

# ANALYZING “IRRETRIEVABLE BREAKDOWN OF MARRIAGE” AS A SEPARATE GROUND FOR DIVORCE UNDER HINDU LAW

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## ABSTRACT

“Irretrievable breakdown of marriage” refers to a marriage that is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably. Though 'irretrievable breakdown of marriage' is not a ground for divorce under the Hindu Marriage Act and Special Marriages Act, the Supreme Court has, in a significant ruling, said divorce can be granted if a marriage is totally unworkable, emotionally dead and beyond salvage.

## INTRODUCTION

Marriage is a sacred institution and it is the very foundation of a stable family and civilized society. Under Hindu Law, marriage is regarded as sacrament which is eternal and indissoluble. But there is also a concept of divorce in Hindu law. The term 'divorce' comes from the latin word '*divortium*' which means to turn aside; to separate. It is the legal cessation of a matrimonial bond. According to Derret<sup>i</sup> in one of his study remarked that- "*Divorce was introduced into Hindu Law for the protection of helpless women when they were ill-treated. It was never Parliament's intention to give husbands matrimonial variety at their option so long as they could remain a pleader*". Not until a few decades back, divorce was abhorred as an evil; the grounds for divorce were very limited and it was sought only under compelling circumstances. Things have, however changed now and marriage is no longer viewed as an indissoluble union. In view of the needs of changing times, divorce laws have been substantially liberalized. The Hindu Marriage Act, 1955 revolutionised the matrimonial laws and provided for divorce on several grounds. Initially the grounds were based on fault on the part of the respondent. Later the theory of breakdown was further advanced by amendment in s. 13(1) clauses (viii) and (ix) in 1964 and in 1976 divorce by mutual consent was introduced.<sup>ii</sup> Thus over the years, the Indian legislature has attempted to introduce irretrievable breakdown of marriage as a ground for divorce according to the changing needs of the society. However, discussions and deliberations for so many years have not led to any consensus on whether irretrievable breakdown of marriage as a ground for divorce should be introduced or not.

"Irretrievable breakdown of marriage" refers to a marriage that is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably. Though 'irretrievable breakdown of marriage' is not a ground for divorce under the Hindu Marriage Act and Special Marriages Act, the Supreme Court has, in a significant ruling, said divorce can be granted if a marriage is totally unworkable, emotionally dead and beyond salvage.

## HISTORY OF IRRETRIEVABLE BREAKDOWN THEORY OF MARRIAGE

The concept of Irretrievable breakdown of marriage was for the first time introduced in New Zealand where it was recognized that it needn't be necessary for there to be some fault or other

for a spouse to want to opt out of a marriage and hence the law has to recognize and cater to that requirement. The first divorce on the ground of Irretrievable breakdown of marriage was granted by the court in New Zealand in 1921. The Court held that “*when matrimonial relations have ceased to exist, it is not in the interests of the parties nor in the interest of the public to keep the man and woman bound as husband and wife in law*”. Then in England it was the case of *Masarati v. Masarati*<sup>iii</sup> that introduced the theory of breakdown and the 1943 House of Lord decision in the case of *Blunt v. Blunt*<sup>iv</sup> made it increasingly accepted that no public interest was served by keeping legally in existence a marriage which had in fact broken down.

## LAW COMMISSION 71<sup>ST</sup>REPORT

From the Indian context, The Law Commission of India, in its seventy-first report<sup>v</sup> recommended the introduction of irretrievable breakdown of marriage as a ground for divorce. According to the report- “*Restricting the ground of divorce to a particular offence or matrimonial disability causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such nature that the parties to the marriage cannot be worked. In such circumstances there is hardly any utility in maintaining the marriage as a façade, when the emotional and other bonds which are of the essence of marriage have disappeared.*”

Then in 1981, a bill was introduced providing for irretrievable breakdown of marriage as a ground for dissolution of the marriage but it did not get through as some groups felt that unscrupulous husbands would desert their wives and take advantage of this provision.<sup>vi</sup>

## LAW COMMISSION 217<sup>TH</sup>REPORT

In 2009 once again, the Law Commission of India has, in 217<sup>th</sup> Report, recommended the incorporation of irretrievable breakdown of the marriage as another ground for divorce. Pursuant to that and Apex court recommendations, another bill was introduced- The Marriage Laws (Amendment) Bill 2010 and then the Marriage Laws (Amendment) Bill, 2013. However, the statutory provision as it stand today is that simple breakdown of the marriage *per se* is no ground for divorce under any of the personal laws in India. Thus, there have been innumerable cases where

the marriage was in fact utterly broken, but the courts tied down by the technicalities of the law, could not give any meaningful relief to the parties. It is however evident that legislative as well as judicial trends are heading towards the introduction of irretrievable breakdown as a specific ground for divorce.

## CONCEPTUAL FRAMEWORK OF IRRETRIEVABLE BREAKDOWN THEORY OF MARRIAGE

According to the legal definition<sup>vii</sup>, Irretrievable breakdown theory of law can be defined as- *“The situation that exists when either or both spouses are no longer able or willing to live with each other, thereby destroying their husband and wife relationship with no hope of resumption of spousal duties.”* The Irretrievable breakdown of marriage is the most controversial theory in legal Jurisprudence. Marriage is the union of two persons which is based on the love and affection and respect for each other. If any of these is hampered due to any reasons or if there is a failure in the matrimonial relationship between the spouses that reaches to such an extent that both the spouses are no longer willing to live with each other peacefully then it is better to dissolve such a dead relationship which exists only in name not in reality<sup>viii</sup>.

*This means that if the couple can no longer live together as husband and wife then they must prove to the court that the marriage broke down and there is no reasonable chance of living together. Although the Hindu Marriage Act in Section 13 recognizes few grounds for the dissolution of marriage but irretrievable breakdown of marriage is not a ground for divorce under Hindu Marriage Act, 1955. The Supreme Court in its various landmark cases has shown its concern of making irretrievable breakdown of marriage as a ground for divorce. But ultimately it is for the legislature to decide whether to include irretrievable breakdown of marriage as a ground of divorce or not but the legislature must consider irretrievable breakdown of marriage as a ground to grant divorce under the Hindu Marriage Act, 1955.*

The Supreme Court recently dissolved a marriage by exercising its inherent powers under Article 142 of the Constitution, even as it recognised that there is no statutory law for recognising ***irretrievable breakdown of marriage*** as a ground for divorce in India.

The Bench of Justices Sanjay Kishan Kaul and K M Joseph passed a judgment to this effect after taking note that the Supreme Court has earlier invoked its inherent powers under Article 142 to grant a divorce on the ground of *irretrievable breakdown of marriage*. Further, the Court took note that this was done “*not only in cases where parties ultimately, before this Court, have agreed to do so but even otherwise.*”

It was pointed out that,

*“There is, thus, recognition of the futility of a completely failed marriage being continued only on paper ... In numerous cases, where a marriage is found to be a dead letter, the Court has exercised its extraordinary power under Article 142 of the Constitution of India to bring an end to it.”*

Citing the judgment of *R. Srinivas Kumar v. R. Shametha*, the Bench added the caution that such powers are not exercised routinely. However, the same could be invoked “*in rare cases, in view of the absence of legislation in this behalf, where it is found that marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably.*”

## **DECISION      FAVOURING      IRRETRIEVABLE      BREAKDOWN OF MARRIAGE**

In *Munish Kakkar v. Nidhi Kakkar*, the appellant and the respondent got married in accordance with Hindu rites in the year 2000. The parties co-lived for a period of two months, after which the respondent-wife went to Canada, where she eventually obtained citizenship in 2002. The appellant alleged that the respondent went to Canada without his consent. The respondent returned to India only after she got her Canadian citizenship in 2002.

Even after coming back, there were continuous quarrels between the parties. Owing to the same, Panchayat had intervened and further asked the parties to reside separately from their family. Even this solution did not prove to be effective. Subsequently, the respondent left to Canada again.



This prompted the appellant to file for a divorce Section 13(1) (ia) of the *Hindu Marriage Act, 1955* on the ground of cruelty before the lower Court. The appellant contended that the loneliness and lack of co-habitation had caused him extreme physical and mental torture.

Despite his reluctance to go to Canada, he had signed the immigration papers in order to save his marriage, the appellant stated. However, the papers were never submitted. In fact, the appellant stated that the respondent herself had reached Canada on improper travel documents. The respondent, in her arguments, blamed the appellant for abandoning her and made various other allegations relating to dowry, physical assault and extra-marital affairs.

She also claimed that she was forced to have an abortion when she was taken to a doctor once. The appellant denied this allegation and stated that the respondent was never pregnant.

After hearing the arguments from both sides, the Additional District Judge granted a decree of divorce against which an appeal was filed before the High Court of Punjab. Interestingly, the High Court set aside the decree of divorce, attributing various allegations exchanged between the parties to the *wear and tear of marriage* and “inflamed passions”. The High Court judge had opined that these were not adequate to *knock down the walls of marriage*.

Aggrieved, the appellant-husband filed an appeal before the Supreme Court. The respondent-wife, in the meanwhile, expressed consent to continue staying with the appellant.

## **PRESENT STATUS OF IRRETRIEVABLE BREAKDOWN OF MARRIAGE IN INDIA**

With regard to the current status of irretrievable breakdown of marriage it can be inferred that although the law-making body has failed to amend the law to include irretrievable breakdown of marriage as a ground for divorce though the Law Commission of India has recommended the same way back its 71st Report and 217<sup>th</sup> Report but the Supreme Court in its various cases have analysed the importance of irretrievable breakdown of marriage as a ground for divorce. The Supreme Court has exercised its power under Article 142 of the Indian Constitution and has dissolved marriages on the ground of breakdown theory. In fact, Marriage Laws

(Amendment) Bill, 2010 seeks to make Irretrievable breakdown of marriage as a ground for divorce. The amendment which was included in this bill provided advantage to the women. The amendments states that a wife can oppose a husband's plea for a divorce under the "Irretrievable breakdown of marriage" clause but the husband will have no such right to oppose if the wife moves the court on the same ground. On 26<sup>th</sup> August 2013, the bill was passed by the Rajya Sabha however it was not taken up for discussion in Lok Sabha.

Given the current scenario the Supreme Court in case, *R. Srinivas Kumar v. R. Shametha*, 4<sup>th</sup> October 2019 used its inherent power under Article 142 of the Constitution of India for dissolution of marriage on the ground of 'Irretrievable breakdown of Marriage'. In this case for the last two decades the petitioner was fighting a legal battle for divorce and his plea was rejected by the lower court as well as the Andhra Pradesh High Court. The Supreme Court bench consisting of Justice S.K Kaul and M R Shah applied the inherent power under Article 142 of the constitution to do complete Justice and allowed the petition claiming that the marriage had irretrievably broken down. In this case the Supreme Court held that – *"In the present case, admittedly, the husband and 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 to dissolve the marriage between the parties."*

So, when a "Wedlock becomes deadlock" the court analyses the case and if the circumstances go to such an extent that the marriage is beyond repair then accordingly the court grant dissolution of marriage based on the concept of breakdown theory. However irretrievable breakdown of marriage has not been inducted as a ground for divorce in the Indian legal context but if in the future if it is incorporated in law then it should be hedged with sufficient safeguards and applied with utmost discretion.

## WHAT THE SUPREME COURT OBSERVED

The Supreme Court found that the personal relationship between the parties seemed to have been greatly deteriorated and strained. As noted in the judgment,

*“... the relationship appears to have deteriorated to such an extent that both parties see little good in each other; though the respondent insists that she wants to stay with the appellant. In our view, this insistence is only to somehow not let a decree of divorce be passed against the respondent. This is only to frustrate the endeavour of the appellant to get a decree of divorce, completely losing sight of the fact that matrimonial relationships require adjustments from both sides, and a willingness to stay together. The mere say of such willingness would not suffice ...*

*... We have noticed above that all endeavours have been made to persuade the parties to live together, which have not succeeded. For that, it would not be appropriate to blame one or the other party, but the fact is that nothing remains in this marriage. The counsellor’s report also opines so. The marriage is a dead letter.”*

The Bench noted that multiple efforts were made to mediate between the parties, but proved unsuccessful. As a last resort, a counsellor was appointed in an attempt to fix the issue. The Court also took serious note of the critical opinion given by a marriage counsellor that,

*“... the separation of sixteen (16) years since 2003 had made both the parties bitter and cynical about the relationship and there was no sign of any affection or bonding on either side. The parties apparently had no history of pleasant time and only feelings of resentment arising from the several court cases”*

In view of these peculiar facts, the Bench remarked, *“on the ground of irretrievable breakdown of marriage, if this is not a fit case to grant divorce, what would be a fit case!”*

It went on to eventually hold,

*“We are of the view that an end to this marriage would permit the parties to go their own way in life after having spent two decades battling each other, and there can always be hope, even at this age, for a better life, if not together, separately. We, thus, exercising our jurisdiction under Article 142 of the Constitution of India, grant a decree of divorce and dissolve the marriage inter se the parties forthwith.*

The Court concluded on a hopeful note,

*“We do believe that not only is the continuity of this marriage fruitless, but it is causing further emotional trauma and disturbance to both the parties. This is even reflected in the manner of*



*responses of the parties in the Court. The sooner this comes to an end, the better it would be, for both the parties. Our only hope is that with the end of these proceedings, which culminate in divorce between the parties, the two sides would see the senselessness of continuing other legal proceedings and make an endeavour to even bring those to an end. “*

The Court proceeded to award a decree of divorce and dissolved the marriage in the instant case, invoking its jurisdiction under Article 142. The Court also held that the appellant should continue to pay maintenance of Rs.7,500 per month, although the parties were granted liberty to move appropriate proceedings to enhance or reduce the amount.<sup>ix</sup>

## **WHAT DOES ARTICLE 142 PROVIDE FOR?**

The Supreme Court used its extraordinary powers under Article 142 of the Constitution to grant divorce in a case of “irretrievable breakdown of marriage”. Article 142 provides a unique power to the Supreme Court, to do “complete justice” between the parties involved.

This means that at times when law or statute may not provide a remedy, the Court can extend itself to settle a dispute in a manner that would befit the facts of the case. It is with this objective that the court finds it appropriate to grant divorce in a case of “irretrievable breakdown of marriage”.

The Law Commission of India has also twice recommended that this be included as a new ground for granting divorce to Hindus under Hindu Marriage and the Special Marriage Acts. There is, thus, recognition of the futility of a completely failed marriage being continued only on paper.

## **JUDICIAL ATTITUDE**

Even though irretrievable breakdown of marriage has not been stated under Section 13 of the Hindu Marriage Act, 1955 as a ground for divorce, there have been many judgments which gave decisions based on the principle. To further understand the scope of the model, few landmark case laws have been discussed:

In the case of *V. Bhagat v. D. Bhagat*<sup>x</sup>, the Supreme Court observed: “*We reach this conclusion of granting divorce without any mental compunction because it is evident that for whatever be the reasons, this marriage has broken down and the parties can no longer live together as husband and wife; if such is the situation it is better to close the chapter.*”

In the case of *Sanghamitra Singh v. Kailash Chandra Singh*<sup>xi</sup>, a husband sought divorce. The wife informed the court that the husband had already clandestinely married another lady and a criminal case had already been filed against him. Granting the divorce, the court observed: “*Whether the husband has married for second time or not, it is not clear that the marriage has irretrievably broken down and none of the parties wants restoration of marital tie. Accordingly, by applying the doctrine of ‘irretrievable breakdown’, we grant a decree of divorce upon consent of both the parties.*” Likewise, in the case of *Amma Khatoon v. Kashim Ansari*<sup>xii</sup>, was a case under the Dissolution of Muslim Marriages Act, 1939 where the Jharkhand High Court dissolved a marriage on ground of irretrievable breakdown of marriage by invoking s. 2(ix) of the Act, i.e. ‘any other ground which is recognized as valid for the dissolution of marriages under Muslim Law.’

A judgment which is very significant in this context is *Naveen Kohli v. Neelu Kohli*<sup>xiii</sup>. The Supreme Court made a strong plea for incorporating irretrievable of the marriages as a ground for divorce under the Hindu Marriage Act, 1955. The husband filed a petition for divorce on the ground of cruelty making several allegations against the wife; the wife too made several allegations and also criminal complaints against the husband. The family court at Kanpur granted the decree. Against this the wife filed an appeal before the Division bench of Allahabad High Court which set aside the divorce decree; thereupon the husband filed a special leave petition under Article 136 of the Constitution of India. The court after analyzing in great detail the facts and circumstances of the case held that- “*Once marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of the fact and it would be harmful to society and injurious to the interest of the parties.*”

## **MERITS AND DEMERITS OF THE THEORY OF IRRETRIEVABLE BREAKDOWN**

Before discussing the merits and demerits of the theory of irretrievable breakdown, a question arises, that whether the Hindu Marriage Act can be amended with a view to make irretrievable breakdown of marriage as a good ground for grant of a decree of divorce? In seeking answer to the question, we have to bear in mind the changing nature of the family. The family is becoming more democratic and egalitarian. Both the husband and wife share not only the family house; in some cases, they also share the earnings of each other. Because of the rising rate of female activity, the family unit is more of a coalition. It is therefore necessary that if the coalition cannot be worked, the legal sanction for it must be withdrawn.

The Irretrievable breakdown of marriage has its own merits as well as demerits. Marriage is considered to be a sacramental institution which is based on respect, truth, love towards each other. If the matrimonial relation results into a failure where parties develop strong hatred for each other and is not willing to live with each other there is no point in stretching such a dead relationship. Therefore in order to protect the real sanctity of marriage and to reduce the number of unhappy marriages, to prevent from getting wasted the precious years of the spouses it is better to dissolve such marriage. One of the most vital aspect of this theory is that the Marriage Law Amendment Bill, 2010 provides advantage to the women. According to the amendment, the wife can oppose a husband plea for divorce but the husband will have no such right to oppose. Another merit of this theory is that Marriage Laws (Amendment) Bill, 2010 provides the wife and children a clearly-defined share in the husband's immovable property in case of divorce.

The theory also has some demerits as well. The Law Commission of India in its 71<sup>st</sup> report has stated two strong opposition relating to the demerit of this theory.

Firstly, it stated that if the irretrievable breakdown of marriage is made as a ground for divorce then it will make the divorce easy and the sanctity of the marriage in India will get easily destroyed. Secondly it stated that it will allow the guilty spouse to dissolve the marriage out of his own pleasure and he/she will take the advantage of his own fault by dissolving the marriage.

Another demerit of this theory is that if irretrievable breakdown of marriage is introduced as a ground for divorce in India there are chances of increased divorce rates in India, especially women being a victim in the case.<sup>xiv</sup>

## **CRITICISM BY THE GOVERNMENT**

The Government of India, Ministry of Education, Department of Social Welfare, has expressed the review that making Irretrievable breakdown of marriage a ground for grant of a decree of divorce is redundant in the light of the fact that sufficient grounds covering irretrievable breakdown of marriage exist in the Hindu Marriage Act and the Marriage Laws Amendment Act, 1976, for the purpose of seeking divorce.

Thus, we see that though a lot of authorities have deliberated upon the aspect of irretrievable breakdown of marriage as a ground for divorce there has also been a vast majority of authorities that have seen the drawbacks behind this concept of breakdown theory and are not in favour of its legislative birth and implementation.

## **CONCLUSION**

Thus, to conclude, it can be said that marriage is an institution in the maintenance of which the public at large is deeply interested. It is the foundation of the family and in turn of the society without which no civilization can exist. This foundation presupposes the existence of a platform build on the basis of sound understanding between the spouses.

If this understanding is missing between the spouses and the marriage is a continuous malady, then it is desirable that the marriage should be dissolved with the intervention of the court. There is no useful purpose served by continuing such a marriage. Thus, on the basis of “irretrievable breakdown theory” such marriages should be dissolved for the common betterment of both the spouses.

It is high time that we appreciate the need of Irretrievable Breakdown of Marriage theory so that spouses can have a new and better life instead of wasting their valuable time in courts.<sup>xv</sup>

## ENDNOTES

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- <sup>i</sup> J. Duncan M. Derrett, *A Critique of Modern Hindu Law*, (1970) pp. 329
- <sup>ii</sup> Kusum, “Irretrievable breakdown of marriage: A ground for divorce”, Indian Law Institute, Volume 20:2
- <sup>iii</sup> [1969] 1 WLR 393, CA
- <sup>iv</sup> [1943] AC 517, HL
- <sup>v</sup> ‘Irretrievable Breakdown of Marriage as a Ground for Divorce’, 1978.
- <sup>vi</sup> B. Sivaramayya, ‘Irretrievable Breakdown of Marriage as a Ground for Divorce: Gateway to liberalization or oppression’ in Kusum (ed), *Women: March Towards Dignity*, 1993, pp. 56-62.
- <sup>vii</sup> West Encyclopaedia of America Law Edition.
- <sup>viii</sup> Paras Diwan, “Law of Marriage and Divorce”, Universal law publishing and Co., 6<sup>th</sup> Edition, 2011, pg. 29.
- <sup>ix</sup> Bar & Bench ‘Irretrievable breakdown of marriage: “Nothing remains in this marriage”, Supreme Court invokes Article 142 to grant divorce’ by Rintu Mariam Biju on 18 dec, 2019.
- <sup>x</sup> AIR 1994 SC 710, P. 721: (1994) 1 SCC 337
- <sup>xi</sup> AIR 2001 Ori 151: (2001) 91 CLT 404
- <sup>xii</sup> AIR 2001 Jharkhand 28
- <sup>xiii</sup> AIR 2006 SC 1675: (2006) 4 SCC 558
- <sup>xiv</sup> LEXLIFE INDIA, *Aditi Mishra from ILS Law College, Pune. January 8, 2020*
- <sup>xv</sup> Available at [http://www.legalserviceindia.com/Himani Sharma and Chetan Bagdi – IIIrd Year National Law Institute University Bhopal \(M.P.\)](http://www.legalserviceindia.com/Himani%20Sharma%20and%20Chetan%20Bagdi%20-%20IIIrd%20Year%20National%20Law%20Institute%20University%20Bhopal%20(M.P.))