissolve the marriage is exercisable by Hon'ble Supreme Court and is not available to High court and Family courts. The relevant observation is as follows:

“25. In terms of the Judgment of the Constitution Bench of the Supreme Court in Shilpa Sailesh (supra), the power to grant divorce on the ground of irretrievable breakdown of marriage is exercised by the Supreme Court under Article 142 of the Constitution of India to do complete justice to both the parties. Such a power is not vested in the High Courts leave alone the Family Courts.”

The Hon'ble Telangana HC has in the case of *X vs X*¹⁶ has also reiterated that irretrievable breakdown of marriage is not a ground for divorce under section 13 of HMA and therefore, divorce could not be granted solely on this basis. The relevant observation of the Hon'ble HC is as follows:

“29. As discussed supra, Sri J. Prabhakar, learned Senior Counsel for the appellant contended that the appellant and the respondent are staying separately since last 17 years and their marriage is it retrievably breakdown, there is no possibility of living together. But the said ground of irretrievable breakdown of marriage is not a ground to seek divorce. Neither, the Family Court nor this Court can grant divorce on the said ground. The said aspect can be considered while coming to a conclusion with regard to alleged cruelty.”

Interestingly, the Hon'ble SC in case of *Shri Rakesh Raman vs Smt. Kavita*¹⁷ has observed that if the facts and circumstances so indicate, the court can consider irretrievable breakdown of marriage as cruelty under Section 13(i)(i-a) HMA. The Supreme court while recognising as such observed as follows:

“Irretrievable breakdown of a marriage may not be a ground for dissolution of marriage, under the Hindu Marriage Act, but cruelty is. A marriage can be dissolved by a decree of divorce, inter alia, on the ground when the other party “has, after the solemnization of the marriage treated the petitioner with cruelty”. In our considered opinion, a marital relationship which has only become more bitter and acrimonious over the years, does nothing but inflicts cruelty on both the sides. To keep the façade of this broken marriage alive would be doing injustice to both the parties. A marriage which has broken down irretrievably, in our

¹⁵ 2023:DHC:6803-DB

¹⁶ 2024 LiveLaw (TS) 102

¹⁷ 2023 LiveLaw (SC) 353

opinion spells cruelty to both the parties, as in such a relationship each party is treating the other with cruelty. It is therefore a ground for dissolution of marriage under Section 13 (1) (i-a) of the Act.”

Thus, even when the family courts can not grant divorce on the ground of irretrievable breakdown of marriage, if the marriage has been broken down irretrievably then the court can consider it as a cruelty upon both the parties and dissolve it under Section 13(i)(i-a) HMA. However, this has to be considered in the light of facts and circumstances of each case.

IV. Position Of the Government: The Marriage Laws (Amendment) Bill, 2010 And Report of the Law Commission

The Marriage Laws (Amendment) Bill, 2010 was introduced by the government on 04.08.2010 in Rajya Sabha which seeks to introduce irretrievable breakdown of marriage as a ground of divorce. It moreover seeks to address the issues pertaining to the rights of the spouses and children. The bill was introduced with following statement of objects and reasons:

“The Hindu Marriage Act, 1955 was enacted on the 18th May, 1955 to amend and codify the law relating to marriage among Hindus. Similarly, the Special Marriage Act, 1954 was enacted on the 9th October, 1954 to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorce. The provisions of the said Acts have proved to be inadequate to deal with the issue where there has been irretrievable breakdown of marriage and therefore a need has been felt for certain amendments therein.

Having regard to the recommendations of the Law Commission of India and the observations of the Hon'ble Supreme Court as aforesaid and the demand from various quarters, it is proposed to amend the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 so as to provide for irretrievable breakdown of marriage as a ground of divorce thereunder subject to certain safeguards to the wife and affected children.”

The bill proposed to make following changes in The Hindu Marriage Act:

- a. Insertion of Section 13C to provide for the ground of irretrievable breakdown of marriage as a ground of divorce.
- b. Insertion of Section 13D to provide for right of the wife to oppose the petition of divorce on the ground of irretrievable breakdown of marriage as a ground of divorce on account of grave financial hardship.

c. Insertion of Section 13E to provide for provision for adequate maintenance to children born out of marriage in consonance with the financial status of the party.

d. Amendment in Section 13B (2) to do away with the requirement of six months of cooling off period¹⁸.

The bill was referred to the standing committee on the personnel, public grievances, law and justice which in its 45th report on THE MARRIAGE LAWS (AMENDMENT) BILL, 2010 has agreed with the objective of the bill to introduce irretrievable breakdown of marriage but has suggested some changes to the bill qua the doing away of cooling off period and also recommended that the government may define the term ‘irretrievable breakdown of marriage’. Lastly, the committee was of the view that though it is in agreement with the object of the bill but the has shown apprehension that such provision may be with safeguard as otherwise they are capable of being misused against the women.

The Law Commission has also on two occasions recommended the inclusion of irretrievable breakdown of marriage but the same has not been acted upon by the government. 71st Law Commission Report has already been discussed above and is not repeated here. However, for the purpose of comprehensive discussion the 217th Law Commission Report is discussed here.

217th Law Commission Report

The law commission headed by Dr. Justice AR. Lakshmanan submitted its report titled “Irretrievable Breakdown of Marriage – Another Ground for Divorce” wherein the inclusion of Irretrievable ground of marriage was supported by the Law Commission of India.

While approving of the inclusion of irretrievable breakdown of marriage, the law commission recommended that the courts before granting decree of divorce should examine whether adequate financial arrangements have been made for the parties and children.

At present, when an unstarred question was asked to the Union Minister of state of Law and Justice about the stand of the government’s stand on making law for granting of divorce on the ground of ‘irretrievable ground of divorce’ to which it was responded that currently there was no such proposal being considered¹⁹.

¹⁸ Parliament of India Rajya Sabha, “Forty Fifth Report on the Marriage Laws (Amendment) Bill” (2010)

¹⁹ Ramji Kumar P, “Exploring the imperative and Implementation challenges for Irretrievable Breakdown of Marriage as a Ground for Divorce in India- A comparative Study with Other Jurisdictions”, 6 International Journal of Law Management & Humanities 1860 (2023)

V. Challenges and Way Forward in Recognising the Irretrievable Breakdown Of Marriage

Now as the Irretrievable Breakdown of Marriage has been considered as a situation where the courts can grant divorce, though under its extra-ordinary powers (under Article 142 of Constitution of India), it is considered as a welcome step and recognition of the fact that there is no use in sustaining a marriage between the parties which is already beyond salvage. But recognising such a ground of divorce is not a easy option, it comes with various challenges regarding its enforcement in view of marriage being an institution and the socio-cultural factors.

Since Irretrievable breakdown of marriage has not been recognised as one of the statutory grounds for dissolving marriage, it is only a way out of the unworkable marriage. As observed by the Hon'ble Supreme Court that marriage is based on trust, mutual respect, companionship and shared experiences²⁰ and when these elements are missing for a long period of time, the marriage merely remains a formality and which is not in societal interest to keep it intact by way of legal force.

One of the main challenges in recognising it as a ground of divorce is that it may be considered as an easy way of shedding their responsibility. In socio-cultural landscape like India, where the marriage is considered as sacrament and divorce is still not acceptable recognising irretrievable breakdown of marriage must be with some proper safeguards and it should be allowed only after parties have been in separation for longer period of time and efforts have been made to reconcile the differences and same have been failed.

While recognising it as a ground of divorce, it should be kept in mind that the women often face greater economic vulnerability and therefore, the recognition must be with some proper safeguards securing their economic well-being.

Moreover, the recognition of Irretrievable breakdown of marriage poses another problem of determining whether marriage has been broken or not. Thus, the legislature must lay down some guideline and standard to be followed while determining irretrievable breakdown of marriage as the it should not be misused by the parties.

²⁰ Amutha vs A R Subramaniam 2024 INSC 1033

Another substantial challenge is regarding the welfare of the children. In cases where the marriage between the parents have been broken down irretrievably, the worst sufferers are the children as their welfare is at stake. Thus, the courts while granting divorce under this ground must remain cautious of the fact that the welfare of the children is also required to be taken into consideration.

Though recognition of irretrievable breakdown of marriage as a ground of divorce may come with several challenges. However, such challenges can be tackled by means of public awareness. The government along with various NGOs should create public awareness campaign informing about the rights and liabilities of the parties so that further complications can be avoided. The challenges can further overcome by introduction of relevant standard guidelines and through removal of stigmatisation of divorce in the society through blend of legal, social and educational approaches.

Moreover, as stated earlier that The Marriage Laws (Amendment) Bill, 2010 which seeks to introduce irretrievable breakdown of marriage has not seen the light of the day, the government must re-introduce it or may present a fresh bill in accordance with the societal conditions as of today.

VI. Conclusion

There is a growing need for the parliament to recognise irretrievable breakdown of marriage as a ground of divorce. It becomes more important when the Hon'ble SC has recognised it as a ground of divorce to reduce their agony. However, such a power can be exercised only by supreme court. Thus, in the opinion of the author, the legislature should recognise it as ground of divorce and the family court should also be empowered to grant a decree of divorce on the said ground. When the Hon'ble SC is granting the divorce to reduce the mental agony then there is no question why the parties must be compelled to face such a situation for number of years while litigating before district court and high court. The introduction of irretrievable ground of marriage would be a less contentious and quicker way of resolving disputes and would be beneficial of all the parties. However, it should be with proper safeguards, safeguarding the interest of wife and children while granting divorce.