Madras High Court
Lakshmi Shanmugham vs P.R. Shanmugham on 13 September, 1995
Equivalent citations: II (1996) DMC 21, (1996) IMLJ 271
Author: S Subramani
Bench: S Subramani
JUDGMENT S.S. Subramani, J.

1. In both these appeals, wife is the appellant.

2. O.P. No. 254 of 1991 was filed by the wife on the file of the Subordinate Judge, Thanjavur, for restitution of conjugal rights. That was filed on 2.8.1991. Counter was filed by the husband on 5.2.1992. Immediately thereafter, husband filed H.M.O.P. No. 19 of 1992, on the file of the Subordinate Judge's Court, Kumbakonam on 31.3.1992. The wife seems to have filed an application for transfer in view of the pendency of O.P. 254 of 1991 before the Subordinate Judge's Court, Thanjavur as Tr. O.P. No. 61 of 1992. The District Court allowed the petition and H.M.O.P. No. 19 of 1992 was transferred to the Subordinate Judge's Court, Thanjavur, where it was re-numbered as P.P. No. 59 of 1992. It was thereafter the wife filed a counter in O.P. No. 59 of 19.11.1992

3. I have stated the dates of filing of petitions and counter-affidavits since they have some relevance when I deal with the matter regarding the merits of the case.

4. In the petition filed by the wife for restitution of conjugal rights, it is averred that the marriage took place on 7.9.1986 at Swamimalai. At that time, the respondent (husband) was employed at Tirunelveli and the petitioner (wife) was employed in Canara Bank, Trichy Junction Branch. It is stated that they lived as husband and wife at 21, Keela Kosa Street, Beema Nagar, Trichy from 1986 onwards. The respondent was transferred to Thanjavur in October, 1987 after which they got settled down at Thanjavur. The petitioner was transferred to Thanjavur in January, 1989 and till then she was attending to her duty at Trichy by going from Thanjavur. During 1989-90, both of them lived at No. 2, Anna Nagar, Easwari Nagar, Thanjavur Town. It is said that right from the beginning, except at the initial stage, the husband had started to cast a doubtful eye upon the petitioner (wife), and also treated her with utmost cruelty and beat her black and blue. The wife says that she was patiently waiting that one day or other the husband would change his attitude and lead a normal life with her. But it was of no use. Under some pretext or other or on some flimsy grounds, the husband had started beating the wife without any justification at all. It is stated by the wife that he even avoided having any sexual relationship with her and was always insulting. her using undesirable and unpalatable words. It is stated that the respondent deserted the petitioner on 10.6.1990 taking away with him all the articles offered at the time of marriage. The wife was left alone in the house. She made several bona fide and earnest attempts to effect a mediation, but due to the stubborn attitude of the husband, nothing could be done. As a result of this, she had no other alternative except to live with her parents at Kumbakonam from August, 1990. Even thereafter several mediations were attempted. But the attitude of the respondent (husband) was not encouraging. It is said that after marriage, she alone was maintaining the family spending more than Rs. 5,000/-. According to the wife, right from September, 1986 till May, 1990, she has handed over her entire salary, bonus and arrears, totaling about Rs. 80,000/- to the respondent (husband). All these amounts were given

with the fond hope that both of them would settle down peacefully. But, inspite of the same, the conduct of the respondent was cruel. It is said that in view of the conduct of the respondent, she has undergone untold mental and physical torture. A demand was made to the respondent to cohabit with her and lead a happy marital life. A reply was sent by the husband in which false allegations have been made. The statement made therein that the wife left the matrimonial home is incorrect. The statements made in the reply notice are false to the knowledge of the respondent. In the reply, the husband wanted the petitioner-wife's consent for her divorce, for which she is not willing. She is still hopeful of leading a normal life. Since the respondent has refused to lead a normal marital life and has deserted her, she has sought for restitution of conjugal rights.

5. In the counter filed by the respondent to the petition, the date of marriage is admitted. It is also admitted that he was employed at Tirunelveli and he used to visit Trichy once in a fortnight and stay with his wife during every weekend and he was transferred to Thanjavur in October, 1987, after which both the petitioner and the respondent settled down at Thanjavur. But the petitioner (wife) was transferred to Thanjavur only in January, 1989. Till then she was attending to her duty at Trichy by going from Thanjavur. It is said that right from the beginning, the petitioner did not exhibit any genuine anxiety to run the matrimonial home as a dutiful Hindu wife and she proved herself to be an overbearing type of woman given to hysterical outbursts. According to the husband, the wife was always quarrelsome and not a single day passed without her picking up some quarrel or other on trivial and flimsy things. It is stated that the respondent's continuous approach to the petitioner (wife) to put her in proper lines and to make her develop a taste for a peaceful and harmonious marital life was only in vain and she had obviously no desire to run the matrimonial home in a normal and peaceful manner. According to the husband, the wife used to go to Kumbakonam to her parents' house frequently under some pretext or other not bothering about her husband's comforts and well-being and she sometimes did not even return home after finishing her office work, and because of this, the respondent had to undergo terrible mental agony without any peace of mind and his efficiency in his official career was also affected as a result of the mental agony. The respondent (husband) tried to change the attitude of the petitioner (wife) through his well-wishers. The allegation that the husband avoided having sexual relationship with the wife, is denied. On the other hand, the wife only avoided the husband even from the first day itself. The respondent says that the averment that he used to beat the wife without any justification is false. It is stated that in December, 1989, the wife left the family house without any reason whatsoever and she was attending to her official work at Thanjavur by coming from her parents' house at Kumbakonam. When the respondent met the petitioner at her office and expressed his displeasure and wanted her to come and live with him, she ridiculed the idea and gave out that she was not prepared for any such event. But she came to the house of the respondent only once between December, 1989 and March, 1990, for the purpose of threatening and intimidating, and the letter sent by her in October, 1990 also reveals her character. It is said the respondent went on official tour in or about January or February 1990, handing over the key of the house to the owner, with a request that in the event of his wife coming there, the key might be given to her. Sometime letter, the petitioner had come there alongwith her parents and occupied the house. When the husband returned from tour, she did not open the door, and making hysterical outbursts she cried out that she was not prepared to live with him and showered volley of abuses on the respondent from upstairs, creating an ugly scene in the locality. Hence the respondent was forced to stay in his friend's house that night consequent upon

the indecent behaviour of his wife. It is said that the wife herself wrote a letter addressing her name, with an intention to stop the marriage. In fact, the marriage was arranged by the respondent only after seeing a "Wanted" column in 'The Hindu' dated 1.6.1986. After sometime, on 15.7.1987, she had undergone a training in her office at Madras Staff Training College. On receipt of some records after filing of the O.P., he got an order sent from the Circle Office to the petitioner to undergo the training. From that order, he found that she had undergone the Special Training for Scheduled Tribes in the Bank. After verification, the respondent came to know that her father, brother, herself and her sister got job only claiming as Scheduled Tribes. It is stated that the wife's parents belonged to Gavara Naidu and the documents reveal the original community of the petitioner and her parents. It is stated that the wife has cheated the Government and has seized the opportunity which is intended to benefit a Scheduled Tribe. According to the respondent, this one incident is sufficient to prove the mentality of the wife.

6. It is further averred by the husband that there are several instances which will speak volumes of her indecent behaviour. The respondent bore such humiliations and insults only with the genuine hope of turn of events for better. It is said that the wife had shown disrespect to her husband. While the husband was working at Tirunelveli, and the wife was at Trichy, she was in the family way. The husband took her to a doctor for check up and it was found that she was pregnant an her pregnancy was two months old. When he came from Tirunelveli subsequently, he was shocked to find that his wife had effected voluntry miscarriage. When the husband questioned her as to how she could do it without his consent, she had the temerity to retort that effecting miscarriage was her own business and she was not bound to get the respondent's consent. It is said that this one incident will be ample proof of the petitioner's overbearing nature and also her adamant attitude. It is said that the respondent could refer so many incidents which he reserves for the time of enquiry. From December, 1989 to March 1990, there were several incidents which completely betrayed the imperious and overbearing attitude petitioner. The petitioner would never tolerate her conduct being questioned by the respondent. At times she even grew violent and threw costly articles including a transistor in a fit of wild rage. The respondent says that he was brought up in such atmosphere that he would deal with the domestic issues smoothly. On the other hand, the wife was always found lacking in patience, tolerance and amicable settlement of any domestic dispute. It is stated that from March, 1990, the respondent was never allowed to enter the house at No. 2, Anna Nagar, Thanjavur. She abused him, and in fact, went to the extent of asking him to fix up some other house for himself. The matter was tried to be compromised through mediation. At a mediation, in the presence of certain well- wishers, the petitioner expressed that she was not prepared to live with the husband and that she would take away all her belongings including the jewels, and then, in fact, within a few days of the mediation, she had removed all her belongings including 18 sovereigns of jewels presented to her by the respondent's parents and left Thanjavur to settle down at Kumbakonam with her parents. Hence the respondent was forced to fix up a separate house for himself in No. 24, Sri Nagar 1st Street, Thanjavur. It is stated by the husband that only the wife, by her own conduct and callous mental attitude, rendered herself to be unsuitable for any peaceful marital life, and that the petitioner (wife) is clearly guilty of infliction of mental cruelty and also desertion of the respondent without any justifiable or reasonable cause. It is also stated that the wife herself at several times expressed that she was not willing to lead a matrimonial life with the respondent. It is said that the wife, without realising the consquences, has indulged in baseless and

wild allegations, obviously to cover up her own deficiencies and weaknesses. For these reasons, the respondent (husband) wanted the petition for restitution of conjugal rights to be dismissed.

7. As stated earlier, on 31.3.1992, the husband filed before the Subordinate Judge's Court, Kumbakonam H.M.O.P. No. 19 of 1992, for divorce. In that petition, it is averred that the wife did not exhibit any genuine anxiety to run the matrimonial home as a dutiful Hindu wife and she proved herself to be an overbearing type of woman, given to hysterical outbursts, as she is working in Canara Bank. It is said that she was always quarrelsome, and not a single day passed without her picking up a quarrel on some trivial or flimsy reasons.

It is said that the conduct of the wife amounts to severe cruelty and torture, and, therefore, he is entitled to get a decree of divorce under Section 13(1)(a) of the Hindu Marriage Act. The husband also says that the wife got employment under Scheduled Tribe quota on the false grounds. It is said that the husband is therefore, entitled to get divorce on the above grounds.

8. A detailed counter has been filed by the wife on 19.11.1992. The averments therein are more or less the same as in the petition for restitution of conjugal rights. She also denied the allegation that she caused any mental agony to her husband. She has offered herself to discharge the obligations as a wife. She had denied the allegation that she got employment under Scheduled Tribe quota on false grounds.

9. Even before the transfer was ordered, trial in H.M.O.P. No. 254 of 1991 has begun, and the wife was examined on 3.4.1992 and her evidence was completed on 6.4.1992. It is seen that the husband was examined on 7.4.1992, 8.4.1992 and 9.4.1992 During this time, on the side of the wife. Exs. A-l to A-4 and on the side of the husband, Exs. B-l to B-14 were marked, and the case was posted for arguments on 10.4.1992. Thereafter, an application seems to have been filed as LA. No. 43 of 1992, to reopen the case for evidence and also an application as LA. No. 48 of 1992 to recall the witness. The matter was adjourned from time to time. In the meanwhile, the petition for divorce was transferred to the Subordinate Judge's Court, Thanjavur, and the same was tacked on with H.M.O.P. No. 254 of 1991. On 11.1.1993, the interlocutory application seems to have been allowed, and the husband was recalled and examined. On the side of the husband, R.W. 2 and R.W. 3 were examined on 13.1.1993 and 18.1.1993 respectively. The wife was recalled and examined on 2.2.1993, and through the wife, Exs. B-15 and B-16 were marked.

10. On the basis of the above evidence, the Trial Court dismissed the application for restitution of conjugal rights and allowed the petition for divorce. The Trial Court was of the view that Ex. B. 16 speaks volumes about the conduct of the wife, and any husband who has got self-respect cannot live with such a wife. It also believed the evidence of R.W. 2 and R.W. 3. But the Trial Court did not discuss the evidence of these witnesses, but only said that they have no axe to grind against the wife, being independent witnesses. Even the evidence of R.W. 1 was not discussed by the Trial Court. It assumed that what all he deposed must be (sic), and on the basis of such assumption, Ex. B-l6 was also taken into consideration The Trial Court also found that abortion was performed without the consent of the husband and that also amounts to cruelty. It also held that the wife secured job by misrepresenting to the Government and Bank Officials declaring herself as belonging to Scheduled

Tribe. It took the view that a person who goes to the extent of falsely describing herself as belonging to Scheduled Tribe for the purpose of getting a job, can never be believed.

11. The wife filed two appeals before the District Court Thanjavur, as C.M.A. Nos. 17 and 18 of 1993. The lower Appellate Court held that the question of obtaining a job and the circumstances under which the wife got the same are not relevant for the purpose of deciding the case. It also opined that the finding on those aspects by the Trial Court was unwarranted. But the lower Appellate Court relied on Ex. B-16 to hold that the conduct of the wife does not deserve granting a decree for restitution of conjugal rights, and also held that the allegation of the husband that the wife always treated him with cruelty can only be true. The lower Appellate Court was of the view that the wife was always insulting her husband and that has caused mental cruelty. It also found that the husband was kept outside the house waiting, and the allegation by the wife that the husband is impotent and her use of abusive language, all amounted to cruelty. The lower Appellate Court also relied only on Ex. B. 16 to enter a finding on the same. There is no finding by the lower Appellate Court whether the allegation of cruelty on the basis of abortion was true or not. The lower Appellate Court only said that such a case has been put forward by the husband and the same is denied by the wife. No definite finding was entered.

12. As it stands, the finding on divorce is mainly on the basis of Ex. B-16 only and also on the evidence of RWs 2 and 3 who, according to the Courts below, have corroborated the evidence of R. W. 1, the husband. In respect of the allegations regarding the obtaining of job by the wife and abortion, there is no finding by the lower Appellate Court.

13. Since the lower Appellate Court has also upheld Ex. B-16 to enter a finding on cruelty, the petition for restitution of conjugal rights was dismissed, and the petition for divorce, filed by the husband, was allowed, he., the judgment of the Trial Court was confirmed.

14. It is against these decisions, the wife has preferred these appeals.

15. At the time of admitting these appeals, the following substantial question of law has been formulated :

"When Ex. B.16, the letter written by the appellant to her parents, was not posted to the addressee, whether the said letter is admissible in evidence and whether the courts below can take cognizance of the same ?"

16. At the time of arguments, learned Counsel on both sides argued the entire matter, and they did not confine themselves to the question of law raised (extracted above). They also argued the effect of Ex. B-16 and also how far the oral evidence can be acted upon. Learned Counsel on both sides also argued on the aspect of jurisdiction of this Court when there is a concurrent finding against the wife.

17. On the basis of the arguments, I feel that some more questions of law have to be formulated for consideration in this Second Appeal. I think I am empowered to do so under Section 100 of the Code of Civil Procedure which says:

"Provided that nothing in this Sub-section (i.e., 5) 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 it is satisfied that the case involves such question."

Learned Counsel for the wife argued on the aspect of lack of pleading and lack of particulus both in the counter to the restitution petition also in the petition for divorce filed by the husband. Accordingly, the learned Counsel for the husband argued that in matrimonial cases, the Court need not confine itself to the pleadings regarding cruelty, and it can take into consideration act of cruelty which have arisen even subsequent to the filing of the petition. Therefore, I formulate the following substantial questions of law for consideration in these Second Appeals:

"(1) Whether, on the basis of the pleadings in both the cases, the husband is entitled to get a divorce, and whether his counter statement in O.P. No. 254 of 1991 has explained reasonable cause for refusing restitution of conjugal rights ?

(2) Even if Ex. B-16 can be admitted in evidence, whether the same is sufficient to pass a decree of divorce ?

(3) Is not the finding of the Courts below that the husband has proved his case based on no evidence or misreading of evidence ?

(4) Is not the procedure adopted by the Trial Court in casting the burden of proof on the wife, caused grave miscarriage of justice?"

18. Before entering a finding on the above substantial questions of law, let me consider how far the pleadings enable the husband in getting a divorce. Even if the wife's application for restitution of conjugal rights is dismissed, that will not enable the husband to get a decree of divorce, for, the scope of enquiry in both the cases is different. The wordings of Sections 9 and 13 of the Hindu Marriage Act have, therefore, to be considered. Section 9 deals with restitution of conjugal rights. It reads thus :

"When either the husband or the wife has without reasonable excuse withdrawn from the society of the other, the aggrieved party may apply, by petition to the District Court, for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted may decree restitution of conjugal rights accordingly."

Section 13 deals with divorce. It reads thus :

"13. Divorce.- (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(i) xxx (i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or (i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition;

xxx xxx xxx xxx"

Section 9 deals with reasonable excuse for withdrawing from the society of the other, whereas Section 13 contemplates proof of facts alleged. The ground mentioned in Section 13 will have to be proved before getting a decree of divorce. I am not for a moment saying that the proof must be as in a criminal case, but, being a civil proceeding, it depends upon the preponderance of probabilities. as decided in Dr. N.G. Dastane v. Mrs. S. Dastane, A.I.R. 1975 S.C. 1534: [1975 All India Hindu Law Reporter 111 (SC)]. Hence, both the cases will have to be considered independently, for, the refusal of a relief in one application will not result in the granting of relief in the other.

19. First I will deal with the petition for divorce, filed by the husband.

20. In paragraph 4 of the petition, the husband has averred that 'the respondent has completely deserted the petitioner (husband) for the past more than 2 years without any valid reasons/In paragraph 5, he says that he is entitled to get a relief of divorce on the ground of cruelty.

21. Both the Courts below have held that the husband is entitled to get a divorce on the ground of cruelty, and not on the ground of desertion. But, for the sake of appreciation, I extract paragraphs 4 and 5 of the petition filed by the husband. They read thus :

Alongwith the same, I will also incorporate the averments contained in the counter in O.P. No. 254 of 1991. Paragraphs 2 to 4 read thus :

I incorporated the pleading in the above case only for the reason that both these were jointly tried.

22. In A.I.R. 1982 Delhi 240, Smt. Maya v. Brij Nath, the learned Judge held thus:

"In a petition for divorce on the ground of cruelty, acts of cruelty will have to be specifically pleaded. No amount of evidence can be looked into on a plea which was never pleaded."

23. In A.I.R. 1989 Himachal Pradesh 29, Smt. Parvati v. Shiv Ram and Another, the learned Acting Chief Justice said thus :

"The pleadings in regard to desertion, and cruelty have to be specific in nature as envisaged by Section 5. Desertion, in essence, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. Heavy burden lies upon a petitioner who seeks divorce on the ground of desertion. The offence of desertion must be proved beyond any reasonable doubt. Similarly, acts of "cruelty" have to be specifically pleaded. In absence of such pleadings it would be impossible for the answering spouse to effectively meet the allegations. If specific allegations are not made with sufficient details no amount of evidence can

cure the defect, for, it cannot be looked into....."

The learned Judge further held thus :

"Acts of "cruelty" have to be specifically pleaded. In the absence of such pleadings it would be impossible for the answering spouse to effectively meet the allegations. If specific allegations are not made with sufficient details no amount of evidence can cure the defect for it cannot be looked into."

24. B.P. Beri, on Law of Marriage and Divorce in India, Second Edition 1989 (at pages 148 and 149), has stated thus:

"As the charge of cruelty is within the direct knowledge of the complaining spouses law requires that averments in relation to this charge must be specific, concise and clear. Vagueness or ambiguity in the allegations of cruelty is likely to be viewed with disfavour.

If the instances of cruel treatment are not pleaded they cannot be considered for granting relief on the ground of cruelty. The Trial Court's judgment reversed where the husband's petition for divorce was granted on the ground of cruelty which was not pleaded in the petition by the Punjab & Haryana High Court."

25. A.N. Saha, on Marriage and Divorce, Second Edition 1981, has stated at page 131 thus:

"Acts of cruelty are to be specifically pleaded. Specific instances of conduct should be described in particular and in separate paragraphs....."

26. This Court framed Rules under the Hindu Marriage Act. Rule 4 (a)(vi) deals with the contents of the petition. The relevant portion of the said Rule reads thus :

".....If the petition is for divorce, the matrimonial offence alleged or other grounds upon which the relief is sought together with the full particulars thereof so far as such particulars are known to the petitioner....."

27. According to me, the pleadings put forward by the husband are vague. Except for the general pleadings, no specific act of cruelty has been mentioned (apart from alleged abortion).

28. I will deal with the case of abortion initially. In paragraph 5 of the Divorce Petition, it i.e. stated that the wife is guilty of cruelty on the ground that she effected a voluntary miscarriage The time at which it was alleged to have been effected is also relevant. Regarding this, it is stated that when he came back from Tirunelveli, the husband was shocked to find that 'the wife had effected voluntary miscarriage'. From the averments in the notice, reply notice and counter-affidavit, it is clear that the husband was employed at Tirunelveli at the time of marriage. So, it was sometime immediately after the marriage. It is also admitted that in October, 1987, the husband was transferred to Thanjavur and thereafter the husband and wife were living at Thanjavur together, and the wife was attending her office by going to Trichy by bus from Thanjavur, till she was transferred to Thanjavur in 1989.

So, after the alleged abortion, both the husband and wife lived there for more than two years. In her evidence, P.W.I (wife) has stated that she had a miscarriage once, by she did not do it voluntarily. In cross-examination, the only question that was suggested is, "Is not the miscarriage done by you voluntaily" for which the answer was a denial of the suggestion. There was no serious cross-examination on this point. Taking into consideration their continued residence for more than two years, it can be assumed that it would not have been a voluntary miscarriage as alleged. At any rate, the lower Appellate Court has not entered any finding on the same. In this connection, it is also worthwhile to remember that in the petition for restitution of conjugal rights, the wife has averred that the husband was avoiding sexual relationship with her. The same is specifically denied by the husband. That means, he was having sexual relationship even after the alleged incident. If we read all these together even if there was any voluntary abortion or miscarriage, by the conduct of the husband the said act must be deemed to have been condoned. The husband will not, therefore, be entitled to decree of divorce on the said ground. This point has not been considered either by the Trial Court or by the lower Appellate Court.

29. Regarding the evidenciary value of Ex.B-16, it is admitted that it is a letter written by the wife to her parents. Even though it is addressed to her parents, she did not send the same. It was left in the house where they (husband and wife) were residing together. It is that letter which has been made use of by the husband as a trump card for proving his allegation regarding cruelty. On the basis of Ex. B-16, there is no pleading and there is also no evidence to show that the same has affected him mentally. The wording in Section 13 of the Hindu Marriage Act is 'treated the petitioner with cruelty'. So, there must be evidence in this case to show that Ex. B-16 has effected him. Even though he was examined on 11.1.1993, after the case was transferred from Kumbakonam to Thanjavur, he did not speak anything about Ex. B-16. Regarding that letter,P.W.I was asked. She admits that it was written by her. She saws that she wrote Ex. B16 only because she suffered physical torture from her husband. But inspite of the same, even though she addressed it to her parents, she did not send it. Regarding Ex. B-l, her evidence is :

As being this, there is no counter evidence. Now let us see what she has written in Ex. B-16 which reads as follows :

"According to me, a reading of the above letter will not show any cruelty but only the helplessness of the wife in cohabiting with her husband. According to her, he is always suspicious; he has no love for her; always physically cruel; and when he beings to manhandle her, he becomes an animal. She also says that he never used to take her out. From 6.00 p.m. to 10.00 p.m. he will not be available. If any question is put, he will not answer, or will take a long time to answer. She further says in the letter that he is not in the habit of informing her where he is going, and that she was also prevented from enquiring about it. She has further said that he has not informed her about his emoluments and that he is also not helping her in maintaining the family, and that her entire income has to be spent for the family and only if there was any balance, that will be retained by her. She also says that she should not talk to anybody, whether male or female, and even if she does not speak, that also will be made use of by him for picking up a quarrel. Whenever he comes from the office, he has quarrelsome behaviour. He also used to go to her office and enquire about her. She also says than whenever she speaks to him, that ends in quarrel. For all these reasons, and that too when the

husband is suspicious about her, she says that she cannot live with him. She also says that she has been prevented from meeting her parents and she was always manhandled. In her letter (Ex. B-16) she has written that her husband wants to know as to what she had done about the four months' salary she had earned while she was at Kumbakonam. For not giving that, she was beaten and physically tortured. In fact, in view of his conduct, she dose not want to live with him. Whatever she does he finds fault with her. With such a man, how she can live, is her pleading in that letter. In the letter itself she says that only as a last resort she is writing that letter to her parents, after having thought over the matter. She wants her parents to come and take her. This is the sum and substance of Ex. B-16. Alongwith Ex. B-16, we have the evidence of P.W.l. This will not show that she was cruel towards him. She also says that even within two months, she had taken seven days leave and from 1.3.1990, she was again on leave for one month. She says that only because there was nobody to question him, he (husband) was behaving like that. For these reasons she wanted her parents to come and take her."

30. The Courts below have found fault with the wife for having used the word. (He) and also the words [Omitted being in regional language] and Learned Counsel for the respondent (husband) argued on these two words. According to him, the wife has described the husband as an 'animal' and 'impotent' and that she was also called him with disrespect. I do not think that the argument of the learned Counsel for the husband can be accepted so long as the evidence of P.W.I remains unchallenged. The circumstances under which Ex. B-16 was written by her, were explained by P.W.I. The conduct also reveals the same. She was put to misery and torture. We must appreciate the conduct of the wife, that even though she wrote the letter, she did not send the same to her parents. That only shows her tolerance in cohabiting with her husband. According to me, Ex. B- 16 cannot be made use of by the respondent. For, he has not spoken about the impact in his mind after he read that letter (B-16).

31. In this connection, it is relevant to point out the decision reported in 1994-1-L.W.27 : [1994(1) All India Hindu Law Reporter 74 (SC) V. Bhagat v. Mrs. D. Bhagat, wherein (in paragraph 15) their Lordships of the Supreme Court have stated thus:

"Mental Cruelty" in Sec.13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be, expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."

32. It is true that cruelty need not be physical cruelty alone .It has got varied meanings. As has been held in the decision reported in AIR 1988 SC 121, Shobha Rani v. Madhukar Reddi, it has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and behaviour. It is the conduct in relation to or in respect of matrimonial duties an obligations. It is a course of conduct of one which is adversely affecting the other.; The cruelty may be mental or physical, intentional or unintentional. It is a question of fact and degree. Their Lordships held thus:

"Section 13(1)(i.a) uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the Court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehenion that it would be harmful or injurious to live with the other. Ultimately, it 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 the 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.

It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and Lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon v. Sheldon, (1966) 2 All ER 257 (259), the categories of cruelty are not closed. Each case may be defferent. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate I the conduct complained of. Such is the wonderful realm of cruelty."

33. In A.I.R 1985 Punjab and Haryana 199, Kamlesh v. Paras Ram, the learned Judge of the High Court has held thus:

The term "legal cruelty" as known to matrimonial law is that item of cruelty which the law recognises as an instance. Making a false allegation of adultry by one spouse against the other is an

instance of "legal cruelty'. That is to say it has inherently an element of cruelty and the law recognises it Other instances of objectionable human behaviour can easily be multiplied. From time to time they have come to the notice of the Courts and off and on been given the title of cruelty, and have unquestionably been followed by Courts precedent bound. But elemental cruelty does not ipso facto mean that it would entitle the aggrieved spouse to a relief. And to the precise relief under Section. 13(1)(a) of the Hindu Marriage Act. The ground of divorce now available to the petitioning spouse is that the other party has after the solemnization of marriage treated the petitioner with cruelty. It does not ipso facto mean that the petitioner has only to allege and prove that the respondent has indulged in act or acts which amount to 'legal cruelty'. But then he or she has further to prove that it was 'cruelty' satisfying the tests of the Hindu Marriage Act. In that Act cruelty as a ground for divorce must mean cruelty of such a character as to cause danger to life, limb or health or to give rise to reasonable apprehension of such danger. After the 1976 amendment in the Hindu Marriage Act, cruelty as a ground for divorce has been brought at par with one existing in the Special Marriage Act. And under the Special Marriage Act the ground of cruelty has always been understood to mean cruelty as it is understood under the English Law. The effect of Dastane v. Dastane, AIR 1975 SC 1534 was nullified by causing the 1976 amendment in the Hindu Marriage Act. In Raj Kumar Manocha v. Smt. Anskuka Manocha, 1983 Cur L.J.(Civ & Cri) 134: [1983 All India Hindu Law Report 110 (Pb.& Hry.)], S.P Goyal, J., relying on Madan Lal Sharma v. Smt. Santosh Sharma, 1980 Hindu L.R. 441 (Bom.) summed up the position of law on the point with erudite clarity with which I am in respectful agreement:

"The accusations instantly made by the wife-appellant even if proved to have been false would not ipso facto entitle the husband to have a decree for divorce unless there was a further finding that these were of such a grave character so as to cause danger to life, limb, health or to give rise to reasonable apprehension of such danger....."

34. In Sir Hari Sing Gour's Hindu Code-6th Edition Volume 2, page 1057, the learned author on the basis of the decision reported in 1988 Mah. L.J 419, Mr. P. v. Mrs. P., has stated thus :

"...Take the example of a virgin, who has had a pre-martial serious love affair with some man other than her husband, she has received a bunch of letters from him. After the marriage, she vows to remain and actually remains chaste to her husband alone. If such a wife were to read these letters in the physical presence or the husband, one can appreciate that she is treating him with cruelty. But if. she reads the letters in hiding, taking all precautions to keep them secret from the husband and the husband himself undertakes to unearth the secret activity of the wife by some ingenious means, it is doubtful whether the wife would be charged with "treating " him with cruelty."

In this case, the letter is not published, by the wife, and he has not made use of the same for any purpose. The husband takes possession of it and publishes himself. That will not show that the wife was treating him (husband) cruelly.

35. In this connection, the legal concept of 'cruelty' also has to be considered. The existence of cruelty depends not on the magnitude but, rather on the consequence of the offence of cruelty, actual or apprehended. In a petition based on cruelty, the duty of the Court to interfere was

intended, not to punish the husband for the past, but to protect the wife for the future. According to the learned author (of Hindu Code mentioned above, Hari Singh Gour's Hindu Code) the word 'cruelty' is employed only in limited, sense. The learned author says that:

"Every unpalatable behaviour of the other spouse is not necessarily "cruelty" physical or even mental, so as to afford a ground for judicial separation under Section 10 of the Act. Sometimes, when parties to a marriage forget that married life is a joint adventure and they do not bear and forbear", differences occur, and if they are not resolved amicably they give rise to misunderstandings and if either party lacks the force of character and the art of tact and patience, they aggravate and aggravate sometimes to such an extent that the parties begin to feel hostile to each other. Then it becomes difficult to horn their minds to peace. And, if they have foolish advisers, fuel is added to fire; their problems are converted from molehills into mountains,, with an enabling dissolution of marriage, they rush to the Court and try to wash their dirty linen. Each seeks the pride of winning the case. Here, it is that the Court has carefully to bear in mind the expression cruelty is employed in the Act in a limited sense. The learned author also says at page 1058 that the following tests have been followed by the Court in India for granting or refusing to grant a relief of divorce in matrimonial cases. The relevant portion reads as follows:

"...First the act, words omissions or events alleged to amount to cruelty directed against the petitioner must be proved beyond reasonable doubt. This must be in accordance with the law of evidence, second it must be established that there is an apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the other party. No doubt, every petitioner will say that he apprehends such harm or injury But he must be able to establish that what he apprehends is real harm or injury. Even that is not enough; and the third requirement of law is that the Court must be satisfied that this apprehension is reasonable having regard to all the facts and circumstances of the case including the physical, mental and social condition of the parties concerned; their status, perhaps social, economic and physical; the nature of the differences between the spouses; the welfare of the children, if any, of the marriage; the conduct of the parties towards each other during coverture and thereafter, including the conduct of the parties in the course of the prosecution of the matrimonial petition, if necessary depending on the nature of each case; and possibly what the Court ought to regard as the prevailing notions regarding the conduct and relation between husband and wife. Moreover, the Parliament has considered that even this is not enough to entitle the petitioner to relief, if the conduct of the petitioner himself disentitles him to any relief, because if the Court finds that the petitioner is taking advantage of his own wrong, it is the duty of the Court not to grant the relief. Hence the fourth requirement laid down by the law is that the petitioner must satisfy the Court that the is not in any way taking advantage of his or her own wrong or disability for the purpose of the relief. The fifth requirement, so far as the present case is concerned, which is mentioned in Section 23 is that where the ground of the petition is cruelty an in the present case, the petitioner has not in any manner condoned the cruelty. It is not sufficient to prove mere cruelty. What is required is that the conduct should be such as is wilful or unjustifiable and of such a character as to cause danger to life, limb or health, bodily or mental or to give rise to a reasonable apprehension of such danger. If without the presence of danger to health element, the Courts were to grant divorce on the ground of cruelty, a heavy toll would be levied on the institution of matrimony."

36. Ex. B-16 according to me, has been misused by the Courts below in rendering a finding against the wife.

37. I come to oral evidence of RWs 1 to 3. According to me, their evidence was misread by the Courts below.

38. RW1 is the husband. While he was examined, he said that on the first night of the marriage, the marriage could not be consummated since his wife slept within five minutes. Further he says that it is not correct to allege that he teased his wife by mentioning her community. He came to know that his wife belonged to a Scheduled Tribe only when the wife went for training. He further said that he never talked to his wife about caste to which she belonged. He has further deposed that his parents are at Madras, that he went to the petitioner (wife) in October 1987 and that she teased him, that she asked him to go to Dubai, that once his wife had pregnancy, that it was confirmed to be of two months, that when he left for Tirunelveli, the wife committed voluntarily miscarriage, and further down he says that very often his wife used to go to Kumbakonam to her parents' house, that whatever he said, she will not obey, and she was always suspicious. In December, 1989 his wife scolded him in front of the house. She abused him and he immediately left the house taking the scooter. Later, his wife brought her parents and when he returned in the night, they also scolded him. His wife left with her parents to Kumbakonam. 15 days later, he came back and his wife alongwith her parents bolted the doors from inside. His wife scolded him from the balcony by saying, "you are sleeping with your mother, why are you coming to your wife". He immediately went alongwith his friend. Later, in March, 1990, the matter was settled and thereafter he went to a new house. Even in the new house his wife used to bolt the door from inside and used to ask him, which woman you are keeping? In the examination dated 8.4.1992, he has said that his wife used to take sleeping pills and she used to throw away household articles. He has futher said that the scooter which he is having was purchased by him. He denied the suggestion that, his wife used to spend more than Rs. 5,000/- per month, and added that her income was only Rs. 1,500/-. In the last sentence of the chief-examination, he has stated that he does not want to live with his wife. These are the only statements of RW1 (husband) in the chief-examination.

39. In the cross-examination, he says that he came to know that his wife belonged to Scheduled Tribe, that he never hesitated to live with his wife, and that his marriage was performed after noticing a publication in 'The Hindu'. He has further deposed that he did not take away the belongings of the wife. He said that he prepared the documents only for knowing the caste of the wife. He denied the suggestion that in the first night itself the marriage was consummated. He denied the suggestion that he used to scold his wife. He also denied the suggestion that the wife did not avoid a transfer. He said that both of them resided together in Trichy and that after he came over to Thanjavur, the wife came from Trichy to Thanjavur and lived with him. He denied the suggestion that his wife never scolded him in front of the house. He would say that many persons witnessed when his wife scolded him. He denied the suggestion that he only deserted the wife. He says that he does not have the scooter loan application form. He says that he is not willing to live his wife. He denied the suggestion that he did not provide jewels to his wife. After the transfer of the petition for divorce, the chief- examination contains only two sentences. They are "After marriage, the wife did not cohabit with me. She deserted me in March 1990. Thereafter I did not join her. She

has deserted me intentionally and insulted me." In cross-examination, he has stated that he only remembers that in March, 1990 she deserted him, but he does not remember the date. He denies having stated in his petition that she deserted him in December, 1989. He says that in December his wife quarrelled with him. He says that he has not stated as to on which date she deserted him. He says that it is not correct to suggest that he deserted his wife from 10.6.1990. He says that it is only his wife who gave the notice. He says that his addresses is No. 10, Sivapuram, Tirunelveli Junction. He also denied the suggestion that his wife never teased him. This is the evidence of RW 1 (husband). On the basis of this evidence, which is not pleaded, I do no think, a decree of divorce can be granted.

40. Let us now see what RW 2 has stated in his evidence. In chief- examination, he says that the husband was occupying the upstairs portion of his house from April, 1990, alongwith his parents. He says that he knows the appellant. He has further stated that one month after the husband occupied his house, the appellant once came to the house and bolted the house from outside and abused her husband and that he (RW 2) requested her not to abuse RW 1. He further says that she tore the scooter-seat of RW 1 and pushed down the scooter. According to RW2, the incident must be sometime during April, 1990. RW1 has no case that he ever lived with the wife after March 1990 and in the petition it is stated as December 1989. His specific case is that in March, 1990, the wife had left to her parents' house. The Courts below did not consider this fact when they believed the version of R.W.2. He could not have been an eye-witness to the alleged incident if the husband and wife lived separately from March, 1990.

41. RW 3 is a person who can never be believed. He says that he has noted down in a diary as to what all had happened between the husband and wife (parties herein) and that is why he is in a position to speak about the same. He is an utter stranger to the family. The circumstances under which he had to take down these facts in a diary are not explained. The diary is also not produced before Court. He also does not give the details of time or day about such incident. In fact, the incident that was spoken to by RWs 2 and 3 was not pleaded by husband. Even RWs 1 has not spoken about such an incident while he was in the box. What RWs 2 and 3 have spoken is a case which has not been pleaded or proved by RWl. It is that evidence that has been accepted by the the Courts below only for the reason that they are independent witnesses. The reliance placed by the Courts below on the evidence of these witnesses is illegal. Their evidence is no evidence at all.

42. Ex. B-3, B-4 and B-6 are of no evidenciary value to prove cruelty. Of course, Ex. B-3 has been relied on by the learned Counsel for the husband to show that the scooter seat was torn. Though there is a statement that the scooter seat was torn, the wife has stated that if she is responsible for the same, she wants to be excused. She also says that she is possessive and she wants only his love. She further says that even if he does not speak to her, she will continue to talk to him due to love and affection. She further says that sometimes her behaviour may be harsh, but it was only because of greater affection towards him. Even if others laugh at her behaviour, she will continue to talk to him and love him. This only shows that the wife is very much affectionate towards her husband and the alleged cruelty by the husband is lacking in good faith.

43. I have already extracted the passages of the petitions on the allegation of cruelty. I have also stated that these are all only general in character. At the most, it can be said that these alleged acts may be treated as disharmony. Simple trivialities which can truly be described as reasonable wear and tear of married life cannot be treated as cruelty. In paragraph 34 of the decision reported in Dr. M.G. Dastane v. Mrs. S. Dastane, (supra), their Lordships have held thus :

"We do not propose to spend time on the trifles of their married life. Numerous incidents have been cited by the appellant as constituting cruelty but the simple trivialities which can truely be described as the reasonable wear and tear of married life have to be ignored. It is in the context of such trivialities that one says that spouses take each other for better or worse. In many marriages each party can, if it so wills, discover many a cause for complaint but such grievances arise mostly from temperamental disharmony. Such disharmony or incompatibility is not cruelty and will not furnish a cause for the dissolution of marriage. We will, therefore, have regard only to grave and weighty incidents and consider these to find what place they occupy on the marriage canvas."

44. In A.I.R. 1988 S.C. 407, J.L. Nanda v. Smt. Veena Nanda, also, their Lordships said that sometimes the temperament of the parties may not be conducive to each other which may result in petty quarrels and troubles, but the same will not amount to cruelty or a ground for divorce. In paragraph 7 of the judgment, their Lordships have held thus :

"Having heard learned Counsel for the parties and also having heard the parties themselves, we come to the same conclusion as was reached by the learned Judges of the Division Bench of the High Court while disposing of the appeal filed by the appellant against the judgment of the learned Single Judge. It is no doubt an unfortunate state of affairs but it could not be held that the respondent was behaving with the appellant in a manner which could be termed as cruelty which would entitle the appellant to a decree for divorce. Sometimes, the temperament of the parties may not be conducive to each other which may result in petty quarrels and troubles although it was contended by the appellant that he had to suffer various ailments on account of this kind of behaviour meted out to him by the wife; but it could not be held on the basis of any material that ailment of the appellant was the direct result of her (respondent's) conduct. The Division Bench, therefore, was right in coming to the conclusion that there is no material to come to the conclusion that the respondent treated the appellant with such cruelty as would entitle him to a decree for divorce..."

45. In A.I.R. 1992 Patna, 32, Sukumar Mukherjee v. Tripti Mukherjee, a learned Judge of the Patna High Court has held thus :

"The cruelty has not been defined under the Act and the reason is obvious. The acts and behaviour of human being are diverse and infinite and it is impossible to give a definition which will include all acts and conducts amounting to cruelty. Whether a particular act or conduct will amount to cruelty or not will depend upon the facts of each case. However, two elements are required to be proved for obtaining a decree of divorce, namely, the act complained of, i.e., the nature of the cruel treatment and secondly, its effect on the aggrieved spouse. The question whether a particular, act or behaviour will amount to cruelty or not depends upon the character, way of the life of the parties, their social and economic conditions, their status, customs and traditions. Each case is to be decided on the

facts of its own. The Judges and the Lawyers should not import their own notions of life while deciding the matrimonial cases."

46. In this connection, the decision reported in A.I.R. 1991 Madhya Pradesh 346 Smt. Vibha Shrivastava v. Dinesh Kumar Shrivastava, has some relevance. In paragraph 18, the learned Judge has considered the concept of an orthodox Hindu wife and a modern Hindu wife. The relevant portion of the said paragraph reads thus :

"...The orthodox concept of Hindu wife is to recognize her as a marriage partner having only a domestic role in the house of the husband. This orthodox concept has lost its relevance in the modern Hindu society where with advanced education of women, a Hindu wife is also capable of seeking employment and having a professional career of her own. The concept of 'cruelty' in the matrimonial law is not fixed or rigid and the Act has purposely not defined the word 'cruelty'. The concept of cruelty may vary from couples to couples depending upon the peculiar circumstances, intellectual level, financial and social status. In modern Hindu society it would be unjust to the fair sex to look at the Hindu wife only as a marriage partner with a role confined to four walls of her husband's home. She cannot be forced to compromise herself to a secondary role in the husband's house nor can she be expected to subject herself to the unreasonable dictates of her husband. Any other attitude towards modern Hindu women is bound to belittle her status in Hindu society and would deter full growth of her personality in and outside the house."

47. In A.I.R. 1993 Calcutta 33:[1993 (2) All India Hindu Law Reporter 38 (Cal.)] Madan Mohan Manna v. Smt. Chitra Manna, their Lordships followed the decision of Denning, L.J. in Kaslefsky v. Kaslefsky, (1950) 2 All. ER 398 at page 403 which was quoted with approval in AIR 1975 S.C. 1534 (supra), which reads thus :

".....If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility to temperament. This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperssed".

Those observations are made in connection with cruelty, but the result would be same if the Court grants decree simply because a party has filed petition; the whole institution of marriage itself would be seriously shaken if such liberty is given to a person.

48. In A.I.R. 1983 Allahabad 225, Suresh Kumar Gulati v. Smt. Suman Gulati, a learned Judge of that High Court held that every mental tension cannot amount to infliction of mental cruelty, and that it must be shown that the injury inflicted through the mind of the petitioner has affected his health, or that the future repetition of that injury is most likely to affect his health. The learned Judge has held thus:

"Cruelty in order to be a ground for divorce must be some such conduct of the respondent as gives the petitioner a reasonable cause of apprehension of injury to body, mind or health in the future. Past conduct is undoubtedly relevant as it forms the very basis of the reason for the apprehension of

the injury or harm in the future. Cruelty can be mental; but when one speaks of mental cruelty as distinct from physical cruelty, the idea is to show that while in the case of physical cruelty, harm or injury inflicted is to the body directly in the case of mental cruelty the harm or injury caused is through the mind, but nevertheless it is a harm or injury caused to the human body. The injury when caused to the human physical body is something which could be perceived by the senses, but when it is caused mentally the result of it may appear later on by affecting the health of the person to whom it is caused. Every mental tension cannot amount to infliction of mental cruelty. It must, however, be shown that the injury inflicted through the mind of the petitioner has affected his health, or that the future repetition of that injury is most likely to affect his health....."

49. On the basis of settled position of law and also on the basis of the evidence, I have to hold that Ex.B-16 was misread by the Courts below and the evidence of RWs 1 to 3 was misapplied without taking into consideration the pleadings in the case. What was pleaded was not attempted to be proved, and even if any fact pleaded was attempted to be proved, that was also condoned by the conduct of the husband.

50. Learned Counsel for the respondent (husband) cited before me various decisions to substantiate his case regarding 'cruelty', They are:- A.I.R. 1996 Madhya Pradesh 205, Smt. Urmi Bai v. Chittar; A.I.R. 1984 Bombay 413 :[1984 All India Hindu Law Reporter 629 (Bom.)] Dr. Keshaoro Krishnaji Londhe v. Mrs. Nisha Londhe, A.I.R. 1986 Madhya Pradesh 41, Haribhajan Singh Monga v. Amarjeet Kaur, A.I.R. 1986 Rajasthan 13, Smt. Shanthi Devi v. Raghav Prakash, A.I.R. 1979 Jammu & Kashmir 4, Smt. Kamala Devi v. Balbir Singh, A.I.R. 1980 Karnataka 8, Dr. Srikant Rangacharya Adya v. Smt. Anuradha, A.I.R. 1985 Delhi 76, Smt. Asha Handa v. Baldev Raj Handa, A.I.R. 1985 Allahabad 253: [1985 (1) All India Hindu Law Reporter 351 (Delhi)], Smt. Kalpana Srivastava v. Surendra Nath Srivastva, A.I.R. 1987 (Delhi) 86: [1986(2) All India Hindu Law Reporter 104 (Delhi)], Sushil Kumar Verma v. Usha, A.I.R. 1990 Kerla 151, K. Naryanan v. K. Sreedevi and V. Bhagat v. Mrs. D. Bhagat, A.I.R. 1994 S.C 710. The legal propositions settled in those cases are not doubted.

51. In A.I.R. 1959 Kerla 75 (supra), their Lordships followed the decision reported in (1952) 1 All E.R. 875 Jamieson v. Jamieson. While considering the question of 'cruelty', their Lordships held that before coming to a conclusion, the Judge must consider the impact of the personality and conduct to one spouses on the mind of the other, and all incidents and quarrels betwen the spouses must be weighed from that point of view. In determining what constitutes cruelty, regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties, and their character and social status. It is further said in that decision that though the Indian Courts originally construed 'legal cruelty' in the strict sense as above, there has come about a gardual change. I would have appreciated if only the respondent had made an attempt to prove the factum of cruelty and also how the same has affected his character and social status.

52. In A.I.R.1996 Madhya Pradesh 205 (supra), paragraph 5 of the judgment was read before me wherein it is said that the legal concept of 'cruelty' has varied from time to time not in theory but in application, according as the social and economic conditions changed.

53. The other decisions are also cited only for the purpose of showing whether 'cruelty' has undergone a great change, and all acts will have to be taken together in applying the same to the facts of the case. It is the totality of all the circumstances that has to be applied. It is also stated in those decisions that if we take each case independently, it may be trivial. But, if all these are taken together it can be found that there is strained relationship where they cannot live together.

54. As has been held in A.I.R. 1988 S.C. 121 (supra)," a set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human value to which they attach importance. We the Judges and Lawyers, therefore, should not import our own notions. We may not go in parallel with them. There may be generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents".

55. Following the above principles, we have to consider in this particular case only the marital relationship so far as the parties herein are concerned, and not about an ideal wife and ideal husband.

56. Learned Counsel also submitted that the question of cruelty is a concurrent finding of fact, and therefore, this Court may not interfere under Section 100 of the Code of Civil Procedure, unless a substantial question of law arises in this case.

57. I perfectly agree with the correctness of the legal proposition submitted by the learned Counsel for the husband. I have already said that the Courts below have mis-directed themselves and mis-read the evidence and rendered a finding for which there is no evidence and pleading and as a result of that, great prejudice has been caused, and that will be a ground for interfering under Section 100 of the Code of Civil Procedure.

58. In (1992) 1 S.C.C. 647, Jagdish Singh v. Nathu Singh, in paragraph 10, their Lordships have said thus :

"...As to the jurisdiction of the High Court to re-appreciate evidence in a Second Appeal it is to be observed that where the findings by the Court of facts is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings..."

59. In (1990) 3 S.C.C. 285: A.I.R.1990S.C. 723, Hiralal and Anr. v. Gajjan and Ors., their Lordships have dealt with the matter in paragraph 8 which reads thus:

"The main contention advanced on behalf of the appellants before us is that the decision having been rendered by the Trial Court and the first Appellate Court on the basis of the finding of fact regarding the right claimed and the possession alleged, in the absence of any substantial question of law, there was no jurisdiction of High Court under Section 100, CPC to disturb the finding of a concurrent nature and upset the decision. The High Court, while exercising its power under Section

100, CPC, has no jurisdiction to interfere with the finding of fact recorded by the first Appellate Court. Reliance was placed on V. Ramchandra Ayyar v. Ramalingam Chettiar, A.I.R. 1963 S.C. 302. Section 100(1)(c) referred to a substantial error or defect in the procedure The error or defect in* the procedure to which the clause referred is not an error or defect in the appreciation of evidence adduced by the parties on the merits. Even if the appreciation of evidence made is patently erroneous and the finding of fact recorded in consequence is grossly erroneous, that cannot be said to introduce a substantial error or defect in the procedure. If in dealing with a question of fact the lower Appellate Court has placed the onus on wrong party and its finding of fact is the result substantially on this wrong approach that may be regarded as a defect in procedure. When the first Appellate Court discarded the evidence as inadmissable and the High Court is satisfied that the evidence was inadmissible that may introduce an error or defect in procedure. So also in case where the Court below ignored the weight of evidence and allowed the judgment to be influenced by inconsequential matters, the High Court would be justified in reappreciating the evidence and coming to its own independent decision held in Mohan Lal v. Gopi."

60. In AIR 1963 SC 302, V. Ramchandra Ayyar and Anr. v. Ramalingam Chettiar and Anr., it has been held thus :

"In hearing a second Appeal if the High Court is satisfied that the decision is contrary to law or some usage having the force of law, or that the decision has failed to determine error or defect in procedure. If the lower Appellate Court fails to consider some material issue of law or usage having the force of all, or if there is substantial error or defect in the procedure provided by the code, or by any other law for the time being in force which may have produced error or defect in the decision of the case upon the merits, it can interfere with the conclusions of the lower Appellate Court.

The error or defect in the procedure to which Clause (c) of Section 100(1) refers is, as the clause clearly and unambiguously indicates, an error or defect connected with, or relating to the procedure, it is not an error or defect in the appreciation of evidence adduced by the parties on the merits. That is why, even if the appreciation of evidence made by the lower Appellate Court is patently erroneous and the finding of fact recorded in consequence is grossly erroneous, that cannot be said to introduce a substantial error or defect in the procedure. On the other hand, if in dealing with a question of fact, the lower Appellate Court has placed the onus on a wrong party and its finding of fact is the result, substantially, of this wrong approach, that may be regarded as a defect in procedure; if in dealing with questions of fact, the lower Appellate Court discards evidence on the ground that it is inadmissible and the High Court is satisfied that the evidence was admissible, that may introduce error or defect in procedure. If the lower Appellate Court fails to consider an issue which had been tried and found upon by the Trial Court and proceeds to reverse the Trial Court's decision without the consideration of such an issue, that may be regarded as an error or defect in procedure; if the lower Appellate Court allows a new point of fact to be raised for the first time before it, or permits a party to adopt a new plea of fact, or makes out a new case for a party, that may, in some cases, be said to amount to a defect or error in procedure.

But the High Court cannot interfere with the conclusions of fact recorded by the lower Appellate Court, however erroneous the said conclusions may appear to be to the High Court.

If a finding of fact has been recorded by the first Appellate Court without any evidence, that finding can be successfully challenged in Second Appeal, because a finding of fact which is not supported by any evidence can be questioned under Section 100; and in that connection, it may be said that the decree proceedings on which a finding discloses substantial defect or error in procedure. This, however, does not mean that wherever the High Court thinks that the evidence accepted by the lower Appellate Court could not have been reasonably accepted, the High Court would be justified in interfering with the decision of the lower Appellate Court. All that it means is that it should be a case where the evidence, which is accepted by the lower Appellate Court, no reasonable person could have accepted and that really amounts to saying that there is no evidence at all."

61. In this case, the Courts below have cast the burden of proof on the husband who has sought for a decree of divorce. It is for him to prove that there was cruelty on the part of the wife and that she treated him with cruelty. The only piece of evidence is Ex. B-16, I have already said that the same cannot be interpreted in the way in which the Courts below have done. The circumstances under which Ex. B-16 was written were not considered. Moreover, Ex. B-16 must be read as a whole. On other hand, the Courts below, by reading certain words in Ex. B-16, approached the entire case with a prejudiced mind. The oral evidence for which there is no pleading, was acted upon.

62. The learned Counsel for the respondent (husband) wanted me to uphold the concurrent finding of the Courts below. I am of the view that if the same is allowed to stand, it will only be a repetition of the injustice done by the Courts below. A right of appeal under Section 100 of the Civil Procedure Code is only for claiming justice, and not to confirm injustice already done. I repel the contention of the learned Counsel for the respondent (husband) and hold that the husband is not entitled to get a decree of divorce on the grounds alleged in his petition.

63. The courts below have also refused the relief of conjugal rights mainly relying on Ex. B-16.I also rely on Ex. B-16 to show that Ex. B-16 should not be read as the Courts below have done.

64. The letter (Ex. B-16) shows the helplessness of the wife in the acts of the husband. In spite of the same, she wanted to live with him. Both the Courts below have believed Ex. B-16. If you believe the same, then, naturally, the respondent (husband) will not be entitled to say that he has got reasonable cause for withdrawing from the society of the appellant (wife). So if he is permitted to withdraw his society from the wife, then the Courts below will be justifying his own wrong. His cruelty towards his wife will be justified by the Courts below in saying that the restitution should not be allowed. Here is a wife who has filed a petition for restitution of conjugal rights, saying that she is still prepared to cohabit with her husband. She is prepared to forgive his past conduct. The Courts below have disbelieved the evidence of P.W.I (wife) for the only reason that there is no corroborative evidence.

65. In marital disputes, the husband and wife alone can be parties, and insistence of witnesses for all their acts and omissions by way of corroboration will amount to doing injustice to a party. Believing Ex. B-16, I hold that the wife is entitled to get a decree for restitution of conjugal rights also.

66. Learned Counsel for the respondent (husband) wanted this Court to enter a finding on the question whether the conduct of the wife in getting employment describing herself as a member of Scheduled Tribe community would amount to cruelty. A detailed argument was also put forward by the learned Counsel. I have already said that the lower Appellate Court did not consider the same as relevant while considering a case of divorce. I perfectly agree with the said observation of the lower Appellate Court. Even if the said allegation is true (which according to me is not necessary for a finding in this case), we find that no evidence has been let in by the respondent (husband) that the same has in any way affected the marital life. "There must have been some action or conduct by one spouse which affects the other. Behaviour is something more than a mere state of affairs or state of mind. It may take the form of an act or omission or may be a course of conduct, and must have some reference to the marriage'.

[See page 26 of Law and Practice in Matrimonial Causes, Second Edition (1974)-by Bernard Passingham].

67. Learned Counsel for the husband also wanted that the concurrent judgment of the Courts below should be confirmed on the ground that the parties are not on good terms. According to him, even though the marriage was performed in 1986, they could live together only for a period of four years, and thereafter they have been living separately. According to the learned Counsel, the marriage has irretrievably broken down, and for that reason also, the decree for divorce has to be upheld. Learned Counsel also wanted this Court to take note of certain decisions of the Supreme Court for considering the said plea. He relied on the decisions reported in 1995-2 L.W.42: [1995(1) All India Hindu Law Reporter 325 (SC)], Romesh Chander v. Smt. Savitri, and also A.I.R. 1984 S.C. 1582: [1984 All India Hindu Law Reporter 713 (SC)], Smt. Saroj Rani v. Sudarshan Kumar, He also wanted this Court to consider the decision reporter in (1994) 1 L.W. 37 : [1993 (2) All India Hindu Law Reporter, 264 (SC), (Smt. Chanderkala Trivedi v. Dr. S.P. Trivedi, which is also a decision of Apex Court.

68. The decision in AIR 1984 SC 1582 (supra), can be distinguished on facts. The said decision does not lay down the proposition that whenever a decree of divorce is prayed for on the ground that the marriage has broken down, it should be granted. In that case, the facts are different. There, the wife filed a petition for restitution of conjugal rights, and a consent decree was passed granting that relief. There was no cohabitation for a period of one year and the husband filed a petition for decree of divorce. The wife pleaded that after the decree was passed, there was cohabitation for two days, and thereafter the husband turned her out. The Court disbelieved the evidence. The Trail Court did not grant relief, but the High Court passed a decree for divorce. In appeal before the Supreme Court, the wife sought to assail the decree on the ground that the husband wanted the wife to have a decree for restitution of conjugal rights by some kind of a trap and then not to cohabit with her and thereafter obtain a decree for divorce. Thus the original decree for restitution of conjugal rights was itself assailed. It was clear that there was no collusion between the parties. In that background, the Supreme Court made the observation that when the marriage had broken down, it was better to close the chapter.

69. In 1995 (2) L.W.42 (supra), the facts are entirely different. There were allegations and counter allegations of adultery and the parties were living separately for more than 25 years. It was in those circumstances, their lordships said that 'continuance of marital alliance for name-sake is prolonging the agony and affliction'. The marriage was dead for all practical purposes. Their Lordships said that considering the facts and circumstances of the case, it is better to put an end to the relationship. In that case, the children born out of the wedlock had grown and even got employed by the time the decree was passed. In that case, the Supreme Court did not say that whenever a party moves the Court and pleads that there is breakdown of the marriage, a decree of divorce has to be granted.

70. Similar is the case in 1995-2-L.W. 27 (supra). In that case, the husband alleged adultery on the part of the wife and the wife in turn alleged that the husband has lost his .mental equilibrium. Their Lordships began the judgment in the following words:

" This is an unsusual case calling for an unusual solution...."

The parties were living separately for more than 15 years on the basis of allegations and counter allegations. Even though the allegations could not be proved, the Supreme Court said that in view of the non-cohabitation for a long period, it is not possible for them to live together thereafter, after having made these allegations. Hence that decision also cannot be made applicable to the facts of this case. In this connection, it is worthwhile to consider the decision reported in 1995-1-L.W.201: [1995 (1) All India Hindu Law Reporter 528 (Mad.)], S. Saikumari v. P. Mohansundram In that case, a similar question was argued. This Court refused to grant a divorce on the said allegation. It was held thus:

"Section 13 of the Hindu Marriage Act was amended in the year 1976. At that time, when the amendment was moved, there was a proposal to amend the Act providing "breaking of relations" between the parties as a ground for divorce. But, when the Bill was passed, the same was omitted. It makes it clear that the said ground was purposely not included as a ground of relief and, therefore, it cannot be a ground for divorce. We can only grant the relief on the grounds mentioned in Section 13 of the Hindu Marriage Act...."

71. Section 23(1) of the Hindu Marriage Act says that before granting any relief under the Act, the Court must be satisfied that the grounds exist. We have only the statutory grounds that the grounds for getting a divorce. Section 23(2) of the Act also says that before proceeding to grant any relief under this Act, it shall be the duty of the Court to make every endeavour to bring about a reconciliation between the parties, to see that the marriage bond exists. So, the provisions of the Act make it clear that divorce shall not be granted except on specific grounds. In this connection, it is better to remember the observations of Lord Stowell in Evans v. Evans (1790) 1 Bacon 35 which reads thus :

"...Yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together, expect for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining

husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples who now pass through the world with mutual comfort, with attention to their common offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, and in a state of as trangement from their common off spring and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good..."

(See page 175 of Landmarks in the Law by Rt. Hon. Lord Denning -1984). The said observations still hold good inspite of the Statute. It is the foremost duty of this Court, in dispensing the remedy of divorce, to uphold the institution of marriage. The possibility of freedom begets the desire to be set free, and the great evil of a marriage dissolved, that it loosens the bonds, of so many others. The powers of this Court will b turned to good account if, while meeting out justice to the parties, such order should be taken in the matter as, to stay and quench this desire and repress this evil.

[See A.I.R. 1966 MP 205 (supra) approving the passage of Sir J.P Wilds, in Sidney v. Sidney (1734) 34 LJPM 122].

I have already stated in the previous portion of this judment that the allegations are trivial, and if we combine all the allegations, it cannot be said that there is a breakdown of marriage as alleged.

72. I answer the substantial questions of law thus :

On question No. 1, I hold that the pleadings are vague both in the petition for divorce and also in the counter statement in O.P. 254 of 1991, and that the husband has not explained any reasonable cause or excuse for not having cohabitation with the wife. No specific averments ?? been made and the evidence is also lacking. Hence I hold that the husband is not entitled to get a decree of divorce, and the wife is entitled to get a decree for restitution of conjugal rights.

On question No. 2, from my discussion earlier, it is clear that Ex.B-16 is admitted by PW 1 as written by her, the genuiness of which is not questioned. Hence it is admitted in evidence. But for reasons stated in the earlier part of my judgment, I hold that Ex. B-16 cannot form the basis for granting a decree of divorce.

On question No. 3, I hold that the decisions of the Courts below are based on no evidence, and what was attempted to be proved was not pleaded and even in respect of matters which are sought to be proved, evidence is not satisfactory, and that apart, the available evidence has been misread by the Courts below.

On question No. 4, I hold that the burden of proof was wrongly cast on the wife. Ex.B-16 was mis-interpreted for granting a decree of divorce in favour of the husband and the same was made use of against the wife for restitution of conjugal rights. Both the courts below were of the view that if restitution of conjugal rights cannot be had, the husband is entitled to get a decree of divorce. That was the patent illegality committed by the Courts below. The procedure adopted by the Trial Court

and repeated by the lower Appellate Court was illegal, and the same has caused a grave miscarriage of justice.

73. In the result, the judgments of both the Courts below are set aside. C.M. S.A. No. 13 of 1994 is allowed and O.P. No. 59 of 1992 is dismissed. C.M.S.A. No. 16 of 1994 is allowed, and O.P. No. 254 of 1991 also stands allowed. Taking into consideration the facts and circumstances of the case, I feel that this is a fit case where the respondent (husband) must be directed to pay the costs throughout for both the proceedings.