

DIVORCED FROM REALITY

The Supreme Court's recent ruling against easy divorce dashes any hope that legal separation will be quick, smooth and easy in India

By Shefalee Vasudev

A complete breakdown is one of the most unfortunate possibilities of marriage. But despite the overwhelming damage it can cause to emotional and material lives and to the future of children, it is an undeniable reality. Should that become the personal fate of a union, then divorce must fulfil its function as a legal remedy. It must make things easier for a couple's clean exit from the marital bond.

The Supreme Court of India doesn't agree. Last week, while deciding the contested divorce of a couple—Shyam Sundar and Sushma Kohli—justices S.N. Variava and H.K. Sema cautioned subordinate courts against dispensing with divorce cases easily. The argument was that every avenue must be double checked to see if there actually had been a breakdown. The judgement reads: "On the ground of irretrievable breakdown, the court must not lightly dissolve a marriage."

This is seen as a retrograde ruling by many who expect the law to keep pace with the country's changing social skein. But even as the Kohli case was splashed in the newspapers, the fine print was ignored. According to the judgement (a copy of which is with INDIA TODAY), Kohli had filed for divorce in 1991 in a trial court on grounds of cruelty and desertion by his wife. Sushma contested it, saying she had been driven out of her matrimonial home. After

the trial court dismissed Kohli's petition, he went to the Delhi High Court. A single-judge bench granted him divorce but soon a division bench reversed it. By the time Kohli's case reached the Supreme Court, he couldn't prove the accusations of cruelty or desertion. He had also accused Sushma of bigamy—another charge found to be false. After all this, it isn't surprising that the apex court threw out Kohli's explanation of "irretrievable breakdown".

But the case has sparked a prickly debate. And rightly so. When more divorce petitions are being filed across India, the apex court's ruling reveals an inclination towards treating marriages as sacrosanct. If trial courts use this example to doubt irretrievable breakdown before granting divorce, they will complicate the lengthy process that divorce already is. If they send every contesting couple back to "try out a reconciliation", it will mean forcing personal compatibility, which may not be in the domain of legality.

Justice Jaspal Singh, retired Delhi High Court judge who has authored books on legality, including one on matrimonial law, sums it up in a proverb, "You can take a horse to the water, but you can't make it drink." Singh says he feels divorces should become easier. "Marriage will be reduced to hell if divorce is not granted where it is due. I am not sure if we are in touch with the times," he says.

While the media flaunted the



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Supreme Court's ruling, everyone forgot about the elementary premise. Irretrievable breakdown of marriage has never ever been listed as a ground for divorce in any personal law in the country. The Hindu Marriage Act of 1955 accepts five grounds—adultery, cruelty, desertion, chronic or sexually transmitted disease and impotence. But even other acts, the Indian Divorce Act, 1869, which oversees Christian marriages, the Parsi Marriage and Divorce Act, 1936, the Dissolution of Muslim Marriage Act, 1939 and Special Marriage Act, 1956, the law for civil and inter-community marriages, don't include it. As Delhi-based advocate Sunil Mittal says, "Breakdown has only persuasive value, no content value." It is used as an additional argument along with a ground to convince courts that divorce is a saving grace.

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JUSTICE JASPAL SINGH, RETIRED DELHI HIGH COURT JUDGE

This is unlike divorce laws in the West where more than 16 grounds for divorce are accepted. These include irretrievable breakdown and irreconcilable differences. In the US, alcoholism or drug addiction, conviction of a felony and false accusations of adultery or homosexuality too are accepted. Whereas in the UK, even "unreasonable behaviour" has been taken note of.

In India, however, marriage is valued as the primary edifice of society, and divorce its most avoidable contradiction. But while attitudes change, courts stand rooted in history. They are not supported by surveys or opinions of

sociologists to enable radical decisions. There are no reality checks to assess why a marriage that is being bitterly fought in court is not really sacred. As a result, there has been a flip-flop of judicial decisions on separation. But if the law hesitates to make divorces easy, says lawyer Nitya Ramakrishnan, there is some validity in it. "The law cannot take subjective stands. It has to equalise everybody and lay down some norms," she says, adding that issues like maintenance, access and custody of children and property have different consequences for different people. The convenient use of "irretrievable break-

DIVORCE CODE

NO DAMAGE: No divorce petition, contested or by mutual consent, will be directly affected by the Supreme Court's recent ruling.

JUST AN ARGUMENT: No personal law of the country accepts irretrievable breakdown as a stand-alone ground for divorce. It is only a persuasive tool to convince the court.

LEGAL PARAMETERS: Grounds for divorce are cruelty, desertion, adultery, chronic or sexually transmitted disease, impotence and refusal by the husband to pay maintenance despite a court order.

PERSONAL LAWS: The Indian Divorce Act 1869, governing Christian marriages, accepts charges of rape, sodomy and bestiality as grounds.

SCOPE FOR IMPROVEMENT: If Parliament, the Law Commission, social organisations and courts get together to consider including irretrievable breakdown as a separate ground, things would be easier.

ELSEWHERE IT'S EASY In the West, over 16 grounds are accepted for divorce. They include irretrievable breakdown, unreasonable behaviour, drug or alcohol addiction, a felony charge, false accusations of homosexuality or adultery.

down" cannot resolve these problems.

Even so, it is seen as an effective shield against petty mud-slinging. But the mosaic of divorce laws is so complicated and so variously interpreted, that every analysis falls short. No legality, no judgement can give a common prescription for a smooth separation.

"Instead of critiquing the judgement, Parliament, marriage counsellors, social organisations and the Law Commission must come together and consider the inclusion of irretrievable breakdown as a ground for divorce," suggests Ramakrishnan.

Everyone stresses an urgent need to make divorces hassle free and easy but fair for both parties. Otherwise, people may live with the label of marriage but divorce every intimacy associated with it. ■

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SUPREME COURT RULING, SHYAM SUNDER VS SUSHMA KOHLI CASE