



Supreme Court rules regarding granting Divorce

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Why in News: A five-judge Constitution Bench of the Supreme Court recently ruled that it can exercise its plenary power to do “complete justice” under Article 142(1) of the Constitution to dissolve a marriage on the ground that it had broken down irretrievably, without referring the parties to a family court where they must wait 6-18 months for a decree of divorce by mutual consent.

Current procedure for divorce under the Hindu Marriage Act

Section 13B of the HMA provides for “divorce by mutual consent”. Both parties to the marriage must together file a petition to the district court “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”.

Under Section 13B(2) of the Act, the parties must move a second motion before the court “not earlier than six months after the date of the presentation of the [first] petition...and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime”.

The mandatory six-month wait is intended to give the parties time to withdraw their plea.

Thereafter, “the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit...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”.

A petition for divorce by mutual consent can be moved only after a year of the marriage. However, Section 14 of the HMA allows a divorce petition sooner in case of “exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent”.

A waiver of the six-month waiting period under Section 13B(2) can be sought in an exemption application filed before the family court.

In its 2021 ruling in *Amit Kumar vs Suman Beniwal*, the SC said, “Where there is a chance of reconciliation, however slight, the cooling period of six months from the date of filing of the divorce petition should be enforced. However, if there is no possibility of reconciliation, it would be meaningless to prolong the agony of the parties to the marriage.”

The process of obtaining a decree of divorce is often time-consuming and lengthy owing to a large number of similar cases pending before family courts.

The recent ruling

The present case was originally filed in 2014, where the parties sought a divorce under Article 142.

While granting divorce to the parties, the SC said it can depart from procedure as well as existing substantive laws only if the decision to exercise the power under Article 142(1) is “based on considerations of fundamental general

and specific public policy”.

During the pendency of the case last year, the court said that it would determine what rules should be followed while dissolving marriages directly under Article 142 of the Constitution.

The first and most “obvious” condition is that the 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”.

The court laid down the following factors:

the period of time that the parties had cohabited after marriage;

when the parties had last cohabited;

nature of allegations made by the parties against each other and their family members;

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 a court or through mediation, and when the last attempt was made.

The court also noted that the period of separation should be sufficiently long, and “anything above six years or more will be a relevant factor”.

It emphasised the need to evaluate the factors according to the economic and social status of the parties, including their educational qualifications; whether they have any children; their age; and whether the spouse and children are dependents.

About Article 142

Article 142 provides a unique power to the Supreme Court, to do “complete justice” between the parties, where, at times, the law or statute may not provide a remedy. In those situations, the Court can extend itself to put an end to a dispute in a manner that would fit the facts of the case.

While the powers under Article 142 are sweeping in nature, SC has defined its scope and extent through its judgments over time.

In the Prem Chand Garg case, the majority opinion demarcated the contours for the exercise of the Court’s powers under Article 142(1) by saying that an order to do complete justice between the parties “must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws,” referring to laws made by Parliament.

“Therefore, we do not think it would be possible to hold that Art. 142(1) confers upon this Court powers which can contravene the provisions of Article 32 (right to constitutional remedies),” it said.

The seven-judge bench in ‘Antulay’ upheld the 1962 ruling in ‘Prem Chand Garg.’

Notably, in the Bhopal gas tragedy case (‘Union Carbide Corporation vs Union of India’), the SC in 1991 ordered UCC to pay \$470 million in compensation for the victims of the tragedy. In doing so, the Bench highlighted the wide scope of Article 142 (1), adding that it found it “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”.

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Deeming the power under Article 142 to be “at an entirely different level and of a different quality”, the court clarified that “prohibitions on limitations on provisions contained in ordinary laws cannot, ipso-facto, act as prohibitions or limitations on the constitutional powers under Article 142”.

Adding that it would be “wholly incorrect” to say that powers under Article 142 are subject to express statutory prohibitions, the court reasoned that doing so would convey the idea that statutory provisions override a constitutional provision.

Criticism of Article 142

The sweeping nature of these powers has invited the criticism that they are arbitrary and ambiguous.

It is further argued that the Court then has wide discretion, and this allows the possibility of its arbitrary exercise or misuse due to the absence of a standard definition for the term “complete justice”.

Defining “complete justice” is a subjective exercise that differs in its interpretation from case to case. Thus, the court has to place checks on itself.

In 1998, the apex court in ‘Supreme Court Bar Association vs Union of India’ held that the powers under Article 142 are supplementary in nature and could not be used to supplant or override a substantive law and “build a new edifice where none existed earlier”.

The Court said that the powers conferred by Article 142 are curative and 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”. Adding that Article 142 cannot be used to build a new edifice, ignoring statutory provisions dealing with a subject, the court also said that the provision cannot be used “to achieve something indirectly which cannot be achieved directly”.

More recently, in its 2006 ruling in ‘A. Jideranath vs Jubilee Hills Co-op House Building Society’, the Supreme Court discussed the scope of the power here, holding that in its exercise no injustice should be caused to a person not party to the case.

Another criticism of the powers under Article 142 is that unlike the legislature and the executive, the judiciary cannot be held accountable for its actions. The power has been criticised on grounds of the separation of powers doctrine, which says that the judiciary should not venture into areas of lawmaking and that it would invite the possibility of judicial overreach.

However, the Drafting Committee of the Indian Constitution was mindful of the wide-reaching nature of the powers and reserved it only for exceptional situations, which the existing law would have failed to anticipate.

Additionally, the apex court has imposed checks on its own power under Article 142. In 2006, the SC ruling by a five-judge Bench in ‘State of Karnataka vs Umadevi’ also clarified that “complete justice” under Article 142 means justice according to law and not sympathy, while holding that it will “not grant a relief which would amount to perpetuating an illegality encroaching into the legislative domain.”