

Allahabad High Court

Ram Babu Babelay S/O Sree Krishan ... vs Smt. Sandhya Daughter Of Pt. ... on 2 September, 2005

Equivalent citations: AIR 2006 All 12, 2006 (1) AWC 183

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Bench: Y Singh, R Rastogi

JUDGMENT R.K. Rastogi, J.

1. This is an appeal against the judgment and decree dated 26.1.1999 passed by Sri M.Q. Siddiqui, then learned Judge Family Court, Jhansi in Suit No. 34/98, Ram Babu Babeley v. Smt. Sandhya.

2. The facts giving rise to this appeal are that the plaintiff appellant filed the aforesaid suit against the defendant-respondent in the court of Family Judge, Jhansi under Section 13 of the Hindu Marriage Act with these allegations that the marriage of the parties had taken place according to the Hindu Rites on 15.5.1981. The plaintiff Ram Babu Babeley was working as a labourer mostly at Nagpur and Maharashtra under the contractors and so he asked the defendant to reside at Nagpur with him as he had already taken a room on rent at Nagpur, but she refused to do so, and after lapse of two months from the date of marriage she went to her parents' house at village Dinara. She said to the plaintiff that he should not go outside Jhansi and then only she would reside with him and not otherwise. Thereafter the plaintiff started to work at Jhansi and he has been doing the work of labourer at Jhansi for the last seven years. The defendant came to his house at Jhansi in May, 1990, and stayed for ten days only; then she went with her father to her parental home at village Dinara, Tahsil Karaira District Shivpuri (M.P.) and also took those ornaments with her which were given by the plaintiff to her. Thereafter the plaintiff went to her house in July, 1990 to call her back but of no avail, and since then he has been regularly visiting the house of her parents after the lapse of 4-5 months each. Some times he went alone, some times with friends & relations, and sometimes he sent his father for 'Vida', but the defendant always refused to come back, her father also refused to send her and he asked the plaintiff that he should come to his house at Dinara and look after his agricultural work as Ghar Jamai. The plaintiff did not agree to this proposal. Then the defendant and her father became more angry. The defendant and her father wanted to grab the ornaments given to her by the plaintiff, and so she had not come to the plaintiffs house after 1990. The plaintiff several times sent notices to the defendant asking her to come to his house for restitution of conjugal rights, but the defendant in collusion with the post man sent a report that the addressee was not available at the house and that she had gone out of station for a long time. The defendant had deserted the plaintiff since May, 1990 without any lawful excuse, hence now the plaintiff wants divorce from the defendant, and so he filed the suit for divorce. 3. The defendant contested the suit. She admitted her marriage with the plaintiff but denied rest of the allegations. She pleaded that the plaintiff's allegation that he is working as labourer at Nagpur and Maharashtra is false. The source of the plaintiffs income is agriculture and rent and he is earning Rs. 10,000/- per month. His allegation that defendant refused to go to Nagpur with the plaintiff is false. She is always ready to reside with the plaintiff wherever the plaintiff resides. She never forced the plaintiff to reside at Jhansi or at any other place. The defendant always resided with the plaintiff after marriage. She never refused to perform her marital obligations. She did not go to her father's house taking ornaments with her. The true facts are that the plaintiff had been making demand of a Motor Cycle since the time of marriage; and when she objected to it, he started to commit cruelty upon her and

he has been levelling false allegations against her. The plaintiffs allegation that he himself and his parents, relations and friends went to her father's house for her Vida, is totally false . She never asked the plaintiff to come to village Dinara and to reside there. On the other hand the position is that the plaintiff repeatedly forced her to leave his house and pressurized her to meet his demand of dowry. The defendant even after being thrown out from the house went to the plaintiffs house. No notices of the plaintiff were received by her . It is false that she got any ' endorsement done on those notices in collusion with the Post man . She had not deserted the plaintiff. On the other hand the plaintiff himself forced her to leave his house and was levelling false allegations against her so that he may perform second marriage after divorcing her. She had neither deserted the plaintiff nor committed cruelty upon him .She is still ready to reside with the plaintiff so the plaintiffs suit is liable to be dismissed as he has got no cause of action for filing the suit.

4. The suit was heard and decided by Sri M.Q. Siddiqui vide his judgment dated 26.1.1999. He held in his judgment that the plaintiff had failed to establish that the defendant had deserted him or had committed cruelty upon him. He , therefore, dismissed the plaintiffs suit. Aggrieved with that judgment and decree the plaintiff filed this appeal.

5. We have heard the counsel for both the parties and have perused the record.

6. It was contended by the learned counsel for the plaintiff appellant that the defendant had deserted the plaintiff without any lawful excuse and the finding of the trial court that the allegation of desertion was not proved is erroneous. He, therefore, contended that this appeal should be allowed and the decree of divorce should be passed. On the other hand , the learned counsel for the defendant contended that the defendant never deserted the plaintiff and actually the plaintiff wants a motor cycle in dowry, and the defendant even after being thrown out of the house , repeatedly, came to the plaintiff to reside with him, but she was again forced to leave the house after being beaten by the plaintiff. He submitted that in this way the plaintiff himself is guilty of forcing her to leave house and the defendant can not be treated to have deserted the plaintiff, and so the trial court has committed no error in dismissing the suit.

7. Let us now examine the evidence led by both the parties on the point.

8. It has been alleged by the plaintiff in his statement as P.W. 1 that after marriage the defendant came to his house at Jhansi and he was working as labourer at Nagpur at that time and had also taken a room on rent at Nagpur, and he had asked the defendant to accompany him to Nagpur but she refused to do so, and stated that she would reside with him only when he resides at Jhansi and she does not want to go any where else and then she went to her parents' house at village Dinara.

9. The defendant in her statement as D.W.I had denied the aforesaid allegations of the plaintiff. Now it is to be seen that generally ladies after marriage want to reside with their respective husbands at such a place where other persons of the family of husband are not residing so that they may enjoy the life without being interrupted by any one else. In the present case the allegation of plaintiff is just otherwise. The plaintiff's house is at Jhansi where his parents also reside, and, according to him, after marriage, he asked the defendant to accompany him to Nagpur where he was working as

labourer and had taken a room on rent. Any newly married wife will joyfully accept this offer because she would get an opportunity of residing with her husband without being interrupted by other family members of the husband, but in the present case the plaintiff's allegation is that the defendant refused to do so, and she stated that she would reside with him only when he resides at Jhansi where the parents of the plaintiff also reside, and that she would not reside with him if he goes anywhere else. Such an allegation does not inspire any confidence.

10. The plaintiff has further alleged that the defendant and her parents wanted that the plaintiff should come to village Dinara to reside in the house of the defendant's father as "Ghar Jamai" and since he refused to accept this proposal, the defendant refused to come to live with him and the defendant's father also did not permit the defendant to live with the plaintiff. The defendant denied this allegation. She has alleged that she has got three brothers and two sisters, and as such there was no question of asking the plaintiff to reside in the house of her father as "Ghar Jamai". This assertion of the defendant again appears to be quite natural and probable. Generally the fathers of those girls keep their sons-in-law as "Ghar Jamai" who have got no son and there is no male member in their family to look after their business etc, and then they ask their sons-in-law to reside in their house. In the present case when the defendant's father has got three sons, the allegation that he asked the plaintiff to reside in his house as "Ghar Jamai" does not appeal to reason. In this connection, the allegation of the defendant is that actually the plaintiff made demand of a Motorcycle at the time of Kalewa and when her father expressed his inability to meet this demand, the plaintiff felt aggrieved, he left the Kalewa, threw away his Pagari and left her house without taking her with him saying that in case her father wants that she should live with the plaintiff, he would himself send her to the plaintiff's house along with the Motorcycle. It has been alleged in the cross examination of Sri Arun Kumar Pathak P.W.2, who is brother-in-law (Bahnoi) of the plaintiff, that after this incident the defendant's father took a bullock-cart and got the defendant seated in that bullock cart and took her to the Janwasa and got her seated in the bus of the Barat as the plaintiff had left the house without performance of Bida.

11. The plaintiff has further alleged that he sent three notices to the defendant in the months of June, July and September, 1995 asking her to return back to the matrimonial home further stating that if she does not come to his house, he would file a suit for restitution of conjugal rights against her. He has further alleged that the defendant in collusion with the post man got these original notices returned back (Papers No. C-12, C-13 and C-14). The defendant has denied receipt of any such notice. She has also denied the allegation of getting any false endorsement done on these notices in collusion with the post man. Her allegation is that she never received these notices and the plaintiff had himself got a false endorsement on these notices in collusion with the post man that she was not available at the house, and the allegation of plaintiff that the defendant is constantly residing at her father's house since 1990 is totally false. She has further alleged that the allegation of the plaintiff that she herself left the plaintiff's house in May, 90, is false and actually she had been forced by the plaintiff to leave the house and then she came to her father's house; and after some time she again went to the plaintiff's house, and resided there for some time and then she was again forced to leave the house. Her allegation is that in this way she goes to the house of the plaintiff and to her father's house after short intervals. She has also alleged that some Panchayats were also called and in those Panchayats it was settled that the plaintiff would keep her peacefully, and the plaintiff

took her after proceedings of the Panchayat, but he again forced her to leave his house. She has further alleged that in the year 1997 also such a Panchayat was called, and after that Panchayat she again went to the house of the plaintiff but again she was forced to leave the house . She also examined Sri Ram Sahai as D.W. 2 who was present in that Panchayat. His statement was recorded on 13.10.1999 and he stated that the Panchayat was organized about three years ago. The defendant Smt. Sandhya Kumari (D.W.I) stated that she had gone to the house of the plaintiff after the 1997 Panchayat, but the plaintiff after keeping her for ten days again forced her to leave his house , and since then she is residing at her parents' house and the plaintiff did not come to her parents' house to take her.

12. It was submitted by the learned counsel for the plaintiff that the notices papers No. 12-C, 13-C and 14-C are documentary evidence to show that that the plaintiff had asked the defendant to come to his home but the defendant did not come to his house and in this way the defendant had deserted the plaintiff and so the plaintiff is entitled to divorce on the ground of desertion. The defendant, on the other hand, has denied receipt of any such notice and alleged that the plaintiff himself procured false endorsement on these notices in collusion with the post man.

13. Before advertng to the notices Papers No. 12-C and 13-C, We are first taking up the notice paper No. 14-C which is addressed to the defendant's father Pt. Bhagwat Prasad Tiwari , Pradhana Adhyapak , Shashkiya Madhyamik Vidyalaya, Gram and post Dinarai Tahsil Karaira District Shivpuri (M.P.). There is an endorsement of the post man on this notice that upon an inquiry in the Madhyamik Vidyalaya he came to know that there was no Pradhana Adhyapak of this name in the school and so it was returned to the sender. If Mr, Bhagwat Prasad Tiwari was working as Pradhana Adhyapak in the above school, this type of endorsement that there was no Pradhana Adhyapak of this name in the school does not, inspire any confidence. The report apparently appears to be collusive. There is endorsement on the notices (Papers No. 12-C and 13-C) that the addressee Smt. Sandhya is not available as she has gone out of station , hence notices were being returned.

14. Without entering into this controversy as to who is guilty for these so called fictitious reports on these notices , it is to be seen that even if the endorsements on these notices are taken to be true on their face value, they fail to give any support to the plaintiffs case. It has no where been reported that the addressee refused to take notice .If a notice is returned back with this report that the addressee was not there at the house and was out of station, the service can not be deemed to to be, sufficient, and so no adverse inference can be drawn against the addressee on the basis of such an endorsement. These notices, in this way, fail to give any support to the plaintiff's case . It is also to be seen in this connection that in these notices the plaintiff had stated that if the defendant does not come to his house, he would file a suit for restitution of conjugal rights but instead of doing so , he filed the suit for divorce.

15. It is also to be seen that in the entire plaint there is no other allegation against the defendant except this allegation that she had deserted the plaintiff without any lawful excuse .The defendant has denied this allegation and her case is that she repeatedly went to the plaintiffs house for residing with him, but the plaintiff after permitting her to reside for some time forced her to leave the house. She has levelled the allegation of demand of motorcycle against the plaintiff. She has stated in her

written statement that she is still ready to reside with the plaintiff. She has made the same statement in the witness box as D.W. 1 that she is still ready to reside with the plaintiff. On the other hand the plaintiff has stated in his statement as P.W. 1 that he does not want to keep the defendant with him as she has deserted him. The same thing has been stated by his brother-in-law (Bahnoi) Mr. Arun Kumar Pathak (P.W.2) who too stated that even if the defendant is willing to live with the plaintiff, the plaintiff is not ready to keep her with him.

16. Learned Presiding Officer of the court below has rightly held taking into consideration the evidence led by " both the parties that the defendant has not deserted the plaintiff and so the plaintiff had no good case for grant of divorce. We find no error in the above finding and confirm the same.

17. It was contended by the learned counsel for the plaintiff appellant that even if it is found that the plaintiff had failed to prove the allegation of desertion , the marriage should be dissolved on the ground that it had irretrievably been broken and a decree of divorce should be passed on this ground alone. Several rulings of Hon'ble Apex Court were cited before us in this regard.

18. We have gone through all those rulings and now we proceed to discuss them . One of the cases in which the decree of divorce was passed on the ground that the marriage was irretrievably broken is the case of Chandra Kala Trivedi v. Dr. S.P. Trivedi : . In this case their Lordships of the Apex Court referring to the facts of the case observed in para 2 as follows:

"Both the appellant(wife) and the respondent(husband) come from middle class families. Their father were Void by profession. The husband while he was doing internship at the J.J. Hospital, Bombay, was married to the appellant and from their wedlock a daughter was born who admittedly is now married. Differences appear to have arisen sometime in late seventies nine years after marriage due to alleged intimacy of the husband with another lady doctor, which ultimately led to filing of the petition for divorce by the husband on ground of cruelty. When written statement was filed and allegations of adultery were made against the husband he set up a case of undesirable association of his wife with young boys. Unfortunately for the appellant, even the matrimonial court, which dismissed the petition, found that her behaviour was not of a Hindu married woman. Whether the allegation of the husband that she was in the habit of associating with young boys and the findings recorded by the three courts are correct or not but what is certain is that once such allegations are made by the husband and wife as have been made in this case then it is obvious that the marriage of the two cannot in any circumstances be continued any further. The marriage appears to be practically dead as from cruelty alleged by the husband it has turned out to be at least intimacy of the husband with a lady doctor and unbecoming conduct of a Hindu wife." (underlined by us)

19. It may be mentioned that the Supreme Court holding that the finding of the court below that the behaviour of the wife appellant was unbecoming appeared to be shaky, deleted this finding and confirmed the divorce decree with this condition that the husband should provide one bed room flat to the wife -appellant and should deposit a sum of Rs. 2,00,000/- for her welfare .

20. Another case on the point is of V. Bhagat v. Mrs D. Bhagat : . In this case V. Bhagat , who was a practising Advocate in the Supreme Court , had filed a suit for divorce against his wife Mrs. D. Bhagat. In this case the parties had married in the year 1966. The husband Mr. B. Bhagat, who was a practising Advocate in the Supreme Court, filed a divorce suit against the wife in the year 1985 mainly on the ground of adultery alleging that she is an incorrigible adulteress. The wife filed a written statement denying the allegations. In her written statement she had stated as follows:

"...that the petitioner is "suffering from mental hallucination" that he is a "morbid mind"... for which he needs expert psychiatric treatment" and further that " the petitioner is suffering from paranoid disorder. He needs expert psychological treatment.... He is incoherent in his thinking.... The petitioner is a mental patient . The petitioner needs treatment by a psychiatrist to whom he was directed by his own sister.... He is a patient and needs treatment and restoration of normal mental health....The petitioner needs psychiatric treatment to make him act a normal person ".

21. It may be mentioned that after filing of the written statement, the plaintiff- husband got his plaint amended and added that the allegation of insanity levelled against him in the written statement amounts to cruelty and so a decree of divorce should be passed on this ground alone.

22. On the request of petitioner husband the case was withdrawn from the file of the trial court and it was transferred to the Delhi High Court for early hearing and expeditious disposal. However, it could not be decided in spite of direction of Hon'ble Apex Court . The petitioner's statement was recorded and during the course of cross examination "The Senior Advocate. appearing for the respondent wife put several questions suggesting that the petitioner and the several members of his family including his grandfather are lunatics and that a streak of insanity is running in the entire family. When he protested against the said questions, the learned Senior Advocate made the following statement in the court "all of your (petitioner's) family including your grandfather and Ors. are lunatics with streaks of insanity running in the entire family; this is the respondent's case; and that is why these questions have been asked"

23. The matter again went to Hon'ble Apex Court with the allegation that the case is being delayed and the period of 8 years has passed but the statement of the defendant is still to be recorded. The Hon'ble Apex Court taking note of serious allegation of insanity levelled by wife against her husband and still her assertion that she wants to reside with her husband observed as follows:

"10... The assertion of the wife that she wants to live with the husband even now , appears to be but a mere assertion. After all the allegations made against her in the petition and the allegations levelled by her against the petitioner, living together is out of question. Reapproachment is not in the realm of possibility. For the parties to come together, they must be superhumans, which they are not. The parties have crossed the point of no return long ago. The nature of the allegations levelled against each other show the intense hatred and animosity each bears towards the other. The marriage is over except in name.... "It is significant to note that this is not a case where allegations are made only by one party against the other; both have levelled serious allegations against the other. The husband calls the wife an adulteress and the wife calls the husband a lunatic. "

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20... Making such allegations in the pleadings and putting such questions to the husband while he is in the witness -box, is bound to cause him intense mental pain and anguish besides affecting his career and professional prospects. It is not as if the respondent is seeking any relief on the basis of these assertions. The allegations against her may not be true; it may also be true that the petitioner is a highly suspicious character and that he assumes things against his wife which are not well founded. But on that ground, to say that the petitioner has lost his normal mental health, that he is a mental patient requiring expert psychological treatment and above all to brand him and all the members of his family including his grandfather as lunatics, is going far beyond the reasonable limits of her defence. It is relevant to notice that the allegations of the wife in her written statement amount in effect to " psychopathic disorder or any other disorder" within the meaning of the Explanation to Clause (iii) of Sub-section (1) of Section 13, though, she has not chosen to say that on that account she cannot reasonably be expected to live with the petitioner-husband nor has she chosen to claim any relief on that ground. Even so, allegations of ' paranoid disorder', 'mental patient', 'needs psychological treatment to make him act a normal person' etc. are there coupled with the statement that the petitioner and all the members of his family are lunatics and that a streak of insanity runs through his entire family. These assertions cannot but constitute mental cruelty of such a nature that the petitioner, situated as he is and in the context of the several relevant circumstances , cannot reasonably be asked to live with the respondent thereafter. The husband in the position of the petitioner herein would be justified in saying that it is not possible for him to live with the wife in view of the said allegations, Even otherwise the peculiar facts of this case show that the respondent is deliberately feigning a posture which is wholly unnatural and beyond the comprehension of a reasonable person. She has been dubbed as an incorrigible adulteress. She is fully aware that the marriage is long dead and over, It is her case that the petitioner is genetically insane. Despite all that, she says that she wants to live with the petitioner. The obvious conclusion is that she has resolved to live in agony only to make life a miserable hell for the petitioner as well. This type of callous attitude in the context of the facts of this case, leaves no manner of doubt in our mind that the respondent is bent upon treating the petitioner with mental cruelty. It is abundantly clear that the marriage between the parties has broken down irretrievably and there is no chance of their coming together, or living together again. Having regard to the peculiar features of this case, we are of the opinion that the marriage between the parties should be dissolved under Section 13(l)(i-a) of Hindu Marriage Act and we do so accordingly. Having regard to the peculiar facts and circumstances of this case and its progresses over the last eight years detailed herein before-----we are of the opinion that it is a fit case for cutting across the procedural objections to give a quietus to the matter. "

24. In this case the Hon'ble Apex Court, while recalling the case to its own file granted decree of divorce on the ground of cruelty, even without full trial but observed that the allegations levelled by the petitioner against wife were not proved and in this way the. honour and character of the wife stands vindicated.

25. However, it was further observed by the Apex Court that this ruling is not of general application and can not be applied in every case. Their observations in this regard are as follows:

"21. 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 circumstance 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."

26. The third case cited before us is of Romesh Chander v. Savitri : . In this case the facts were that the husband had earlier filed a suit for divorce on the ground of desertion . The suit was finally dismissed . by the Apex Court on 23.4.1980. Thereafter another suit was filed by the husband on the ground of cruelty. The allegation was that the wife had cast serious aspersions on the character of the husband in the written statement filed by her in the earlier suit and had alleged that he was in the habit of mixing with undesirable girls in the presence of wife . It was held that neither any evidence was led nor it was proved and so it could not be made basis for claiming divorce on the ground of cruelty. Aggrieved with that judgement the husband filed appeal before the Apex Court . It was held by the Apex Court that. taking into consideration the facts and circumstances of this case the marriage was dead both emotionally and practically. So , exercising power under Article 142 of the Constitution of India , the Hon'ble Apex Court directed that the marriage between the appellant and the respondent shall stand dissolved subject to the appellant's transferring a house in the name of his wife.

27. The fourth case cited before us is of Ashok Hurra v. Rupa Bipin Zaveri : 1997(3) A.W.C. 1843(SC). In this case the marriage between the parties was solemnized on 3.12.1970. No issue was born to them . On 30.6.1983 the wife left the matrimonial home . On 21.8.1984 a joint petition for divorce was filed under Section 13B of the Hindu Marriage Act. It was stated in the application that all the matters regarding ornaments, clothes and other movables were settled between them and the wife had pronounced her right to claim maintenance and the parties simply sought a decree of dissolution of the marriage by mutual consent. On 4.4.1985, the husband alone moved an application for passing a decree of divorce. Since the wife had not come, a notice was issued to her. On 27.3.1986, the wife moved an application for withdrawing her consent for divorce .

28. After hearing the parties, the learned City Civil Judge (the trial court) held that since the consent was withdrawn before the decree could be passed , it has to be accepted and he dismissed the petition for divorce by mutual consent. Aggrieved with that judgment the husband filed an appeal and in that appeal the Single Judge of the Gujarat High Court passed a decree for divorce . Against that judgment an appeal was filed before the Division Bench and the Division Bench set aside the order of Single Judge and dismissed the petition for divorce. Then this matter went before the Apex Court and the Honble Apex Court observed as follows:

"19. After considering the matter in detail, we find that the appellate court has not disputed the following:

- (a) the marriage between the parties is dead and has irretrievably broken down;
- (b) there are allegations and counter-allegations between the parties and also litigations in various courts and no love is lost between them;
- (c) there is delay in the disposal of the matter;
- (d) the husband has married again and has got a child; and
- (e) the wife has not withdrawn her consent lawfully given for a period of 18 months and it is not a case where the consent given is revoked on the ground that it is vitiated by fraud or undue influence or mistake etc;
- (f) that the joint petition filed in court by the parties stated (a) that the parties have settled all the matters and the wife had renounced her right to claim maintenance and (b) what the parties prayed for, was only a decree of dissolution of the marriage by mutual consent.

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22. We are of the view that the cumulative effect of the various aspects in the case indisputably point out that the marriage is dead, both emotionally and practically, and there is no chance at all of the same being revived and continuation of such relationship is only for name-sake and that no love is lost between the parties, who have been fighting like " killkenny cats " and there is long lapse of years since the filing of the petition and existence of such a state of affairs warrant the exercise of the jurisdiction of this Court under Article 142 of the Constitution and grant a decree of divorce by mutual consent under Section 13B of the Act and dissolve the marriage between the parties, in order to meet the ends of justice, in all the circumstances of the case subject to certain safeguards. Appropriate safeguard or provision for the respondent/wife to enable her to have 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 rupees four to five lakhs , towards provision for life , is totally insufficient , in modern days of high cost of living and particularly for a woman of the status of the respondent. At least, a sum of about Rs. 10,000 p.m. Will be necessary for a reasonable living. Taking into account all aspects appearing in the case, more so the conduct of the parties and the admissions contained in the joint petition filed in court, we hold that the respondent (wife) should be paid a lumpsum of rupees ten lakhs (Rs. 10 lakhs) (and her costs in this litigation as estimated by us) on or before 10.12.1997 as mentioned herein below, as a condition precedent for the decree passed by this Court to take effect. "

29. Another ruling cited before us is of the Hon'ble Apex Court in Chetan Dass v. Kamla Devi : . In this case the facts were that the husband had filed a suit for divorce against wife on the ground of desertion . The wife in her written statement made allegation of adultery against the husband and she had averred in her statement that she is still ready to live with him provided he snaps his relationship with the other woman. After recording evidence ,it was found that the allegations

levelled by the wife against the husband were proved and so the suit for divorce was dismissed . The husband went to Hon'ble Supreme Court taking a plea that a decree of divorce should be passed on the ground that the marriage had irretrievably been broken down . It was held that the husband could not take advantage of his own wrong and so the decree of divorce could not be passed on the ground that the marriage had been irretrievably broken down. It was further observed that:

"20. In this case ..the averments made in the petition for obtaining a decree for divorce, namely, desertion on the part of the wife without any reasonable cause have not been found to be correct. The petition was liable to be dismissed on that ground alone. The defense of the respondent for having a justified reason to live away from the husband has been found to be correct. Behaviour of the appellant certainly falls in the category of misconduct on his part. In such circumstances, it is too much on his part to claim that he be given the advantage of his own wrong and be granted a decree of divorce on the ground of desertion on the part of his wife who is still prepared to live with him provided he snaps his relationship with the other woman. Similar offer had also been made on behalf of the appellant, which , we have already dealt in the earlier part of the judgment. He perhaps prefers to snap relationship with the respondent rather than with Sosamma Thomas. A decree of divorce on the ground of marriage having been irretrievably broken cannot be granted in the facts and circumstances of the case as indicated above."

30. The next ruling cited before us is of Savitri Pandey v. Prem Chandra Pandey: . In this case the marriage between the parties had taken place on 6.5.1987. They lived together upto 21.6.1987. After 21.6.1987 they started living separately . Thereafter the wife filed a petition for divorce on the grounds of cruelty and desertion. It was also alleged that the marriage had not been consummated. It was found that the husband was not responsible for non consummation of marriage and it was the wife who did not permit consummation of the marriage. In view of this finding it was held that when the wife herself did not permit the husband to consummate the marriage , it was not a case of cruelty or of desertion and so the suit was dismissed.. The wife went in appeal before Honble Supreme Court taking a plea that the marriage had irretrievably been broken down and so a decree for divorce should be passed under Article 142 of the Constitution of India. Reliance was also placed upon the following observations of the Apex Court in Ms. Jorden Diengdeh v. S.S. Chopra : :

"16... It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases.... There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of legislature in those matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situation in which couples like the present have found themselves."

31. Repelling the above contentions and dismissing the appeal their Lordships observed as follows:

"16..". Marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature in its wisdom , despite observation of the Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on

facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in *V. Bhagat v. Mrs. D. Bhagat* held that irretrievable breakdown of the marriage is not a ground by itself to dissolve it. (underlined by us)

17. As already held, the appellant herself is trying to take advantage of her own wrong and in the circumstances of the case, the marriage between the parties cannot be held to have become dead for invoking the jurisdiction of this court under Article 142 of the Constitution for dissolving the marriage."

32. The next ruling cited before us is of *Shyam Sunder Kohli v. Sushma Kohli* : . In this case the appellant and respondent were married on 18.11.1981. The appellant filed a suit for divorce on the ground that the respondent had left the matrimonial home on 28.1.1987. The respondent claimed that she was driven out of the matrimonial home. She claimed that she was always and even now is ready to stay with the appellant. The suit was dismissed by the trial court holding that the allegation of desertion was not proved and that decree was also affirmed by the Division Bench of High Court . Aggrieved by that judgment the husband filed an appeal before the Hon'ble Apex Court and prayed for grant of divorce on the ground that the marriage had irretrievably been broken down. The Hon'ble Apex Court referring to the above plea made following observations:

"12. on the ground of irretrievable breakdown of marriage, the court must not lightly dissolve the marriage. It is only in extreme circumstances that the court may use this ground for dissolving a marriage. In this case, the respondent, at all stages and even before us, has been ready to go back to the appellant. It is the appellant who has refused to take the respondent back. The appellant has made baseless allegations against the respondents. He even went to the extent of filing a complaint of bigamy, under Section 494 IPC against the respondent. That complaint came to be dismissed. As stated above, the evidence shows that the respondent was forced to leave the matrimonial home. It is the appellant who has been at fault. It can hardly lie in the mouth of a party who has been at fault and who has not allowed the marriage to work to claim that the marriage should be dissolved on the ground of irretrievable breakdown . We, thus , see no substance in this contention."

33. The recent ruling of the Hon'ble Supreme Court in *A. Jayachandra v. Aneel Kaur* : was also cited before us . In this case both the appellant husband and the respondent wife developed love affairs when they were student in a medical college . They were married on 10.10.1978. Both of them got employment in a hospital established by the husband's father Dr. A Ram Murthy. They had two children out of this wedlock. On 5.3.1997 the husband gave a notice to the wife seeking divorce on the ground of mental cruelty alleging that the behaviour of the wife was obnoxious and humiliating and they had not shared the bed and there was no physical contact between them for over two years. Reply was given by the wife on 21.3.1997 denying the allegations and suggesting that there should be a free and heart to heart discussion to sort out the problems. The discussion took place but in vain. Ultimately the husband filed a petition under Section 13 of the Hindu Marriage Act on the ground of cruelty alleging that the conduct of the wife was causing mental agony and there was no sharing of the bed and cohabitation for more than two years . It was further alleged that the wife had ill-treated

her husband , abused him in vulgar language in the home and at the hospital and at other places thereby causing mental agony, damage and loss personally and professionally and also in the social circle and she had also levelled allegations against his character also. She had filed caveats at different places describing wrong address of the husband to defame him and create an impression of her innocence. The wife in her written statement denied the allegations and stated that her bona fide act in advising her husband to act properly and to be decent in his behaviour was misconstrued and it was being projected as nagging and insulting behaviour and the petition for divorce was based on unfounded allegations.

34. The wife also filed O.S No.89 of 1997 in respect of her right to practise in the hospital . This suit was not contested by the husband . It was decreed exparte on 20.11.1997. Thereafter the wife moved an application for attachment of the hospital equipment belonging to her husband and for his detention in civil prison for alleged disobedience of the order of injunction and she categorically stated in the court during trial that she was not willing to withdraw the application for his detention in civil prison until divorce case was finalised. The suit was decreed by the Judge Family Court on the ground of cruelty . The wife filed an appeal before the High Court and the Division Bench was of the view that since the husband had not produced any witness from the hospital to prove the allegations of cruelty, an adverse inference should be drawn against him, and so the allegation of cruelty was not proved. The appeal was, therefore, allowed. Then the husband filed an appeal before the Hon'ble Apex Court.

35. The Hon'ble Apex Court observed that the trial court had rightly held that the behaviour of the wife amounted to mental agony and cruelty upon the husband, and the High Court did not discuss the evidence at all and wrongly set aside the finding of cruelty on the ground that no witness of the hospital was produced. This approach was held to be not proper. Hon'ble Apex Court was of the view that the husband was entitled to decree of divorce on the ground of mental cruelty. The court also considered the aspect of irretrievable break down of marriage and observed in paragraph 16 of the judgment as follows:

"16. The matter can be looked at from another angle. If acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct. In the instant case, after filing of the divorce petition a suit for injunction was filed, and the respondent went to the extent of seeking detention of the appellant. She filed a petition for maintenance which was also dismissed. Several caveat petitions were lodged and as noted above, with wrong address. The respondent in her evidence clearly accepted that she intended to proceed with the execution proceedings, and prayer for arrest till the divorce case was finalised. When the respondent gives priority to her profession over her husband's freedom it points unerringly at disharmony, diffusion and disintegration of marital unity, from which the Court can deduce about irretrievable breaking of marriage "

36. The discussion attempted above leads to the following conclusions:

(i) The irretrievable break down of marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the grounds on which divorce is sought are made out, this circumstance can be taken into consideration as laid down by Hon'ble Apex Court in the case of Savitri Pandey v. Prem Chand Pandey and V. Bhagat v. Mrs. D. Bhagat (supra). (ii) No divorce can be granted on the ground of irretrievable break down of marriage if the party seeking divorce on this ground is himself or herself at fault for the above break down as laid down in the case of Chetan Das v. Kamla Devi, Savitri Pandey v. Prem Chand Pandey and Shyam Sunder Kohli v. Sushma Kohli (supra).

(iii) The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases where both the parties have levelled such allegations against each other that the marriage appears to be practically dead and the parties can not live together as laid down in Chandra Kala Trivedi v. Dr. S.P. Trivedi (supra),

(iv) The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases also where the conduct or averments of one party have been so much painful for the other party (who is not at fault) that he cannot be expected to live with the offending party as laid down in the cases of V. Bhagat v. D. Bhagat, Romesh Chandra v. Savitri, Ahok Hurra v. Rupa Bipin Zaveri and A. Jayachandra v. Aneel Kaur (supra).

(v) The power to grant divorce on the ground of irretrievable break down of marriage should be exercised with much care and caution in exceptional circumstances only in the interest of both the parties, as observed by Hon'ble Apex Court at paragraph No. 21 of the judgement in the case of V. Bhagat and Mrs. D. Bhagat (supra) and at para 12 in the case of Shyam Sunder Kohli v. Sushma Kohli (supra).

37. Now let us apply the aforesaid law to the facts of the present case.

38. We have already held that in the present case there was no fault on the part of the wife who was always willing to reside with her husband and is still ready to do so and her grievance is that the husband was not keeping her with him because there was demand of the motorcycle in dowry and when her father could not meet his demand the appellant forced her to leave his house . In the present case the fault is of the husband and so he can not be permitted to seek divorce on the ground of irretrievable break down of marriage and to take benefit of his own wrong as provided under Section 23 of the Hindu Marriage Act as well as in the rulings in Chetan Das v. Kamla Devi, Savitri Pandey v. Prem Chandra Pandey and Shyam Sunder Kohli v. Sushma Kohli (supra).

39. The appeal, in this way, has got no force and is dismissed with costs.