Ironing out the Creases: Re-examining the Contours of Invoking Article 142(1) of the Constitution

*Rajat Pradhan**

Abstract

In the light of the extraordinary and rather frequent invocation of Article 142(1) of the Constitution of India, this note expounds a constructive theory of perusing Article 142(1) by the Supreme Court. The central inquiry seeks to answer the contemporaneous question of whether Article 142 can be invoked to make an order or pass a decree which is inconsistent or in express conflict with the substantive provisions of a statute. To aid this inquiry, cases where the apex court has granted a decree of divorce by mutual consent in exercise of Article 142(1) have been examined extensively. Thus the note also examines the efficacy and indispensible nature of this power in nebulous cases where the provisions of a statute are insufficient for solving contemporary problems or doing complete justice.

Introduction

An exemplary provision, Article 142(1) of the Constitution of India envisages that the Supreme Court in the exercise of its jurisdiction may pass such enforceable decree or order as is necessary for doing 'complete justice' in any cause or matter pending before it. While the jurisprudence surrounding other provisions of the Constitution has developed manifold, rendering them more concrete and stable interpretations, Article 142(1) is far from tracing this trend. The nature and scope of power contemplated in Article 142(1) has continued to be mooted imaginatively. Most recently, the Supreme Court battled with tracing the contours of this provision in *National Insurance Co. Ltd. v. Parvathneni*[1] and *University of Kerala v. Council of Principals of Colleges, Kerala*.[2] The need for concretising the import of Article 142(1) has arisen out of decisions which have failed to demonstrate a unifying philosophy of the Supreme Court in doing 'complete justice'. The provision was

* IV Year, B.A. LL.B. (Hons.), Dr. Ram Manohar Lohiya National Law University, Lucknow. The author would like to dedicate this note to his grandfather, Justice (Retd.) O.P. Pradhan, without whose constant guidance and support, this note would not have been possible.

1. (2009) 8 SCC 785, at 786 (A bench of Katju and Ganguly JJ., referred a question to the Chief Justice of India for constituting a larger bench, with respect to the scope of Article 142 and if it permits the Court to create a liability where none exists.).

2. (2010) 1 SCC 353, at 362 (A bench of Katju and Ganguly JJ., expressed its different opinions on the constitutionality of judicial legislation under the Constitution. Five questions were framed by Katju J. to be referred to the Chief Justice of India to constitute a larger bench, for an authoritative decision. The fifth question was framed in the nature and scope of Article 142 of the Constitution and whether it allowed the judiciary to legislate and/or perform the functions of the Executive of the State.).

pressed into aid for creating *de novo* grounds for a decision in *Leila David v. State of Maharashtra*[3] and *Anil Kumar Jain v. Maya Jain*.[4] On the other hand, similar pleas invoking Article 142 for waiving a statutory requirement were rejected in *Manish Goel v. Rohini Goel*[5] and *Poonam v. Sumit* Tanwar.[6] An extraordinary, yet nebulous provision, Article 142's invocation has been fraught with uncertainty which indicates the need for examining its true import.

This note attempts to answer the contemporaneous question of *whether Article 142 can be invoked to make an order or pass a decree which is inconsistent or in express conflict with the salutary substantive provisions of a statute*. Part I of the note examines the nature and scope of Article 142 in the context of this issue. It identifies three sorts of case law which have answered this question with distinct approaches. Part II reconciles the conflicting decisions which have invoked Article 142 to develop a constrictive theory of doing 'complete justice' using this extraordinary power. Part III discusses the issue of creating a fresh ground of divorce as 'irretrievable breakdown of marriage' by convoluting the established procedure of divorce by mutual consent in the guise of Article 142. The conclusion reemphasises the need of developing a more balanced jurisprudence and case law surrounding Article 142 as a matter of good legal and judicial practice.

I. Restricted, Broad and Harmonious Interpretations of Article 142(1)

The open-ended interpretation of Article 142(1) rendered by the Supreme Court has raised a significant query of the possibility of invoking Article 142 in situations where a decision may fall foul of substantive provisions of a statute. The Supreme Court's approach to this issue can be identified as chronologically falling into three phases of restricted, broad and harmonious interpretations given to Article 142. All three phases contain dynamic case law trying to justify its approach and possible reach. The following sections preview the approaches developed in these three phases.

A. Restricted Interpretation

Article 142 of the Constitution received its first significant interpretation in a restricted, more balanced light. In *Prem Chand Garg v. Excise Commissoner, U.P.*[7],

3. (2009) 10 SCC 337 (A three judge bench of the Supreme Court upheld the conviction for contempt which had been issued summarily in the exercise of Article 142 without following the mandate of § 14 of the Contempt of Courts Act, 1971.).
4. (2009) 10 SCC 415 (In this case, the apex court granted a decree of divorce by mutual consent to the spouses even when the wife had withdrawn her consent. The fact that the wife did not intend to live with the husband prompted the Court to invoke Article 142 for granting a divorce decree in order to do what the justices saw as complete justice.).
5. (2010) 4 SCC 393.
6. (2010) 4 SCC 460.
7. AIR 1963 SC 996 [hereinafter *PC Garg*].

a Constitution bench was faced with the question of whether the Supreme Court could frame a rule or issue an order which would be inconsistent with any of the fundamental rights. GAJENDRAGADKAR, J. answered the question unambiguously as:

> *[T]hough the powers conferred on this Court under Article 142(1) are very wide, and the same can be exercised for doing complete justice in any case, this court cannot even under Article 142(1) make an order plainly inconsistent with the express statutory provisions of substantive law, much less, inconsistent with any Constitutional provision.*[8]

This view was endorsed by a nine-judge Bench in *Naresh Shridhar Mirajkar v. State of Maharashtra*[9] and was reiterated by a seven-Judge Bench in *A.R. Antulay v. R.S. Nayak*.[10] This seemingly unambiguous and pragmatic declaration was amended and disputed in later judgements which signify a different approach to interpreting Article 142 of the Constitution.

B. Broad Interpretation

One of the first indications of a broad interpretation can be traced back to *K.M. Nanavati v. State of Bombay*.[11] Even as the case did not directly analyse the issue at hand, certain preliminary observations are insightful. SINHA, C.J. speaking for the majority held that Article 142 is the power to pass orders incidental or ancillary to the exercise of the power under Article 136, which gives the Supreme Court discretionary power to allow special leave to appeal from any judgment. The Court contrasting the phraseologies of Article 161, which gives the Governors power to grant pardons, reprieves, etc., and Article 142, held that:

> *Article 161 contains no words of limitation; in the same way, Article 142 contains no words of limitation and in the fields covered by them they are unfettered.*[12]

In an eminent decision of a three-judge Bench decision in *Delhi Judicial Service Association v. State of Gujarat*[13] the Supreme Court extolled its power to new heights by declaring Article 142 as a part of basic structure of the Constitution. K.N. SINGH, J. held that:

> *This Court's power under Article 142(1) to do 'complete justice' is entirely of different level and of a different quality. Any prohibition or restriction*

8. *Id.* at 1003.
9. AIR 1967 SC 1, at 14-15.
10. (1988) 2 SCC 602.
11. AIR 1961 SC 112.
12. *Id.* at 122.
13. (1991) 4 SCC 406, at 452 [hereinafter *Delhi Judicial Service*] (The Supreme Court, inter alia, for the first time held that the power under Article 142 is a part of the basic structure of the Constitution).

> *contained in ordinary laws cannot act as a limitation on the constitutional power of this Court...No enactment of Central or State Legislature can limit or restrict the power of this Court under Article 142 of the Constitution though while exercising power under Article 142 of the Constitution, the Court must take into consideration the statutory provisions regulating the matter in dispute.*[14]

Again, this line of argument was forthrightly forwarded in *Union Carbide Corporation v. U.O.I*[15] even as the Constitution bench did not make any reference to the jurisprudence propounded in *Delhi Judicial Service*. The Supreme Court speaking through RANGANATH MISRA, C.J. added a rider circumscribing the power under Article 142 in the following manner:

> *Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142...Perhaps, the proper way of expressing the idea is that in the exercise of the powers under Article 142 and in assessing the needs of 'complete justice'...take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of the power and discretion accordingly.*[16]

Importantly, *Delhi Judicial Services* observed the restricted interpretation rendered in *Prem Chand Garg* and *A.R. Antulay* as obiter dicta and the principle of inconsistency with statutory provisions or fundamental rights as a limitation to the Constitutional power under Article 142 was said to be unnecessary.[17]

C. Harmonious Interpretation

A watershed development in Article 142 jurisprudence came with the five-judge bench decision in *Supreme Court Bar Association v. U.O.I.*[18] The Court in this case rectified the error of *In Re, Vinay Chandra Mishra*[19] by holding that the

---

14. *Id.* at 463 (emphasis supplied) (The interpretation of Article 142 as envisaged in *P.C. Garg* was diluted by the apex court. The rationale for the same was that as the issue involved in *P.C. Garg* was that of fundamental rights, the observations made therein as to the exercise of the power under Article 142 in relation to other provisions can have no bearing on subsequent cases (*see* Zee Telefilms Ltd. v. U.O.I (2005) 4 SCC 649, at 737)).
15. (1991) 4 SCC 584 [hereinafter *Union Carbide*] (The central question in this case was whether an offence can be compounded or the criminal proceedings be quashed by invoking Article 142(1) in case of a statutory prohibition to the contrary.).
16. *Id.* at 635 [emphasis supplied].
17. *Delhi Judicial Service*, *supra note* 13, at 462.
18. (1998) 4 SCC 409 [hereinafter *Supreme Court Bar Association*].
19. (1995) 2 SCC 584.

suspension of an advocate can only be done by the Bar Council of India under the Advocates Act and the Supreme Court cannot usurp this statutory power to suspend an advocate by invoking Article 142.[20] A.S. ANAND, J., speaking for the court held:

> *It, however, needs to be remembered that the powers conferred to the court by Article 142 being curative in nature cannot be construed as powers which authorise the court to ignore the substantive rights of a litigant while dealing with a case pending before it...Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly*.[21]

This indicates that Article 142 is available to supplement the salutary substantive law and not to supplant it. The opinion expressed by the apex court reconciles the restricted and broad interpretations of Article 142 thus:

> *The very nature of the power (under Article 142) must lead the court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it.*[22]

This interpretation of Article 142 (1) highlights the notion that although Article 142(1) is not abated by the statutory provisions, the same is an ancillary power and can be used when it is not expressly in conflict with the substantive provisions of law and when the Supreme Court is of the opinion that circumstances merit its invocation to avert miscarriage of justice.

II. RECONCILING ARTICLE 142(1) JURISPRUDENCE

A careful marshalling of the decisions invoking Article 142(1) reveals that this power has been employed by the Supreme Court for two purposes: *first*, to by-pass or to give a go-by to the procedural technicalities mandated by the statute; *second*, to bring finality to a cause or matter by invoking Article 142 at the time of passing a decree or making an order. Some commentators observe that Article 142(1) is

---

20. The Court suspended the license of a practising advocate who had been guilty of contempt of court, by invoking Article 129 read with Article 142 of the Constitution. The said punishment can only be given by the State Bar Councils and the Bar Council of India as mentioned in the Advocates Act, 1961. The Court in this case erroneously held *P.C. Garg* to be "no longer a good law", however the error was later rectified by the court in *Supreme Court Bar Association*.

21. *Supreme Court Bar Association*, *supra* note 18, at 431-432.

22. *Id.* at 432.

only available for procedural purposes.[23] However, others are of the opinion that the provision has been practically raised by the Supreme Court to the status of a new source of substantive power.[24] On a careful perusal of case law it emerges that the power has been resorted to for both procedural and substantive purposes. In the first category are cases which demonstrate that adherence to procedural technicalities may have adverse results, and the same can be given a go-by by invoking Article 142.[25] In the second category are those cases where the apex court has passed appropriate orders to fill in the gaps where there is a vacuum in law.[26] The substantive use of inherent power by the Court has met with criticism from all quarters. This assumption of role of 'super legislature' or 'super executive'[27] is observed as a transgression from the principle of separation of powers.[28] Thus, it becomes imperative to analyse the contours of Article 142 in both these circumstances to do 'complete justice' to this provision.

It is submitted that Article 142(1) does not confer a fresh source of power to the Supreme Court for creating new law nor does it create an independent basis of jurisdiction. The primary function of Article 142(1) is to help effectuate Articles 32 and 136 of the Constitution of India. Article 142(1) infuses life and blood in these two provisions by providing a mandate that the orders and decrees passed by the Court in pursuance of Article 32 or 136 (which are independent jurisdictions) or other jurisdictions (Articles129, 131, 132, 133, 137, 138) shall be enforceable throughout the territory of India. This argument is further bolstered if we look at the positioning of Article 142 in the Constitution of India. The said provision appears in the Constitution after Article 32 and 136, i.e. the Constitution first confers jurisdiction on the Court through Article 32 and 136 and then provides a mechanism by which the letter of law pronounced by the highest Court is to be followed in spirit by enforcing it.

23. *See* R. Prakash, *Complete Justice Under Article 142,* (2001) 7 SCC (J) 14, 16 ("Article 142 is an article which deals with procedural aspects and the two words 'complete justice' cannot enlarge the scope of the article.").

24. M.P. JAIN, INDIAN CONSTITUTIONAL LAW 262 (5th ed. 2008) ("The creative role that the Supreme Court has assumed under Article 142 of the Constitution is much wider than a court's creative role in interpreting statutes and is plainly legislative in nature."); G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 26 (11th ed. 2008) [hereinafter SINGH, PRINCIPLES].

25. Laxmi Morarji v. Bherose Darab Madan, (2009) 10 SCC 425, at 432-433; Hidayatkhan Bismillakhan Pathan v. Vaijnath, (2009) 7 SCC 506, at 513.

26. Vineet Narain v. U.O.I., (1998) 1 SCC 226, at 264; B.P. Achala Anand v. S. Appi Reddy, (2005) 3 SCC 313, at 329; Prakash Singh v. U.O.I, (2006) 8 SCC 1, at 13. *See also* Adithya Reddy, *Judicial Activism or Overreach*, (2009) 6 SCC (J) 29.

27. Somnath Chaterjee, *Democracy and Judiciary*, *in* HIGH COURT OF MADHYA PRADESH, GOLDEN JUBLIEE 1956-2006 – A REMEMBRANCE BY ADVOCATE GENERAL 7, 8 (2007)

28. SINGH, PRINCIPLES, *supra* note 24, at 279. Perhaps the proper way of exercising powers in this regard is that the Supreme Court can make a recommendation to the legislature as to the desired changes to be brought in law, and it is for the latter to act upon the same as was done in Naveen v. Neelu Kohli (2006) 4 SCC 558, at 578, 583 However, the prompt implementation of such recommendations is doubted.

The purpose of Article 142(1), which is of immense significance, is to do complete justice in any cause or matter pending before the Court. The phrase 'complete justice' signifies the possibility of invoking this provision in myriad situations.[29] Article 142(1) is a repository of unenumerated power which has been left 'undefined and uncatalogued' so that 'it remains elastic enough to be moulded to suit the given situation.'[30] This inherent power of the Court signifies our commitment to justice as a nation.

As has been held by the Supreme Court, Article 142 is a power of equity which is wielded by the Court in appropriate circumstances[31] i.e. where rigidity is considered inappropriate.[32] This flexibility in Article 142 is not because of the supremacy of the Court, but due to the fact, that no matter how imaginative or vigilant law makers may be, it is not a rational expectation that it will frame a statute which is capable of answering all the future disputes. It is when *hard cases* arise that the demands of justice go further than what is already carefully settled by law or convention.[33] The spirit of our dynamic Constitutionalism ensures that the Supreme Court is not forced to fold its hands in despair, pleading its inability to pass necessary orders where the existing laws cannot tackle a dispute effectively.

In a nutshell, it can be said that Article 142 is that extraordinary arrow in the quiver of the Supreme Court, which is to be taken out, when the other arrows (powers) fail to resolve the dispute or the relevant statutory provisions provide no guidance in that regard. But when the Supreme Court is faced with bad law or conflicting laws, it must overrule those on *legal* and existent grounds rather than merely invoking Article 142 to render a desired result. Even though Article 142 keeps alive the natural law element in our Constitution, if this salutary provision is pressed to aid where contrary legal grounds exist and the Court overlooks those without explaining its rationale, Article 142 will be reduced to a self-serving principle. At times, the apex court has passed orders quoting phrases like "in the interests of justice" or "to do complete justice", without making a reference to Article 142. In

---

29. Ashok Kumar Gupta v. State of U.P., (1997) 5 SCC 201, at 250.

30. Delhi Development Authority v. Skipper Construction Co., (1996) 4 SCC 622, at 634.

31. Sandeep Subhash Parate v. State of Maharashtra, (2006) 7 SCC 501; Ministry of Defense v. A.V. Damodaran, (2009) 9 SCC 140, at 147, 151.

32. Justice J.S. Verma, *B.N. Datar Centenary Endowment Lecture: New Dimensions of Justice*, (1997) 3 SCC (J) 3,4 ("The Constitution of India by Article 142 expressly confers on the Supreme Court plenary powers for doing complete justice in any cause or matter before it. Such power in the court of last resort is recognition of the principle that in the justice delivery system, at the end point attempt must be made to do complete justice in every cause, if that result cannot be achieved by provisions of the enacted law. These powers are in addition to the discretionary powers of courts in certain areas where rigidity is considered inappropriate.").

33. *See* RONALD DWORKIN, LAW'S EMPIRE (1986).

such cases it is not clear whether the Supreme Court had invoked its inherent powers under Article 142(1) consciously or impliedly.[34] It becomes a quandary for the subsequent benches dealing with a matter arising out of such orders, as it is difficult to ascertain that in pursuance of which power was the order made.[35] This covert invocation of Article 142 is neither comprehensible nor just. Hence it is humbly submitted that whenever the Court deems fit to invoke its power under Article 142 the same should be made patent and legally perusable.[36]

Thus, a word of caution needs to be formulated that Article 142 cannot be pressed into service to achieve something which is against the cardinal principles of well-settled law or the substantive law.[37] The judicial process is well developed to allow for overruling or disagreement but this must be done through the process itself and not by fiat of Article 142. For example, Article 142 cannot be used by a judge sitting in a two-judge Bench to pass directions, when the other judge disagrees to the same. It has to be exercised in concurrence by a majority of judges in a Bench.[38]

The nature of this extraordinary power has been summed up in an exhaustive and authoritative manner thus:

> *The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statues. These powers are of very wide amplitude and are in the nature of supplementary powers.*[39]

---

34. *See* Raju Ramchandran & Gaurav Agarwal, B.R. Agarwala's Supreme Court Practice and Procedure 264 (6th ed. 2002).

35. M.S. Ahlawat v. State of Haryana, (2000) 1 SCC 278, at 284 (A three judge bench of the Supreme Court assumed that the previous bench had issued the order of conviction under Article 142. For cases where the court impliedly invoked Article 142 without making reference to it, *see* Punjab & Haryana High Court Bar Assn. v. State of Punjab, (1994) 1 SCC 616, at 624 which was followed in the same manner in Rubabbudin Sheikh v. State of Gujarat, (2010) 2 SCC 200, at 209, 216; Shiv Pujan Prasad v. State of Uttar Pradesh, (2010) 1 SCC 517, at 520).

36. For a similar view, *see* Indian Bank v. ABS Marine Products Pvt. Ltd., (2006) 5 SCC 72, at 87.

37. Nahar Industrial Enterprises Ltd. v. Hong Kong & Shanghai Banking Corpn., (2009) 8 SCC 646, 707 (as adequate remedy was available in law the apex court declined to invoke Article 142); Delhi Development Authority v. Skipper Construction Co., (1996) 4 SCC 622, at 635 (it was held that even under Article 142 the court cannot reopen the orders and decisions of the courts which have become final); Rumi Dhar v. State of W.B., (2009) 6 SCC 364, at 372 (the Court held that in exercise of Article 142 it would not direct quashing of a crime against the society, particularly when the subordinate courts had made out a prima-facie case against appellants).

38. Gaurav Jain v. U.O.I, (1998) 4 SCC 270, at 275-276 (Article 142 cannot be inconsistent with Article 145(5) which says that no judgment of the Court will be delivered save with the concurrence of the majority of judges).

39. Supreme Court Bar Association v. U.O.I., (1998) 4 SCC 409, at 431.

III. Invoking Article 142 in Matrimonial Disputes

Matrimonial disputes, specifically those of divorce by mutual consent are perhaps the best example to take our discussion forward in tracing the contours of Article 142. It directly deals with the issue of whether Article 142 can be pressed into aid for rejecting the mandate of a statutory provision. Section 13B(2) of the Hindu Marriage Act, 1955[40] mandates the grounds of divorce under Hindu law and it mentions the procedure for seeking a decree by mutual consent. The essential ingredient of sub-section (2) is that 'both the parties (spouses) must apply to the Court not earlier than six months from the presentation of the divorce petition and not later than eighteen months after that date the petition may be heard and decree dissolving the marriage may be granted.'[41] Thus, this ingredient contemplates two aspects: *first*, it provides a period of *interregnum* i.e. a minimum of six months and the maximum of eighteen months, which has been envisaged to enable the spouses to introspect before seeking divorce; *secondly*, it requires that the motion should be made by *both* the parties, at the time of presenting a petition of divorce and also at the time of divorce decree being granted.

Now, the question arises as to whether the procedure specified in Section 13B(2) of the Act is mandatory or directory in nature.[42] Lately, a two-judge bench of the apex court in *Neeti Malviya v. Rakesh Malviya*[43] has referred this question to a three-judge bench, that whether the period prescribed in Section 13B(2) of the Act can be waived or reduced by the Supreme Court in exercise of its jurisdiction under Article 142 of the Constitution. In fact, the Supreme Court has previously invoked Article 142(1) to give a go-by to the procedure in Section 13B(2) of the Act in both situations of:

First, when the Court grants a decree of divorce by mutual consent or directs the subordinate Court for the same, by waiving the period of interregnum as mentioned in S. 13B(2) of the Act.[44]

Secondly, when one of the parties has withdrawn the consent or revoked it within or after the period of interregnum as mentioned in Section 13B(2) of the Act.[45]

---

40. The Hindu Marriage Act, 1955(Act No. 25 of 1955) [hereinafter the Act].
41. II S.A. Desai (ed.), Mulla Principles of Hindu Law 166 (20th ed. 2008).
42. A bare reading of the provision does not lead to any conclusion in this regard. Majority of the authors are of the opinion that the procedure prescribed is directory in nature and the Courts need not follow the same. For a contrary view, *see* Ramesh Chandra Nagpal, Modern Hindu Law 255 (2008).
43. (2010) 6 SCC 413, at 417.
44. Anita Sabarwal v. Anil Sabarwal, (1997) 11 SCC 490; Anjana Kishore v. Puneet Kishore, (2002) 10 SCC 194.
45. Ashok Hurra v. Rupa Bipin Zaveri, (1997) 4 SCC 226; Anil Jain v. Maya Jain, (2009) 10 SCC 415.

By overstepping the statutory limitations contained in Section 13B(2) of the Act, the apex court has used its inherent powers for granting a decree of divorce by mutual consent, relying on the doctrine of irretrievable breakdown of marriage.[46] The position in this regard has been summed up by the Supreme Court in *Anil Kumar Jain v. Maya Jain*[47] as:

> *[A]lthough irretrievable breakdown of marriage is not one of the grounds indicated whether under Sections 13 or 13B of the Hindu Marriage Act, 1955, for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13B of the aforesaid Act. This doctrine of irretrievable breakdown of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution...*[48]

Subsequent to this case, two unsuccessful attempts were made in *Manish Goel v. Rohini Goel*[49] and *Poonam v. Sumit Tanwar*[50] to seek divorce decrees based on the supposed additional ground of irretrievable breakdown of marriage. The Supreme Court has also faced pleas for waiving the statutory period in Section 13B(2) of the Act, in exercise of powers under Article 142. It is submitted that waiving the cooling off period dismantles the procedure and theory developed in relation to grant of divorce decrees under Hindu law. The legislature in its wisdom has provided a

---

46. It means that the marriage ties have broken to the extent that the same are beyond salvage or repair, there being no chance of reconciliation between the parties. Irretrievable breakdown of marriage is not a recognised ground of divorce under the Act, but the same has been recognised by the courts for granting divorce. A three judge bench in Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558, at 578-579 acknowledging the recommendations of the 71st Law Commission Report, has appealed to the Legislature that the same should be made a ground of divorce. As a consequence of this decision the 18th Law Commission in its 217th report has further recommended the same. Cf. Vishnu Dutt Sharma v. Manju Sharma, (2009) 6 SCC 379, at 384 (A two judge bench of the Supreme Court refused to a grant a decree for divorce on the ground of irretrievable breakdown of marriage, holding that it would be amending the Act which was the exclusive function of the legislature, and hence this two judge bench seemingly overlooked the earlier three judge bench decision).

47. (2009) 10 SCC 415 [hereinafter *Anil Kumar Jain*].

48. *Id.* at 423.

49. (2010) 4 SCC 393 (A highly qualified couple seeking divorce by mutual consent pleaded before the apex court to invoke Article 142, for the waiver of the minimum statutory period of six months as mentioned in § 13(B)(2) of the Act).

50. (2010) 4 SCC 460 (A couple whose marriage ran into bad weathers after 48 hours, approached the Court by filing a writ petition under Article 32 of the Constitution, and made a similar plea as mentioned in the above case).

period of interregnum as the severance of marital ties is a matter of grave import and the Court should interfere only as a last resort to grant relief. If *Anil Kumar Jain* is stretched to its logical conclusion, then it deprives the spouses of this waiting period, since it is possible that 'the waiver of statutory period could be granted by the in the exercise of Article 142.' Even if *Anil Kumar* is seen as a well reasoned invocation of the extraordinary power, it is imperative for the apex court to further clarify the grounds and conditions precedent as to when it can waive the minimum statutory period so that *Anil Kumar Jain* is not misconstrued as generating new grounds of law.

Furthermore, the exercise of extraordinary powers under Article 142 to grant divorce under Section 13B(2) of the Act when one of the spouses has withdrawn his/her consent in a bona-fide manner has been vehemently criticised by the learned author Kusum while opposing the decision of the two-judge bench in *Ashok Hurra v. Rupa Bipin Zaveri*[51] as:

> *While one is in complete agreement with the sagacity of the argument that there is no point in simply retaining a dead marriage, it is not easy to concede to an interpretation that a consent decree even after the consent has been explicitly withdrawn by one party can be passed in order to do 'complete justice'...Can the Court invoke its special jurisdiction under Article 142 in a case where a party has committed a wrong which is not only a matrimonial wrong but an offence under the penal code as well...When Law and Equity are clearly against a party, the exercise of special jurisdiction by the court needs special care.*[52]

It is interesting to point out that the offence of bigamy is compoundable only by the husband or wife of the person so marrying, with the permission of the Court. The Supreme Court in the aforesaid decision, while exercising its inherent power, compounded the offence of bigamy committed by the husband and instead granted him a premium by allowing a conditional decree for divorce. Subsequent to the decision, the aggrieved wife filed a curative petition[53] before a three-judge

51. (1997) 4 SCC 226, at 238-239 [hereinafter *Ashok Hurra*] (the Supreme Court granted a decree for divorce under § 13(B) of the Act even though the wife had withdrawn the consent for the same eighteen months after the petition was presented. The decree was conditionally granted on the ground of irretrievable breakdown where the Court took into account the fact that the husband had married a second time and had a child from this wedlock, during the subsistence of the proceedings in the Court (which is a punishable offence under § 494 of the Indian Penal Code as the offence of bigamy.) However the decree was made conditional that the same would be effective only when the husband paid the wife a certain sum of money.).

52. Kusum, *Matrimonial Adjudication Under Hindu Law*, *in* FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH 245-246 (S.K. Verma and Kusum eds., 2000).

53. In a curative petition the Supreme Court in exceptional circumstances reconsiders its judgment, in the exercise of its inherent power. It is also called 'second review by the Supreme Court'. The review can be

bench of the Supreme Court, but in view of the significant issues involved, the matter was referred to a Constitution bench. The petition failed, not on merits but on the ground that the correctness of orders of the Supreme Court could not be assailed under Article 32.[54] This decision is logically and legally untenable since the apex court did not consider resorting to Article 142 to prevent irremediable injustice in the second opportunity when it had curiously invoked Article 142 in the first instance for purportedly doing 'complete justice'.

The Court in *Ashok Hurra* doubted the conclusion in *Sureshta Devi v. Om Prakash*[55] that the consent given by the parties filling a petition for divorce by mutual consent had to subsist till a decree was passed on the petition. When *Anil Kumar Jain* came to consider both these cases, it opined that '*the law as explained in Sureshta Devi case still holds good, though with slight variations as far as the Supreme court is concerned and that too in the light of Article 142 of the Constitution.*'[56]

It may be relevant to summarize a more plausible interpretation of Article 142 vis-à-vis Section 13B(2) of the Act that the said power can be invoked to waive of the statutory period of six months, only when the spouses have been involved in litigation for a long period of time, which is more than the minimum or maximum limits of the cooling period, and the Courts (including the Supreme Court) have failed to bring about reconciliation between the parties. Secondly, with respect to the subsistence of consent of both the spouses, where one of the spouses has withdrawn their consent within or before the waiting period, Article 142 can be invoked by the Court to grant a decree of divorce by mutual consent only when the withdrawal of consent has been in a *malafide* manner.

Conclusion

Cardozo J. writes: *judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment despite of it. They have the power, though not the right, to travel beyond the walls of interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law.*[57] This is an apt summation to the principle which must be observed when invoking the extraordinary power under Article 142. Indeed the

done only if the petitioner is able to show: (i) that there has been violation of principles of natural justice or (ii) where in the proceeding a learned judge failed to disclose his connection with the subject-matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner.

54. *Ashok Hurra*, *supra* note 51, at 403, 416 (although the Supreme Court held that in the interests of justice a final judgment or order of the Supreme Court could be re-examined in the exercise of its inherent powers, in rarest of rare cases, even after a review petition under Article 137 had been dismissed.).

55. (1991) 2 SCC 25, at 31.

56. Anil Jain v. Maya Jain, (2009) 10 SCC 415, at 424.

57. Benjamin N. Cardozo, The Nature of the Judicial Process 129 (2008).

justices have the option of exercising this power but the abuse of power will produce judgements falling foul of law and justice, as can be the fate of erroneous judgements rendered under any other jurisdiction of the Supreme Court.

Our Supreme Court in pursuit of justice knows no bounds, but in such pursuit it must not lose sight of principles of institutional integrity and judicial process. Of course, the application of law with pedantic rigour is neither just nor justifiable, yet the judicial process must be *mindful* of the existing legal principles while invoking principles of equity to strike a harmonious balance between the two. The absence of any Constitutional Assembly Debate on Article 142 (Article 112 of the Draft Constitution) indicates that the founding fathers wanted the powers under this article to remain open-ended, so as to enable the Supreme Court to develop its own jurisprudence. It is then timely for the justices to challenge, clarify and correct the prevailing jurisprudence on Article 142 which presents it as a nebulous, unfettered power. No salvage, other than an inward-looking exercise by the apex court and corrective case law can do justice in redeeming a purposive construction of Article 142.