Gujarat High Court
Anil Kumar vs Sunita on 12 September, 1997
Equivalent citations: I (1998) DMC 345, (1997) 3 GLR 440
Author: M Parikh
Bench: M Parikh
JUDGMENT M.S. Parikh, J.

1. His Lordship after stating the facts of the case, further observed:

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2. Anil Kumar (husband) filed Hindu Marriage Petition No. 175 of 1986 in the Court of the Assistant Judge, Surat for obtaining decree of dissolution of his marriage with the opponent Sunita (wife) on the ground that his wife treated him with cruelty, as per the ground available under Section 13(l)(ia) of the Hindu Marriage Act, 1955 on the allegations that the respondent was having attacks of fit, she used to pick up quarrels frequently, she attempted to commit suicide and she filed false complaints. The learned Trial Judge by his judgment and decree dated 9.8.1989 decreed the husband's petition and granted the prayer of divorce as prayed for by him declaring that the marriage of the parties to that petition would stand dissolved.

3. Since the wife prayed for permanent alimony, the learned Trial Judge also granted permanent alimony in the sum of Rs. 1,000/- p.m. till she would remarry. The wife carried the matter in appeal before the learned District Judge, Surat by filing Regular Civil Appeal No. 48 of 1989. The learned Joint District Judge by his consolidated judgment and decree dated 27.6.1991 allowed the wife's Regular Civil Appeal No. 48 of 1989 and set aside the decree for divorce passed by the learned Assistant Judge, Surat in Hindu Marriage Petition No. 175 of 1989 filed by the husband. He has, therefore, challenged such dismissal of his divorce petition in Second Appeal No. 100 of 1992 under Section 100 of the Code of Civil Procedure before this Court.

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14. It is undisputed that the marriage of the petitioner with the respondent was solemni
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20. Although all the proceedings have been heard together before this Court, it would be

INTERIM ALIMONY (Civil Appeal No. 169 of 1993 in Second Appeal No. 100 of 1992)

21. This civil application has been moved by the respondent for obtaining interim alimony of Rs. 50,000/- per month towards her maintenance, enjoyment of life and other expenditure and Rs. 50,000/- per month towards the maintenance, education and other expenditure for her minor son

Monty as well as for expenses in the sum of Rs. 15,000/- by way of cost of this litigation. For the purpose of this application the respondent has relied upon the facts narrated in the main petition which inter-alia indicate that she was driven out of her matrimonial home on and from 6.6.1986 and she and her minor son Monty have been residing with her father at Bombay and have been dependent upon her father for their maintenance. As against this, the petitioner has been stated to be coming from an extremely well to do joint family of Marwadi community and has been one of the upper-most families in the City of Surat. In order to show that the petitioner has been financially extremely effluent, details of 17 properties and 16 businesses in which the petitioner has been interested have been set out. According to her the petitioner own 5 motor cars, a tempo motor cycle and has large amount of cash, bank balance and movables including jewellery. He had disclosed an income of Rs. 22.50 lacs as his own individual income out of total disclosure of Rs. 70 lacs of family income during an income-tax raid in the year 1989. According to the letter addressed by the petitioner to the Income-tax Authorities he admitted that gross profit of the petitioner from M/s. Monty International was Rs. 3,71,296.05 in 1987-88, Rs. 2,61,282.06 in 1988-89 and Rs. 5,74,417.63 in 1989-90. Besides, a total sum of Rs. 70,039/- was invested in various companies. The respondent-wife has, therefore, alleged that the petitioner earns an amount of Rs. 5 lacs per month from various sources including businesses and properties. She has, therefore, prayed for interim alimony and expenses as stated above in exercise of her right under Section 24 of the Hindu Marriage Act, 1955 (for short 'die Act'). The petitioner has denied the allegations contained in the respondent's application for interim alimony and cost. According to him, the Trial Court awarded in Hindu Marriage Petition No. 175 of 1986 interim alimony in the sum of Rs. 1,000/- and expenses of litigation in the sum of Rs. 3,000/-. The Trial Court passed decree for divorce and granted permanent alimony of Rs. 1,000/- per month to the respondent-wife till she would remarry. The respondent gave application for enhancement of the alimony in the appeal filed by her against the Trial Court's judgment, that was at Exh. 15 in the appeal proceedings. There she prayed for Rs. 8,000/- including amount of Rs. 5,000/- per month for her maintenance and Rs. 3,000/- per month for minor son's education and other expenses and also prayed for the cost of the litigation. The learned Joint District Judge, who heard the appeal observed that on 12.10.1989 she gave application Exh. 15 and requested for enhancement of the amount of alimony to Rs. 8,000 / - per month and to award cost of litigation and that her subsequent application for alimony, etc., was rejected and that the said application was also not argued before the Appellate Court and finally that on merits said application would deserve to be rejected, as respondent-wife might move in the matter for enhancement of the alimony as may be advised. On the basis of such observations of the Appellate Court the petitioner has contended that the respondent has no right whatsoever to file present application before this Court. It has been contended that after passing of the order under Section 25 of the Act respondent-wife would not be entitled to move an application under Section 24 of the Act.

22. Dealing with the allegations of facts the petitioner has adhered to what he has alleged in the Hindu Marriage Petition No. 175 of 1986. According to him the list of properties and businesses and the particulars of his income set out by the respondent-wife in her application were also set out in her earlier application at Exh. 8 in the main matter. With regard to his disclosure of income before the Income-tax Authorities, he has asserted that the matter is still pending before the Competent Authority. He has accordingly denied having income of Rs. 5 / - lacs per month from the aforesaid

sources and properties. He has, therefore, sought for dismissal of the application with cost. The respondent-wife has filed affidavit-in-rejoinder controverting what has been said by the petitioner in his reply to the application for interim alimony and cost.

23. Mr. Bookwala, learned Counsel who argued the application made following submissions:

(i) The application is not maintainable at law.

(ii) Any interim relief is given in aid of final relief and the present application being not in aid of final relief in the Second Appeal cannot be entertained.

(iii) The Trial Court decreed the petition for divorce and while doing so passed order under Section 25 of the Act. Such order of permanent alimony having become final, this application for interim alimony cannot be entertained.

(iv) The petitioner is guilty of suppression of facts with regard to the earlier proceedings of interim alimony, more particularly application Exh. 15 for enhancement of alimony preferred before the Appellate Court. As no appeal or civil revision application has been filed against the order of the Appellate Court in this respect, the application cannot be entertained.

For the purpose of appreciating the submissions of Mr. Bookwala Section 24 of the Act might first be reproduced :

"24. Maintenance pendente lite and expenses of proceedings-Where in any proceeding under this Act it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceedings, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable."

The words "proceeding under this Act" would assume importance for the purpose of dealing with the submission regarding maintainability of the application. Mr. Percy Kavina, learned Counsel appearing for the respondent-wife referred to a couple of decisions in this connection, the first one is in the case of Annapurnamma v. Ramakrishna, reported in AIR 1959 AP 49, where dealing with the aforesaid provision a Division Bench of the Andhra Pradesh High Court first said that the object behind the provision is to enable the party to the proceedings having no independent income or no sufficient independent income to have the provision being made for his or her maintenance during the pendency of the proceedings and the proceedings under this Act would include a proceeding of appeal under Section 28 of the Act, which confers a right of appeal. The second decision is in the case of Chitra v. Dhruba Jyoti, reported in AIR 1988 Calcutta 98 2 (1990) DMC 427. Here also a Division Bench of the Calcutta High Court said that an application for maintenance pendente life and cost of litigation under Section 24 of the Act would be maintainable. Apart from what has been said in the aforesaid decisions on which reliance has been placed by Mr. Kavina, it should be noted

that any proceeding under the Act is a proceeding in respect of a right conferred under the Act and touches, in most cases, the marital status of the party to the marriage. Such a proceeding starts in the Trial Court and continues till the rights of the parties are finally decided or, in most cases, the status of the parties is finally adjudicated. Thus, an appeal, and for that matter even a Second Appeal would obviously relate to the adjudication of the rights of the parties to the main petition and it can hardly be said that a First Appeal or even a Second Appeal is not a proceeding under the Act. Realising such a position of law emerging from the reading of the aforesaid provision as also the object behind the provision Mr. Bookwala fairly did not stretch the point any further. It has, therefore, to be held that the present application under Section 24 of the Act is maintainable.

The second submission of Mr. Bookwala against the grant of interim alimony is that interim alimony is a kind of interim relief and any interim relief is given in aid of final relief. The present application cannot be said to be in aid of final relief in the Second Appeal and therefore, the same cannot be entertained. This submission appears to have been made on the basis of the rule in respect of grant of interim relief such as interim injunction or attachment before judgment or appointment of interim Receiver under the provisions of Order 39, Order 38 and Order 40 of the Civil Procedure Code. The provision of Section 24 of the Act is quite different in nature and object. The prayer in the main petition might be 'divorce' or 'annulment of marriage' or 'restitution of conjugal rights' or 'judicial separation' or any other prayer available under the Act. In case of such petitions and further proceedings arising therefrom Section 24 would operate and it is not necessary that interim alimony might be claimed only in an application wherein there is a final relief for maintenance, for example under Section 25 of the Act. Section 24 of the Act confers a defined right to a specified party to the proceedings under the Act. Hence, the submission that the respondent's application for interim alimony cannot be entertained as it cannot be said to be for an interim relief in aid of final relief, cannot be accepted.

Mr. Bookwala's third submission is that the Trial Court decreed the petition for divorce and while doing so it passed order under Section 25 of the Act and such order of permanent alimony having become final, this application for interim alimony cannot be entertained. It is an admitted fact that the entire judgment and decree passed by the Trial Court in Hindu Marriage Petition No. 175 of 1986 became the subject-matter of appeal before the learned Joint District Judge. It is apparent that the order of permanent alimony of Rs. 1,000/- p.m. passed by the Trial Court is consequential order. Even from the order itself it clearly transpires that it is consequential. The order has been reproduced in the opening part of this judgment. The Appellate Court has set aside the judgment and decree of divorce. Therefore, it cannot be said that the order of permanent alimony has become final. It would be appropriate at this stage to refer to Section 25 of the Act. It reads :

"25. Permanent alimony and maintenance-(1) Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto/on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such

payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under Sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just.

(3) If the Court is satisfied that the party in whose favour an order has been made under this section has re-married or if such party is the wife, that she has not remained chaste, or if such party is the husband, that he has sexual intercourse with any woman outside wedlock, it may at the instance of the other party, vary, modify or rescind any such order in such manner as the Court deem just."

On a plain reading of the aforesaid provision it clearly appears that the order of permanent alimony and maintenance is required to be passed 'at the time of passing of any decree or at any time subsequent thereto'. These words indicate that the order can only be made when a decree is passed granting any substantive relief under the Act and not when the main petition itself is dismissed either on merits or otherwise. If no request is made at the time of passing of such decree, an application for the same might be made subsequently. Thus, when the learned Joint District Judge reversed the decree for divorce and dismissed the petition for divorce, the question of granting permanent alimony did not remain alive. This is the clear legal position is so far as permanent alimony is concerned. Mr. Bookwala, however, read before me what has been observed by the learned Single Judge in para 73 of the judgment:

"On 12.10.1989, the appellant-wife had also given an application Exh. 15 and requested the Court to enhance the amount of alimony and to award alimony of Rs. 8,000/- per month to her, and to award costs of litigation also. Her subsequent application for alimony, etc., is rejected, and the said application was also not argued before me. However, on merits, I am of the opinion that, said application also deserves to be rejected, and for the purpose of enhancement of alimony, etc., the applicant should move in the matter, as may be advised. Hence, said application Exh. 15 is rejected."

It appears that claim for interim alimony and claim for permanent alimony, may be by way of enhancement, are two different claims and there clearly appears to be a confusion created in the submissions made before the learned appellate Judge, who has clearly recognised the right of the respondent in so far as enhancement of alimony is concerned. If the matter was seriously contested before the learned Appellate Judge, he would have been in a position to focus his attention on the two different claims. The learned Appellate Judge could not nave granted permanent alimony since he was reversing the decree for divorce and was dismissing the petition bearing Hindu Marriage Petition No. 175 of 1986. Hence, the observations of the learned Appellate Judge do not run counter to the respondent's statutory right of claiming interim alimony. The submission of Mr. Bookwala, therefore, cannot be accepted and the application for interim alimony moved by the respondent has in law to be entertained.

The fourth and the last submission of Mr. Bookwala is that the petition cannot be entertained as the respondent is guilty of suppression of facts with regard to the earlier proceedings of interim alimony, more particularly application Exh. 15 for enhancement of alimony preferred before the

Appellate Court. It is true that the respondent-wife had claimed enhancement of alimony by claiming the same at the rate of Rs. 8,000/- per month. However, that is a fact apparent on the Appellate Court's judgment itself as can be seen from the above reproduction of the observations of the Appellate Judge. Here it might be noted that the respondent is not claiming any relief in equity. Her's is a statutory right flowing from Section 24 of the Act. Therefore, it can hardly be said that an application for interim alimony in a pending proceeding is not entertainable merely because such an application was preferred in earlier proceedings or merely because reference is not made in that regard in the present application.

24. It may, however, be argued that the respondent has never been serious about the claim of alimony. It can as well be argued that she cannot claim alimony for the amount of more than Rs. 8,000/- per month, as she has set out the same facts and circumstances which she had set out in application Exh. 15. That would obviously relate to her entitlement to X amount or Y amount. The Courts have often followed a formula of working out interim alimony or permanent alimony varying from l/3rd to l/5th of net income of the answering party. However, the Courts have not accepted this formula as a rigid rule. All that depends upon the facts and circumstances of each case. If the normal rule of 'l/5th of the income' is to be accepted, the respondent's claim would be clearly justified bearing in mind the fact that the petitioner has not set out particulars of his income. He has merely dealt with the allegations of facts made in the petition. It is obvious that he would be in possession of the best material with regard to his income. It is clear that disposable income of the petitioner is very high. As against that, respondent does not have any independent income.. However, while determining amount of interim alimony all the facts and circumstances of the case including the conduct of the parties will have to be borne in mind. One of the facets of the conduct of the respondent is that she sincerely wants to resume her matrimonial home. She has never entertained the idea of herself and her younger son living separately from the petitioner and the elder son. Even inspite of the fact that the petitioner has a companion in life, she sincerely expressed her desire to resume her matrimonial home by seeing that the other party might also be attended to by the petitioner at some different place. This part of the respondent's conduct is also reflected when she did not seriously contest her claim of alimony before the Appellate Court. Same is the position in so far as the present proceedings are concerned.

25. Answering the submissions made in respect of the respondent's claim of Rs. 8,000/ - before the Appellate Court Mr. Kavina submitted that cost of living has gone on increasing and even if bare minimum of interim alimony is to be considered in the light of highly affluent financial condition of the petitioner, the same cannot be Rs. 8,000/- both for the respondent and her minor son. He, therefore, submitted that this Court might exercise its discretion of awarding reasonable amount of interim maintenance to the respondent for herself and her minor son.

Even if the circumstances attending the aforesaid facet of the respondent's conduct are borne in mind, it has to be found that the sum of Rs. 8,000/- earlier claimed by the respondent cannot provide a true basis for awarding minimum amount of reasonable interim maintenance according to the financial status of the petitioner. Under such circumstances it would be useful to refer to what the Apex Court has observed in respect of fixing reasonable amount of maintenance, in the case of Ashok Hurra v. Rupa B. Zaveri, reported in 1997 (1) GLH 479 (SC): 1997 (2) GLR 1308 (SC), at page

489 in para 21 of GLH (at page No. 1318 of GLR):

"Appropriate safeguard or provision for the respondent-wife to enable her to have a decent living should be made. The appellant is a well to do person and is a Doctor. He seems to be affluent being a member of the medical fraternity. But his conduct during litigation is not above board. The suggestion or offer of a lump sum payment of Rs. 4 lacs to Rs. 5 lacs towards provision for wife, is totally insufficient, in modem days of high cost of living and particularly for a woman of the status of the respondent. Atleast, a sum of about Rs. 10,000/- p.m. will be necessary for a reasonable living."

In my opinion, above observations of the Supreme Court should provide an appropriate guide for awarding interim alimony in the sum or Rs. 10.000/- per month for the maintenance to the respondent-wife and a sum of Rs. 10,000/- per month by way of interim maintenance for the minor son Monty.

In the facts and circumstances of this case and in the background of what has been said above, it would be just and proper to fix interim alimony for the respondent at Rs. 10,000/- (Rupees ten thousand only) per month with equal amount also being fixed for the interim maintenance of her minor son Monty. The respondent's claim for Rs. 15,000/- by way of cost of litigation appears to be quite reasonable and the said amount has also to be awarded. Appropriate order in this respect will follow.

PETITIONER'S CLAIMS FOR DIVORCE (In Second Appeal No. 100 of 1992)

26. Mr. Percy Kavina, learned Counsel appearing for the respondent addressed this Court on the scope of this Second Appeal under Section 100 of the Civil Procedure Code, and submitted that no question of law, much less any substantial question of law, arises in this Second Appeal. Section 100 of Civil Procedure Code as it stood prior to its substitution by virtue of 1976 amendment might be perused:

"100. Second Appeal-(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree in appeal by any Court subordinate to a High Court, on any of the following grounds, namely:

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed ex-parte."

Section 100 as it stood subsequent to 1976 Amendment with effect from 1.2.1977 reads as under:

"100. Second Appeal-(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex-parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, riot formulated by it, if it is satisfied that the case involves such question." Section 103 of the Civil Procedure Code as it stood prior to amendment would read as under:

"103. Power of High Court to determine issues of fact-In any Second Appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal (which has not been determined by the lower Appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defects such as is referred to in Sub-section (1) of Section 100."

Section 103 as it now reads might also be reproduced:

"103. Power of High Court to determine issue of fact-In any Second Appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal-

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts be reason of a decision on such question of law as is referred to in Section 100."

Mr. Kavina first referred to a celebrated decision of the Hon'ble Supreme Court in the case of Dastane v. Dastane, reported in, AIR 1975 SC 1534. Accordingly, even when the provision of Section 100 of the Civil Procedure Code, 1908 stood unamended, the Apex Court cautioned a Court of Second Appeal in following terms (See Paras 19 and 21):

"19. xxx xxx xxx Sitting in second appeal, it was not open to the High Court itself to reappreciate evidence Section 100 of the Code of Civil Procedure restricts the jurisdiction of the High Court in Second Appeal to questions to law or to substantial errors of defects in the procedure which may possibly have produced error or defect in the decision of the case upon the merits."

"21. xxx xxx xxx Under Section 103 of the Code of Civil Procedure, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal which has not been determined by the lower Appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to :n Sub-section (1) of Section 100. But if the High Court takes upon itself the duty to determine an issue of fact its power to appreciate evidence would be subject to the same restraining conditions to which the power of any Court of facts is ordinarily subject. The limits of that power are not wider for the reason that the evidence is being appreciated by the High Court and not by the District Court. While appreciating evidence, inferences may and have to be drawn but Courts of facts have to remind themselves of the line that divides an inference from guess work. If it is proved, as the High Court thought it was, that the respondent had uttered words of abuse and insult, the High Court was entitled to infer that she had acted in retaliation, provided of course there are evidences, direct or circumstantial, to justify such an inference."

Mr. Kavina then referred to some of the decisions of this Court on the subject, the first one is contained in the case of Umiyaben v. Ambalal, reported in 1965 GLR 714, where a Division Bench of this Court has observed that the right of Second Appeal conferred by Section 28 of the Hindu Marriage Act is limited to the grounds set out in Section 100 of the Code of Civil Procedure on the questions of law and not on questions of fact. Learned Single Judge of this Court in the case of I.N. Khatri v. M.S. Brahmbhatt, reported in 1992 (2) [XXXIII (2)] GLR 1543, Narayanji Makanji v. B.M. Patel, reported in 1993 (2) [XXXIV (2) GLR 1444, and Bai Chanchi v. Darji Shankarlal, reported in 1994 (1) [XXXV (1)] GLR 262, were required to deal with the provision of Section 100 of the Code of Civil Procedure, 1908 as amended by 1976 amendment. Accordingly, they have stated the principle that Second Appeal under Section 100 of the Code is competent on a substantial question of law and findings of facts recorded by the lower Court have not to be interfered with unless and until illegality and manifest perversity or misconstruction or misreading is successfully pointed out. Section 100 of the Code does not empower this Court to upset any finding of fact, however erroneous, recorded by the lower Appellate Court on the* appreciation of evidence on the record unless it is shown or found to be perverse. A reference in this connection has been made to a few decisions of the Supreme Court including one in the case of Karbalai Begum v. Mohammed Sayeed, reported in AIR 1981 SC 77.

Lastly, reference has been made to a recent decision of the Apex Court in the case of Kshitish Chandra Purkait v. Santosh Kumar Purkait, reported in JT 1997 (5) SC 202, where following observations of the earlier decision in the case of Panchugopal Barua & Ors. v. Umesh Chandra Goswami & Ors., reported in JT 1997 (2) SC 554, have been reproduced with approval:

"A bare look at Section 100 C.P.C. shows that the jurisdiction of the High Court to entertain a Second Appeal after the 1976 amendment is confined only to such appeals as involve a substantial

question of law, specifically set out in the memorandum of appeal and formulated by the High Court. Of course, the proviso to the section shows that nothing shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question. The proviso pre-supposes that the Court shall indicate in its order the substantial question of law which it proposes to decide even if such substantial question of law was not earlier formulated by it. The existence of a "substantial question of law", is thus, the sine qua non for the exercise of the jurisdiction under the amended provisions of Section 100 C.P.C.

Generally speaking, an appellant is not to be allowed to set up a new case in second appeal or raise a new issued (otherwise than a jurisdictional one), not supported by the pleadings or evidence on the record and unless the appeal involves a substantial question of law, a second appeal shall not lie to the High Court under the amended provisions."

The Apex Court has pointed at the Constitution Bench decision in Sir Chunilal V. Mehta & Sons Ltd. v. Century Spinning & Manufacturing Co. Ltd., reported in AIR 1962 SC 1314, for the guidelines to determine as to what is a "substantial question of law". Such guidelines might be referred to from Sir Chunilal's case :

"The only guidance that we have had from the Privy Council is that substantial question is not necessarily a question which is of public importance. It must be a substantial question of law as between the parties in the case involved. But here again it must not be forgotten that what is contemplated is not a question of law alone; it must be a substantial question. One can define it negatively. For instance, if there is a well-established principle of law and that principle is applied to a given set of facts, that would certainly not be a substantial question of law. Where the question of law is not well-settled or where there is some doubt as to the principle of law involved, it certainly would raise a substantial question of law which would require a final adjudication by the highest Court." (Para 3) "The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well-settled and there is a mere question of applying those principles or that the plea raises is palpably absurd the question would not be a substantial question of law." (Para 6)

27. Now, the petitioner in his Second Appeal has set out following questions of law as substantial questions of law arising in the present appeal:

"(a) In the facts and circumstances of the case and the oral as well as documentary evidence laid, the Appellate Court has not properly and legally interpreted the meaning of the word 'cruelty' in a well established principle of law by catena of judgments of the Supreme Court and other High Courts. Whether the cruelty is established by the appellant ?

(b) In the facts and circumstances of the present case, whether the Appellate Court can discard the evidence on the ground, that no independent witness has been examined by the appellant, especially in matrimonial proceedings ?

(c) In the facts and circumstances of the case, when the respondent has not examined any independent witnesses, can it be said that the appellant has not established his cruelty which has been disproved by the Appellate Court only on the ground of not examining the independent witnesses ?"

It appears that at the time of admission substantial question of law has been framed as suggested:

"Whether in the facts and circumstances of the case, the lower Appellate Court has committed an error of law in reversing the decree passed by the Trial Court ?"

It should be noted here that for the purpose of enabling making of efforts for reconciliation or settlement, matrimonial matters are usually not thrown off at the threshold.

28. Within the frame work of the aforesaid questions Mr. Ram Jethmalani, learned Senior Counsel appearing for the petitioner has made following submissions

(i) The Court of Appeal has in disregard of legal position interfered with the findings of fact rendered by the Trial Court and it must be slow to interfere with such findings of facts.

(ii) The Appellate Court has erred in law in misunderstanding the evidence contained in Exh. 68.

(iii) The criticism of the petitioner's evidence by the Appellate Court in para 20 of the judgment is not legally permissible. In the absence of availability of independent witnesses and in the absence of placement of the case with regard to availability of particular witnesses, non-examination of witnesses by the petitioner cannot be a ground in law to discard his evidence.

(iv) There has been non-application of mind on the part of the Appellate Court with regard to incident of balcony as has been stated to have occurred on the day of Diwali in the year 1985.

(v) Making of complaints against petitioner's brother Bachubhai and humiliating him by seeing that he was detained for nearly 72 hours and making a publicity in respect of such incident would amount to cruelty in law and the Appellate Court erred in law in not accepting the petitioner's case in that respect.

29. Learned Senior Counsel first referred to the admitted facts as have been set out in the earlier part of this judgment. Accordingly, the petitioner married with the respondent at Agra as per Hindu rites on 18.2.1980 and the parties have two sons from the wed-lock, the elder one Ankur @ Bunty, born on 21.3.1981 and the younger one Monty, born on 20.11.1983. The parties last separated on 6.6.1986. Earlier to that there was a separation between the parties for about 9 months when on the occasion of Dashera in 1984 the respondent is alleged to have left with her two sons to Bombay and

consequent upon some settlement, the respondent resumed her matrimonial home.

30. In support of his first submission Mr. Ram Jethmalani, learned Senior Counsel for the petitioner referred to the findings of fact rendered by the Trial Court upon acceptance of the oral evidence adduced by the petitioner and his witnesses being the members of the family. The first part of the petitioner's case is that the respondent was getting fits. Her behaviour was not normal and she used to pick up quarrels with the petitioner and the members of the family as well as the petitioner's relatives staying with the petitioner. The petitioner was, however, tolerating the respondent's behaviour in order to make the marriage successful. The second part of the petitioner's case is that the respondent was opposed to having children and when she was first pregnant she was very keen in terminating the pregnancy. The third part of the petitioner's case is that after the birth of the first child the respondent started behaving in more cruel and inhuman manner, picking up serious quarrels on small matters, not taking proper care of the child and requiring the petitioner to call his parents from Delhi in order that the petitioner's mother could look after the child. Respondent, therefore, started hating the petitioner's parents. Even then the petitioner tried to convince the respondent to have one more child, but she was again opposed to it. When she was again pregnant there were serious quarrels as the respondent wanted to get rid of the second child. The fourth part of the petitioner's case is that after the birth of the second child the respondent stopped physical relationship and co-habitation with the petitioner out of fear of pregnancy. She was not looking after the children and not taking proper care of them. She was quarrelling with the petitioner and his relations. She was insulting the petitioner in presence of his relatives and her behaviour with the petitioner's brother was not proper. Once the respondent's brother came to the petitioner's residence, abused him and slapped him and yet respondent was not bothered about the same. The petitioner Exh. 47, his brother Mukeshbhai and Krashnagopal (Bachubhai) and his father Balmukund Agrawal Exhs. 58,59 and 80 have in one or the other way deposed to the general allegations appearing in the aforesaid case of the petitioner. Learned Counsel has submitted that when the learned Trial Judge has accepted the oral evidence of the petitioner, the learned Appellate Judge ought to have been slow to interfere with such findings of facts.

In support of his submission Mr. Jethmalani relied upon the decisions in: (i) Veeraswami v. Narayya, reported in AIR 1949 PC 32, (ii) Bank of India v. J.A.H. Chinory, reported in AIR 1950 PC 90, (iii) Benmax v. Austin Motor Co. Ltd., reported in 1955 (1) All ELR 326, (iv) Sarju Prasad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh, reported in AIR 1951 SC 120, (v) Madhusudan Das v. Smt. Narayani Bai, reported in AIR 1983 SC 114. The principle referred to from these decisions is that in an appeal against Trial Court decree when the Trial Court's decision depends upon the appreciation of the oral evidence adduced in the case and the Appellate Court considers an issue turning on oral evidence it must bear in mind that it has no advantage which the Trial Court has, having the witnesses before it and observing the manner in which they deposed in Court. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the Appellate Court should permit the findings of fact rendered by the Trial Court to prevail. In reply Mr. Kavina submitted that the learned Trial Judge has not made any reference with regard to his observation on the credibility of the witnesses. He has also not noted the demeanour of the witnesses in one or the other manner. What he has done is to set out the oral evidence of the respective parties and then he has merely stated that the petitioner

has proved his case of cruelty as set out in the oral evidence of himself and his witnesses. According to his submission, even the most relevant documents in the form of letters placed on record of the case have not been considered by the learned Trial Judge, who has also not considered the effect of such letters on the oral version of the witnesses regarding the general facts alleged by the petitioner. In fact, according to his submission when the petitioner did not come out with specific particulars regarding the general facts alleged by him, respondent should be treated as having been taken by surprise right from the inception as having been prevented from setting out her case with specific particulars. He has, therefore, submitted that the matter was large open before the learned Appellate Judge. He has made reference to the other part of the principle relied upon by the learned Senior Counsel from the aforesaid decisions. He submitted that the Appellate Court has dealt with the evidence taken as a whole and tried to find out whether the conclusions reached by the learned Trial Judge without assigning any reasons were reasonably justified or not. He has referred to number of improbabilities in the petitioner's case from the admitted and/or proved circumstances, which would out-weigh the findings of the Trial Court. The second part of the principle is that the evidence of the witnesses has to be weighed on a reasonable balance of probability to be drawn from all the facts and circumstances of the case and when it is not merely a question of believing one or the other witness and where the question is one of drawing proper inferences from the evidence the Trial Court is in no better position to decide the matter than the Appellate Court. Following observations in Veeraswami's case (supra) have been read:

"This is not to say that the Judge of first instance can be treated as infalliable in determining which side is telling the truth or is refraining from exaggeration....."

In a case where the findings as regards facts have been drawn from argumentative inferences from the testimony, oral and documentary, produced by a witness, and depend upon the weight of evidence and the inherent probabilities of the story, and not on the credibility induced by his whole demeanour in the witness-box of the manner in which he answers questions, the Trial Court is in no better position than the Court of Appeal in discovering the truth.

Mr. Kavina also read the observations of the Apex Court in the case of Dastane v. Dastane, (Supra), in the matter of appreciation of evidence in a matrimonial matter. The observations appear in paras 21 and 24 of the citation and in my opinion, the same would set out the clear principle regarding appreciation of evidence in a matrimonial matter. The observations might be noted:

"While appreciating evidence inference may and have to be drawn, but Courts of facts have to remind themselves of the line that divides an inference from guess work. There must be evidence, direct or circumstantial, to justify such an inference."

Following observations have also been read from para 24 of the citation :.

"The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities..... The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities

the Court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like loan on a promissory note: "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue". Per Dixon, J. in Wright v. Wright, 1948 (77) CLR 191 at 210; or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear -Blyth v. Blyth, 1966 (1) All ER 524 at 536". But whether the issue is one of cruelty or of a loan on a pronote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged."

It has also to be noted from the aforesaid celebrated decision of the Supreme Court that the burden of proof must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it. The petitioner must, therefore, prove that the respondent has treated him with cruelty within the meaning of the word used in Section 13(1)(ia) of the Act. The word "cruelty" has not been defined in the Act. However, the Apex Court in the case of Shobha Rani v. Madhukar Reddi, reported in 1988 (1) SCC 105, has observed with regard to the said word that it has been used in the aforesaid provision of the Act in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty maybe mental or physical, intentional or unintentional. If it is a physical, it is a question of fact and degree. If it is mental, inquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be inquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment. Having observed thus in respect of the word 'cruelty' the Apex Court said that the cumulative effect of all the circumstances and the evidence of parties would merit consideration in such a case.

31. It is, therefore, clear that the principles with regard to appreciation of evidence are quite well-settled. It has to be seen whether the learned Joint District Judge in the First Appeal has committed any error of law (in fact any substantial error of law) in appreciating the evidence, the learned Senior Counsel wisely referred to the broad admitted facts and they will have, in my opinion, as also in the opinion of the Appellate Court, a great impact upon the allegations made by the petitioner. The marriage of the parties took place on 18.2.1980. Within about a year and a month the respondent delivered first son Ankur @ Bunty on 21.3.1981. Where does the general case of the petitioner regarding respondent coining across fits and suffering from mental disorder or mental weakness and having aversion to pregnancy and child birth stand ? The petitioner has not set out

the particulars about the dates or even the period of respondent giving such an ill-treatment to the petitioner. He has also not set out the manner in which one or the other incident occurred. With the general nature of his allegations appearing in the petition the learned Trial Judge has set out the oral evidence. Even after the birth of first son within about two and half years the second son was born. If the respondent was coming across fits what the petitioner was doing ? Was he not getting the respondent treated ? It would be absurd to say that the respondent was getting fits and the petitioner was tolerating respondent's behaviour resulting from such fits or mental weakness. He would have by way of natural conduct seen to his wife being medically treated. Where is the medical evidence ? No doctor has been examined in respect of the respondent having this ailment. This aspect of the case assumes a great deal of importance, since the respondent coming across fits or suffering from mental disorder or mental weakness is stated to be the root cause of her picking up quarrels. All these aspects of the case leave the petitioner's story stated in general manner absurd. Therefore, as the Supreme Court has said the admitted facts and circumstances will have to be borne in mind for finding out the truthfulness of the case of cruelty set up by the petitioner. That apart, the learned Appellate Judge has been careful in objectively weighing the evidence in the light of the facts and circumstances not only flowing from the oral evidence given by the parties and their witnesses, but also from other pieces of evidence which have not been considered by the learned Trial Judge. One of such pieces of evidence is Exh. 68. Exh. 68 is the letter written by the petitioner on 9.4.1981, after the birth of first son. The text of the letter has been reproduced by the learned Appellate Judge and since the learned Senior Counsel has referred to the said document in extenso, the same might here also be reproduced:

"My dear Honey-very sweet love to you. Today, I have received your letter and was very much surprised to know that you can write such a good letter. I was thinking of writing letter to you since last 3 to 4 days, but could not get time, but since I received your letter on 9.4.1981,1 have managed to find time to write this letter. I am very happy at Surat and have started going to the club. I am remembering you very much, as many days have passed since our talk on telephone. There would be telephone at our residence within one or two days, or probably before you get this letter. How is the health of Bunty ? I have not seen Bunty since a long time and am anxious to see him. I hope Bunty is not causing much harassment. Do take proper care. Three to four days back, I had talked with Rajni on telephone, and she was saying that, presently you were weeping much and I had pursuaded her also and I am pursuading to you also that you should live peacefully, by mixing with all, and not to weep much. Much weeping would affect Bunty. You should keep yourself happy and keep Bunty also happy. I am living alone at Surat, but, if you get well soon, I will call you to Surat. I do not get any pleasure in seeing movies without your company. Out of the names suggested for Bunty in your letter, I have selected Ankur, as it would be a good name. The said name is good and new also. Tell everybody that we have chosen name Ankur. How is your health ? How many times you have been checked up by a Doctor, and what he said about your condition ? You should write to me about the same. Are you in a position to move around or not ? Are you taking care for your food, etc. ? My heart says that, you are careless in taking food, etc. Do not do that. Otherwise, I will neither come to Delhi to bring you, nor talk on telephone. Live with all like our home people.

Write to me, as to how is Mummy's health at present. Whether Mummy was taken second time to the hospital for check up. Keep me informed about the actual health of Mummy. Live with Mummy

with special love like your Mummy.

I do not know how to write shers and shayaries. You have written very good shers. Today, I have read your letter 2-3 times. From this morning after reading your letter, I remember you and Bunty very much. I am thinking that once I should come to Delhi to meet you, but there is a lot of work here also. Therefore, presently it is not possible. Otherwise also, your one and a quarter month would be over in the end of this month. So, at that time, I will come to Delhi. You have written that letter from Aba had been received. Whether it was for giving 'name' ceremony ? We will keep the 'Nam Karan Ceremony' at Surat after 3-4 days of your arrival and keep a function for the same.

Everything is O.K. Now I am closing the letter writing, as also a long letter is written. Perhaps you may not be able to read my handwriting, but, try to understand and read, and you will be able to read it. Look after yourself and Bunty. Do not weep even a little. Otherwise I will not talk with you.

Now, it is enough. Again I will go on talking with you on phone."

32. In fact the second submission of the learned Senior Counsel is that the learned appellate Judge has misunderstood the con tents of Exh. 68 so as to displace the oral evidence adduced by the petitioner and his witnesses. The learned Appellate Judge has said that the letter saw the light of the day within about 13 months and 20 days of the marriage and then about 20 days of the birth of first son and that it would tend to falsify the say of the petitioner. In respect of the allegations made by him in Paras 3 and 4 of the petition, the learned Appellate Judge lus observed from the aforesaid letter that the parties must be presumed to be living happily having much love and affection for each other and the separation period for delivery of the first son becoming unbearable for both of them. The learned Trial Court has, therefore, drawn an inference that the respondent-wife could not be said to have aversion of having children and to be keen on terminating pregnancy. These observations in the context of letter Exh. 68 are clearly legal inferences flowing from the said documentary piece of evidence, if one bears in mind the admitted facts and circumstances of the case, principle regarding burden of proof and principle regarding giving of specific particulars of cruelty in the petition. The learned Appellate Judge has obviously in his mind all these nice aspects of the case and it can hardly be said that he erred in law in misreading Exh. 68. It is true that Exh. 68 is not a document like an agreement or like any other such documents entered into between the parties. At the same time it is a piece of evidence written by the petitioner himself displaying his natural conduct at the relevant point of time, which would have been ordinarily otherwise if what he alleged in the petition was true.

33. In my opinion, the appreciation of evidence by the learned Appellate Judge in so far as first two submissions of the learned Senior Counsel are concerned is quite within the sphere of settled principles of law noted hereinabove and it cannot be said that the said two submissions raise substantial question of law qua the learned Appellate Judge's judgment.

34. It should be noted with care that the learned Appellate Judge has not merely relied upon Exh. 68. He has examined the oral evidence adduced on behalf of the parties with great care. The learned Appellate Judge has carefully referred to the petitioner not producing the letter written by the

respondent to him. Exh. 68 is in fact in reply to what must have been written by the respondent and the learned Appellate Judge has been careful to refer to the petitioner not producing such letter. While dealing with the incident of balcony as also complaint filed against Bachubhai @ Krashnagopal, elder brother of the petitioner, the learned Appellate Judge has also referred to letter Exh. 83 dated 3.5.1986 written by the respondent-wife to her mother and that letter lends support to her case about her harassment by Bachubhai and about her ill-treatment. Another letter Exh. 52 which is not dated, addressed by the respondent to her mother also shows her expression about her ill-treatment at the relevant point of time. In the background of what is reflected by the evidence read as a whole, it can hardly be said that the learned Appellate Judge has erred in law in misunderstanding the evidence contained in Exh. 68. It is clear that the learned Appellate Judge has been careful to weigh the facts and circumstances of the case, while appreciating the evidence and has not merely relied upon Exh. 68.

35. The next submission of the learned Senior Counsel is with regard to the criticism of the petitioner's evidence by the Appellate Court in para 20 of the judgment. Para 20 of the judgment of the Appellate Court reads as under:

"On reading the petition, it becomes crystal clear that, apart from the parties and their relatives, other persons would also come to know about the facts of cruelty alleged by the respondent-husband in his petition. What I mean to say is that, for the alleged act of cruelty, there would be independent witnesses. Neighbours, other business people and persons having day-to-day connection with the family, would definitely come to know that the appellant-wife Sunita, from the very beginning, had been treating the respondent-husband with said acts of cruelty. It is not possible to say that, nobody would come to know about such acts, as are alleged in the petition by the respondent-husband. The neighbours would be best persons for the alleged cruel acts of the appellant-wife Sunita. No independent witness has been examined by the respondent-husband in support of his allegations in the petition, for the reasons best known to him. He has only preferred to examine his two brothers and his father. Anybody could have come out and deposed against the appellant-wife, if the allegations made in the petition were true. Neighbours and others would certainly come to depose against the appellant-wife, if her behaviour after the marriage was as alleged by the respondent-husband in the petition."

In support of his submission Mr. Jethmalani made reference to a decision of the Calcutta High Court in the case of A.E.G. Carapiet v. A.Y. Derderian, reported in AIR 1961 Calcutta 359. The Calcutta High Court has observed that wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disturbed at all. This is not merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. This much a Counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. Taking over the reply stage, Mr. Bookwala for the petitioner read the observations of the Calcutta High Court as appearing in para 10 of the

citation and what is noted above is from the said observations. Mr. Bookwala also made a reference to the reproduction of what the House of Lords said in Browne v. Dunn, reported in 1893 (6) R 67, and reproduction of Lord Chancellor Herschell's observations at page 70 of the report, in para 11 of the Calcutta decision:

"Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truths on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair-play and fair dealing with witnesses."

36. Mr. Kavina, learned Counsel appearing for the respondent-wife referred to the evidence of the petitioner and his witnesses and pointed out that they have been asked questions with regard to examination of independent witnesses in respect of one or the other part of the petitioner's case regarding cruelty. Respondent-wife's case of her ill-treatment particularly on account of demand of money by Bachubhai, the petitioner's elder brother, and at the instance of said Bachubhai, has been put up in the cross-examination of the witnesses. Such a case of her ill-treatment has also been deposed to by her and her witnesses and supported by aforesaid letters written by her to her mother. In paragraph 49 and onwards of his evidence petitioner has been asked about whether he has any independent witnesses to prove the respective part of his case. Even with regard to the incident of Dashera 1984 and incident of balcony stated to have occurred on the Diwali of 1985 questions have been asked with regard to independent witnesses. Therefore, when the burden of proof with regard to the allegations of cruelty was on the petitioner, it could hardly be said that the learned Appellate Judge's criticism in para 20 of his judgment was uncalled for. In fact the learned Appellate Judge in his elaborate judgment has dealing with the oral. evidence of the petitioner and his witnesses as well as respondent and her witnesses, minutely and in the context of all the circumstances of the case dealt with the same. Hence, it can hardly be found that any substantial question of law would arise touching the observations of the learned Appellate Judge as appearing in para 20 of the judgment. What has been observed by the learned Appellate Judge in para 20 of his judgment cannot in isolation be looked at. In fact, the learned appellate Judge has considered the evidence as a whole. The third submission of the learned Senior Counsel, therefore, cannot be accepted.

37. Then comes the balcony incident. The submission is that there has been non-application of mind on the part of the Appellate Court with regard to this incident.

The learned Senior Counsel had briefly stated the allegations of facts with regard to the incident in question in continuation of the petitioner's case regarding Dashera of 1984. It has been the case of the petitioner that on that occasion the respondent left the petitioner's house with the two children

without any reason and after long time she resumed her matrimonial home after intervention of some community people and after she was persuaded to do so. She, however, did not improve her behaviour and continued to harass the petitioner, giving threats that her parents would file a complaint against him. Once she gave threat to commit suicide so as to bring the charge of murder against the petitioner and his relatives. Reverting to the incident in question he has alleged that once she tried to jump away from the 3rd floor of the building and tried to commit suicide during the day of Diwali of 1985. Even then he did not lodge any complaint but the respondent lodged complaint against the petitioner. Mr. Bookwala traced out the date. It was 13.11.1985. Reference has then been made to para 7 of the written statement where while denying the allegations made by the petitioner the respondent has alleged that she was frequently being driven out of the house and the complaint lodged by her was not false. Her case was that she was ill-treated at the petitioner's house.

Now paras 32 and 33 of the Appellate Court's judgment have been read :

Learned Appellate Judge has referred first to the examination-in-chief of the petitioner Exh. 47. Accordingly at about 9-00 p.m. the respondent-wife tried to jump down from the balcony of the bedroom in his flat and his brother Mukeshbhai had caught her hands and stopped her. In his examination-in-chief petitioner's father Balmukund Sukhamal, Exh. 80 said that on the New Year day when there was pooja they asked about required things for pooja. At that time the respondent quarrelled and thereafter she went to her room and tried to jump from the balcony. At that time, she had shouted and therefore, the petitioner went there, caught her hand and stopped her while she was jumping from the balcony and saved her. Noticing the contradictory versions of the petitioner and his father the learned Joint District Judge has referred to the complaint Exh. 90 given by the respondent-wife to Umara Police Station. It has been recited there that the petitioner asked the respondent about three silver coins meant for pooja which were not found and at that time there was exchange of words and the petitioner gave two slaps to the respondent. The said complaint was for the offence under Sections 323 and 504 of the Indian Penal Code. Finding that the contradictory versions of the petitioner and his witnesses were not acceptable the learned Appellate Judge held that the incident must have taken place as set out in the complaint Exh. 90. It is in the context of the incident in question that the learned Trial Court has stated from the petitioner's evidence that many guests were present, neighbours on the opposite side telephoned the police and fire brigade and the police had been to the site and the respondent accompanied the police and that realising her mistake she admitted the same before the police and there was settlement before the police and the parties returned home. Li his cross-examination the petitioner denied the fact that the respondent gave the complaint against him. Commenting upon the evidence so given by the petitioner the learned Judge has observed:

"It cannot be said that the said document is bogus. Said document speaks for itself and shows that the case advanced by the respondent-husband in his examination-in-chief and also in cross-examination regarding the incident, is a got up one and false. If the incident was correct, the respondent-husband ought to have given about the incident to Umara Police Station, when the appellant-wife had given complaint Exh. 90. Complaint Exh. 90 is about the incident of giving two slaps on the cheeks when three Silver coins for pooja could not be found. If the incident as alleged by the respondent-husband, of the appellant-wife trying to jump from the balcony was correct, and if

the opposite side neighbours had informed the police, he ought to have examined the neighbours to support his said say. But, in view of Exh. 90, said say of the respondent-husband appears to be got up. In para 11 of his examination-in-chief, the respondent-husband stated that at the time of the alleged incident, many relatives were present at his house. If that were so, he could have examined atleast one of them to support his said say. As he has not examined any neighbour or any of the said guests, one can only come to the conclusion that he has not examined any one of the relatives or neighbours because the said incident is not correct and they would not support him. Therefore, the case advanced by him about the appellant-wife Sunitaben trying to jump from the balcony of the flat situated on the 5th floor cannot be accepted as true. On the contrary, it appears to be got up in view of the N.C. Complaint Exh. 90."

Mr. Jethmalani in the first instance and Mr. Bookwala in reply submitted that the respondent had not disputed the incident. Besides, it is a fact that parties had an occasion to go to the police station pursuant to the incident and as a result of settlement there the respondent-wife's non-cognizable complaint as per Exh. 90 was registered. Therefore, in absence of the respondent setting out her case in her reply and when the incident did occur, the learned Appellate Judge ought to have accepted the occurrence of the incident as per the petitioner's case and not as per the respondent's version. The submission cannot be accepted. The respondent did deny the incident as alleged. Therefore, the burden of proving the incident was on the petitioner. He did not set out any facts showing how the incident had taken place. His is the improvisation at the stage of the evidence. Even then the facts which have been disclosed speak for themselves. Some of the neighbours in the building located opposite to the petitioner's flat noticed the seriousness of the incident and informed the police and fire brigade. The matter was required to be settled at the police station and instead of some cognizable offence only a non-cognizable complaint was taken from the respondent. She was at the petitioner's place not accompanied by any of her relatives from the side of her parents.. The relatives and guests who were present at the time of the incident were the petitioner's relatives and guests. The complaint Exh. 90 was ad invitum and not one voluntarily filed by the respondent. These submissions of Mr. Bookwala did not take the matter any further. The respondent's case was that there was an attempt to throw her out of the balcony. Simply because she has not filed such a complaint it will not go to show that the incident as has been alleged has been proved by the petitioner. The facts and circumstances of the case as they now clearly appear indicate that she had restrained herself from allowing the family affair becoming public. That apart, the question is one within the sphere of appreciation of evidence and the learned Appellate Judge has discussed the evidence as a whole and drawn inferences from the evidence itself and the admitted facts and circumstances and not guess-work. Hence, the fourth submission regarding the balcony incident will not lead to holding that the learned Appellate Judge has committed any error of law in appreciation of the evidence on that incident.

Last submission of the learned Senior Counsel is that the Appellate Court committed error of law in not accepting the petitioner's case that the filing of complaint/s against petitioner's elder brother Bachubhai resulting in Bachubhai remaining in custody for nearly 72 hours and so humiliating him, resulted in great deal of mental pain and suffering both to Bachubhai and the petitioner. According to the learned Counsel, this obviously amounted to "cruelty" and the learned Appellate Judge committed serious error of law in not so holding.

Mr. Bookwala gave the dates in the context of the complaints filed by the respondent. She left the matrimonial home on 6.6.1986. She first lodged the complaint in the Colaba Sub-Division Police Station stating the date of occurrence to be 24.6.1986. It was filed on 5.7.1986. A copy thereof has been submitted. It inter alia recites that when she was residing with her husband he used to get upset upon his mother and sister saying anything about giving and taking, when they happened to visit the petitioner's house. Her elder brother-in-law Barhubhai was first residing at Delhi and for the last four years he had been residing at Bombay. She has then stated having two sons Ankur (Bunty) and Monty aged respectively 4 years 9 months and 21½ years. According to her, her elder brother-in-law used to incite her husband and all the members residing in the house used to upset her even on trivial matters. At about 1-30 p.m. on 6.6.1986 she was driven out and she stayed in the house of the neighbour Jaysukhbhai. She did not complain this to police. She was being accused of insanity. Next day her father arrived there and there was a meeting of Agarwal Caste for about 4-5 hours. At the meeting, it was decided that the children were to be handed over to her and she was to be brought back after two months. Afterwards the matter changed and it was alleged against her that she was severely beating the children in the fit of insanity and they were admitted in the hospital at Delhi and were taken to Bombay from there. She had seen the children sitting with her younger brother-in-law in the car and her elder brother-in-law was also standing downstairs and from 6 p.m. on 6.6.1986 the children disappeared from Surat home. When they were asked to bring the children at the meeting, they were not brought and it was informed that they were sent to Delhi. She was also accused of giving poison to her mother-in-law whereas she had got a heart attack and was treated by the Doctor, who had come home and she was admitted to the hospital. She has asserted that her elder brother-in-law was harassing her much. She alleged : "At night I used to be made sit and he used to release the smoke of the cigarette and used to say that "tu apna jewar ya paisa lekar ke de" . The day on which I was removed from the house he abused that "I would be thrown down, my eyes will be removed and break the hand and I should leave the house within one second". She has then asserted that after going to Bombay she went to Shri Guptaji and told him about the matter. From that place she learnt that both her sons were at Sneh Sadan, Colaba, the residence of Bachubhai. When she went there at 2 O'clock at night, she met her younger son Monty. Ankur was not there. There were only two children and a servant in the house. Shri Bachubhai and his wife were not at home. She, therefore, made a grievance that Bachubhai had hidden her son Ankur and the matter should be dealt with according to law.

Reference has then been made to the complaint filed by the respondent before the learned Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Bombay on 21.7.1986. The same relates to the confinement and/or concealment of her elder son Ankur and the prayer against the petitioner and his elder brother Bachubhai is for assurance of search warrant under Section 93 of the Criminal Procedure Code.

Mr. Bookwala then submitted that a writ petition was filed by aforesaid Bachubhai in the Bombay High Court, being Criminal Writ Petition No. 758 of 1986. Mr. Bookwala read judgment rendered on 14.1.1991 (Coram: M.F. Saldanha, J.) and supplied the copy. He submitted that even the Bombay High Court quashed the complaint proceeding initiated by the respondent against Bachubhai. However, he conceded that the Bombay High Court has not held the complaint to be malicious. Instead it has observed : "Obviously, as a result of the earlier disputes, the complainant-wife was

unaware of the situation and lodged a complaint on suspicion". Mr. Bookwala, however read the following observations regarding the allegations of cruelty made against Bachubhai:

"It is also relevant to mention that even though there is some vague suggestion to the effect that the petitioner is alleged to have ill-treated and threatened the complainant-wife, it is material to point out that this material will have to be totally disregarded as it cannot form the basis of an offence under Section 498-A of I.P.C., because, admittedly, the petitioner is a resident of Bombay and there is not even a whisper in the complaint as to how and under what circumstances he is alleged to have reached Surat."

38. Having gone through the judgment of the Bombay High Court, I am unable to find any observation or conclusion that the complaint was filed by the respondent without reasonable cause or with malice. That apart, in the context of the evidence which has gone on record also, it cannot be held that the respondent filed aforesaid complaints with a view to harass the petitioner in any manner. She was the mother deprived of her two minor sons. It would have been but natural of her to have her minor sons with her. The learned Appellate Judge had dealt with this aspect of the petitioner's case in Para 40 and onwards of his judgment and having gone through the same I am unable to accept the submissions of the learned Counsel fors the petitioner that the filing of the complaints as stated above was a species of cruelty practised on the petitioner. The learned Appellate Judge has dealt with the evidence of the rival parties in great detail and has rightly come to the conclusion that the respondent had valid reasons to file the complaints. The oral evidence of the respondent has been referred to in para 42 of the judgment and the discussion thereof may be reproduced :

"The appellant-wife Sunitaben Anilkumar, Exh. 82, has denied (he case of the respondent-husband, and has stated about her case that the respondent-husband wanted divorce from her and Wanted to remarry for getting Dahej again. Then she has, in her evidence stated that Krishan Gopal Balmukund Exh. 59 was the main person, who was harassing her. She has, in her examination-in-chief, para 8 stated that he was coming to Surat and was harassing her. He was mad after money and to harass her, he was bringing pressure on the respondent-husband. She has also stated that Krishna Gopal's habits are bad. In her entire examination-in-chief she holds Krishna Gopal responsible for the entire problem. She has stated about the allegations of theft made against her. She was cross-examined about the bad habits .of said Bachubhai alias Krishna Gopal, and she stated that she would not like to disclose about this bad habits. In her cross-examination, she has stated that she had no objection about the luxurious expenses of Bachubhai, but she had only objection about his harassing her. Therefore, it appears true that the respondent-husband's brother Krishna Gopal was the main person in harassing the appellant-wife. If he was not the main person to harass her, she would have asked his brother respondent-husband Anilkumar to call the appellant-wife to take away her sons with her. .... However, the appellant-wife did make search for her sons and could ultimately trace them at the place of Bachubhai alias Krishna Gopal in Colaba area of Bombay. It is in her evidence and is true that she contacted an organisation known as "Savdhan" at Bombay, and with the help of the said organisation and the police, she could reach the place of Bachubhai, where according to her, her both the sons Were kept. She went to the flat of said Bachubhai alias Krishna Gopal with the workers of "Savdhan" Organisation and police, and at that

time, neither Bachubhai alias Krishna Gopal was there, nor his wife was there, but she could only find her younger son Monty, and did not find the elder son Bunty alias Ankur."

The learned Judge has also referred to the latter part of the story with regard to her apprehension of confinement of her elder son Ankur and consequent filing of complaint. He has then observed :

"If she filed such a complaint it cannot be said that she filed a false complaint as observed by the learned Assistant Judge, Surat. Elder son Bunty was not with the father and could riot be traced also at the house of Bachubhai alias Krishna Gopal. Any mother, who is driven away by snatching away her child, would certainly file a complaint of kidnapping. She was not even informed as to where Bunty was. Had she been informed about the whereabouts of elder son Bunty alias Ankur, she would not have filed a complaint against Bachubhai alias Krishna Gopal."

The learned appellant Judge has also referred to the evidence regarding the help which Savdhan Organisation rendered to the respondent in para 45 of his judgement where he has also discussed the evidence with regard to the newspaper reports. Reference has inter alia been made to Exh. 55 and it has been observed that even the explanation given by bachubhai in newspaper Exh. 55 which is form Navbharat Times also shows that the respondent-wife had complaint to Savdhan Organisation. In my opinion the learned appellate judge has rightly concluded that the respondent-wife was prosecuting her legal remedies.

The respondent's letters Exhs. 83 and 52 written to her mother also find consideration by the learned Appellate Judge. Relevant observations read as under:

"Further, the letter Ex. 83, dated 3.5.1986 written by the appellant-wife to her mother, is produced by her in her evidence. That letter also shows harassment of the appellant-wife by Bachubhai alias Krishna Gopal and her husband with regard to money. That letter was written one month before she was driven away. It is conveyed by her to her mother that they wish that money should be sent to them in the month of June. The matter written in letter Ex. 83 speaks for itself about her harassment. Therefore, it cannot be said that she left the matrimonial home of her own. It can further be inferred from letter Ex, 83 that, as needs of the respondent-husband and his brother Bachubhai alias Krishna Gopal would not be satisfied, she was driven away from her house by snatching away her children. Under such circumstances, any wife would take legal action against the person guilty of kidnapping or hiding her elder son. Therefore, she had filed a police complaint of kidnapping against Bachubhai alias Krishna Gopal, who is the brother of the respondent-husband. Further, it cannot be said that letter Ex. 83 is a got-up document and the contents were falsely written for the purpose of future legal action. She has, in fact, written in letter Ex. 83 to her mother, to tear up the letter after reading. That itself shows that she was not creating evidence against the respondent-husband. Her undated letter Ex. 52, addressed to her mother, also shows harassment to her from the side of the respondent-husband. All that shows that Bachubhai alias Krishna Gopal and the respondent-husband and their other relatives were harassing the appellant-wife and had ultimately driven her away from the house, and did not allow her to take her children. Under such circumstances, if she filed a complaint against Bachubhai alias Krishna Gopal, the brother of the respondent-husband, it cannot be said that she had filed a false complaint."

Following observations of the learned Appellate Judge would also assume a great deal of importance in the matter of appreciation of evidence:

"From the entire evidence on record, it becomes clear that there were disputes about the money, etc. for which the appellant-wife had to suffer. It is an admitted position in the evidence that the shop of Bachubhai alias Krishna Gopal was destroyed in fire, and the father of the appellant-wife had given him his shop in Bombay for the purpose of business of said Bachubhai. It appears that possession of the same had to be delivered to the father of the appellant-wife but Bachubhai alias Krishna Gopal retained the same With him for a long time and thereafter the same was given. That has come in the evidence of Balmukund Sukhamal Ex. 80 '- the father of the respondent-husband, and even in the evidence of Bachubhai alias Krishna Gopal Balmukund. One can safely infer that, there were disputes about money, etc. for which harassment of the appellant-wife had continued. It is clear that as the father of the appellant-wife, etc. did not act as per the wishes of the respondent-husband and his brother Bachubhai alias Krishna Gopal, the appellant-wife was harassed, and ultimately was driven away from the house on 6.6.1986. That can also be inferred from the letter Ex. 83 of the appellant-wife."

It will be thus clear that the learned Judge has very extensively examined the evidence placed on record and in his well-reasoned judgment he has weighed preponderance of probabilities from the evidence on record and not from his own guess work. It is, therefore, clear that no error of law has been committed by him even in respect of the last submission made by the learned Counsel for the petitioner.

RELIEF OF DISSOLUTION OF MARRIAGE BETWEEN THE PARTIES ON THE GROUND OF IRRETRIEVABLE BREAKDOWN OF THEIR MARRIAGE (Civil Appn. No. 6721 of 1997)

39. Mr. Ram Jethmalani, learned Senior Counsel for the petitioner has submitted that after all the efforts for settlement between the parties it has ultimately appeared that there has been no possibility of reconciliation between them. Hence, this Court will exercise its inherent jurisdiction to dissolve the marriage between the parties.

xxx xxx xxx

40. In support of the aforesaid prayer and submissions in that respect reference has bee

Reference has first been made to a decision of the Hon'ble Supreme Court in the case of

"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 breakdown of the marriage is not a ground by itself. But while scrutinising the evidence on record to determine whether the ground(s) alleged is/are made out and in

determining the relief to be granted, the said circumstances 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."

Reference has then been made to next decision in the case of Romesh Chander v. Smt. Savitri, reported in AIR 1995 SC 851. Paragraph 3 of the citation has been read and the same might be reproduced :

"In V. Bhagat v. D. Bhagat (Mrs.), 1994 (1) SCC 337:1994 AIR SCW 45, this Court has explained the concept of cruelty both mental and physical which could entitle an applicant to claim divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955. In Chanderkala Trivedi (Smt.) v. Dr. S.P.Trivedi, 1993 (4) SCC 232, it was held that if a marriage was dead and there was no chance of its being retrieved it was better to bring it to an end. In this case the marriage is dead both emotionally and practically. Continuance of marital alliance for name-sake is prolonging the agony and affliction. It cannot be disputed that the husband has not been dutiful and conscious of his responsibilities either towards his wife or his son. He did not contribute anything towards upbringing of the child. Yet the marriage being dead, the continuance of it would be cruelty, specially when the child born out of the wedlock of the appellant and the respondent as far back as 1968 having now grown and being in service. The appellant has expressed remorse for his conduct and is willing to compensate for his past mistakes by transferring the only house in his name in favour of his wife."

Finally latest judgment of the Apex Court in the case of Ashok Hurra v. Rupa Bipin Zaveri, reported in 1997 (1) GLH 479 (SC): 1997 (2) GLR 1308 (SC), has been referred to. Para 23 of the citation has been read before this Court. Let the same be reproduced:

"A few excerpts from the Seventy-first Report of the Law Commission of India on the Hindu Marriage Act, 1955 - "Irretrievable Breakdown of Marriage" dated April 7,1978 throw much light On the matter-

"Irretrievable breakdown of marriage is now considered, in the laws of a number of countries, a good ground of dissolving the marriage by granting a decree of divorce..... Proof of such a breakdown would be that the husband and wife have separated and have been living apart for say, a period of five or ten years and it has become impossible to resurrect the marriage or to reunite once it is known that there are no prospects of the success of the marriage, to drag the legal tie acts as a cruelty to the spouse and gives rise to crime and even abuse of religion to obtain annulment of marriage.....

The theoretical basis for introducing irretrievable breakdown as a ground of divorce is one with which, by now, lawyers and others have become familiar. Restricting the ground of divorce to a particular offence or matrimonial disability, it is urged, 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 a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked. The marriage has all the external appearance of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone.

In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a famdae, when the emotional and other bounds which are of the essence of marriage have disappeared.

After the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce. The parties alone can decide whether their mutual relationship provides the fulfilment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances..... 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 off-spring. 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 - "irretrievably breakdown"."

41. In reply, Mr. Kavina submitted that the case of irretrievable breakdown of marriage is one-sided inasmuch as the respondent-wife is prepared to reconcile, particularly bearing in mind the fact that the parties have two grown-up sons, one living with the petitioner and another living with the respondent. Hindu marriage is not a contract and is sacrament and it cannot be dissolved at the will of one party. He submitted that the ground is not one recognised under the Act and if any such jurisdiction or power is sought to be exercised, it would amount to this Court undertaking the task of legislature. In support of his submissions Mr. Kavina has placed reliance upon a Bench decision of this Court in case of Rupa Ashok Hurra v. Ashok G. Hurra, reported in 1996 (2) GLH 489:1996 (3) GLR 668, which has been disturbed on the ground of "irretrievable breakdown" of the marriage between the parties. The decision has been cited for showing that this Court will have no inherent jurisdiction or inherent power to grant the prayer of divorce on the ground of irretrievable breakdown of marriage. Relevant observations are appearing at page 504 of the citation. They are under the heading "Can Marriage be Dissolved on the Ground of Irretrievable Breakdown of Marriage 7" This Court considered the decisions in V. Bhagat v. D. Bhagat (supra), and Prakash Chand Sharma v. Vimlesh, reported in 1995 Suppl. (4) SCC 642, and observed that merely under the circumstances that there are allegations and counter-allegations, that there is delay in disposal of divorce proceedings and that the husband would plead grant of divorce on the ground of irretrievable breakdown of the marriage, the Court would not exercise its powers under Article 142 of the Constitution of India. Dealing with he powers under Article 142 of the Constitution of India, this Court observed in para 39 as under:

"Powers under Article 142 of the Constitution of India are not conferred on the High Courts. Several judgments were read by learned Advocates including 1987 P&H 191. Mr. Pandya submitted that the Court has passed a decree without following the procedure under Section 13B(2) and that this Court should exercise powers under Article 226 of the Constitution. In that case also, parties had jointly requested the Court to dissolve the marriage. In the facts and circumstances of the case, even if

discretion is vested in this Court, this Court would not like to exercise the discretion looking to the conduct of the husband, i.e. (1) remarriage during the subsistence of the first marriage and during the pendency of the petition, (2) participating in reconciliation proceedings knowing fully well that he cannot accept appellant as his wife any more as he has remarried, and (3) unnecessarily prolonging the matter."

The Bench concluded that this Court has no power similar to Article 142 of the Constitution.

Reference has then been made to decision of the Hon'ble Supreme Court in the case of Arjun Khiamal Makhijani v. Jamnadas C. Tuliani, reported in 1990 (1) GLR 209. The Apex Court has in terms observed in the matter under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, that Article 142 of the Constitution of India does not contemplate doing justice to one party by ignoring mandatory statutory provisions and thereby doing complete injustice to the other party by depriving such party of the benefit of the mandatory statutory provisions.

Dealing with the absence of power and / or jurisdiction for grant of divorce on the ground of irretrievable breakdown of marriage, the learned Counsel appearing for the petitioner referred to a decision of the Apex Court in the case of B.C. Chaturvedi v. Union of India, reported in AIR 1996 SC 484. Para 18 has been read. The same might be reproduced:

"A review of the above legal position would establish that the Disciplinary Authority, and on appeal the Appellate Authority, being fact-finding Authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the High Court/Tribunal, it could appropriately mould the relief, either Directing the disciplinary/ Appellate Authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

It might at once be noted that the Apex Court was considering the power of the High Court under Article 226 of the Constitution of India while dealing with the provisions of Articles 14, 21 and 311(2) thereof.

42. Having gone through the aforesaid decisions, I am of the opinion that there is no provision in the Act for granting a decree for dissolution of marriage on the ground of irretrievable breakdown of marriage. If the prayer in that respect is granted by this Court, it would amount to introducing a ground which does not find its place so far in the Act. There is no power or jurisdiction akin to Article 142, with the High Court in so far as substantive statutory rights of the parties are concerned.

43. xxx xxx ' xxx xxx xxx The facts of the present case are quite distinct from the facts of the Hon'ble Supreme Court in various decisions submitted by the learned Senior Counsel for the petitioner-husband. Here there is a presence of two sons, the elder having already grown-up and

there is a keen desire on the part of the respondent-wife to see that her matrimonial home is made up so that he can discharge her obligation towards her husband as well as her two children, xxx xxx xxx The respondent's intention appears to be clear and honest and cannot be doubted.

44. In view of what is stated above, time is not ripe both in facts and in law for grant of a relief of dissolution of marriage of the parties on the ground of irretrievable breakdown of their marriage.

45. xxx xxx xxx xxx

In the result:

I. Civil Application No. 169 of 1983 in Second Appeal No. 100 of 1992 is allowed as unde

(a) The opponent of this application (petitioner-husband) Anil Kumar Agrawal is hereby d

(b) The opponent of this application (petitioner-husband) is also directed to pay to the

(c) The amount worked out at the above rate till upto the date of termination of the pr

(d) The petitioner-husband/ opponent of this application is further directed to pay to t

The Civil Application will accordingly stand allowed. Rule made absolute in these terms

II. Second Appeal No. 100 of 1992 is hereby dismissed with no further order as to cost.

(Rest of the Judgment is not material for the Reports)