

Calcutta High Court

Sri Dipak Kumar Sarkar vs Sm. Sima Sarkar on 29 April, 2004

Equivalent citations: (2005) 1 CALLT 162 HC, I (2005) DMC 577

Author: J Banerjee

Bench: P Ray, J Banerjee

JUDGMENT Joytosh Banerjee, J.

1. The instant appeal is directed against the judgment and decree of dismissal dated 23.3.91 passed by the Additional District Judge, 11th Court, Alipore in Mat. Suit No. 72/86.

2. Briefly stated the facts and circumstances leading to filing of the instant appeal are as follows:

The petitioner Dipak Kumar Sarkar filed an application mainly praying for a decree of divorce dissolving the marriage between the petitioner and the respondent, Sima Sarkar. In the original petition, the petitioner alleged that the marriage between the parties was solemnized according to Hindu rites at Sodepur within P.S. Khardah in the District of 24-Parganas (at present North 24-Parganas) in the father's house of respondent on 6th of December, 1976. The marriage between the parties was a negotiated one. It was alleged there that the parties lived together as husband and wife till the end of January, 1984 and out of the wedlock a female and a male children were born. At the time of filing the petition the age of the female child was 5 years and that of the male child was 9 months. It was further alleged that after their marriage, the parties started living at L.I.G. Housing Estate situated in Belgachia Road. It was further alleged that upto the end of January, 1984 both the husband and wife continued to live in the same flat. Thereafter, they were living separately, cooking their meals separately and since February, 1984 there was no marital relations between the parties, though they continued to live in the same flat and this was culmination of extreme cruel treatment both physical and mental by the respondent/wife towards her husband in the following manner:

(i) The respondent/wife failed to discharge her marital obligation towards the petitioner causing deterioration of the mental and physical condition of the petitioner.

(ii) The respondent/wife was of dominating nature and she wanted to dominate everybody including the petitioner. Prior to February, 1984, the respondent used to keep the entire monthly salary of the petitioner in her custody and did not pay him even the pocket expenses.

(iii) The respondent was a quarrelsome woman who used to pick up quarrel with the petitioner and others without any cause and used to abuse the petitioner in filthy language. The wife became more furious since February 1984, when she became pregnant with the male child. She used to create scene in the flat for which it was almost impossible for the petitioner to live in the said flat. The respondent refused to cook food for the petitioner and on many occasions he had to go to his place of work without taking his meal.

(iv) The respondent used to threaten that she would commit suicide and in this way would teach the petitioner a lesson.

(v) The respondent preferred to stay in her parents' place in most of the time without caring to take consent of the petitioner.

3. In connection with the suit, the respondent/wife filed a written statement denying the material allegations raised in the petition. The respondent specifically alleged in her written statement that from her early childhood she was a girl of soft and submissive nature and after her marriage she came to reside with her husband as a very loving and loyal bride. She was always attentive and careful to his minimum needs and she never opened her mouth even to protest against her husband, even when he was palpably wrong. The respondent was utterly shocked when she came to learn that her husband had a clandestine love affair with her own younger sister Kabita. The petitioner even threatened to marry the said Kabita after obtaining divorce from the respondent. The father of the respondent asked her youngest sister Kabita to shun the company of the petitioner. One of the friends of the father of the respondent Sunil Chowdhury tried to intervene in the matter but in his presence the petitioner openly declared that he was bent upon marrying Kabita and respondent should give her consent for this. The respondent has disclosed that she is always ready and willing to live with her husband and children but she expects that her husband who is on the wrong side of forty (at the time of filing written statement) should live a temperate life.

4. Subsequent to the filing of the written statement by the respondent/ wife, the petitioner/husband made an application for amendment of the plaint on the plea that after the institution of the suit "some most vital facts have been occurred and the respondent in her statement has set up counter claim and the petitioner has been advised to incorporate the said vital facts in his pleadings by amending the plaint." Through such amendment of the petition the petitioner has alleged that the marriage between the parties was settled in hot haste in order to avoid and to rescue the respondent from the grab of her boy friend with whom she had prenuptial love affairs but the result was most unhappy because the financial status of both the families were uneven. The petitioner's family which consisted of 4 unmarried sisters and two virtually unemployed brothers, was poverty stricken. The respondent/wife has come from an affluent family and as consequence thereof, the respondent could not like the petitioner and his family and there was no love and affection between the parties. The petitioner has further alleged that the father of the respondent at the material time was higher official of Eastern Railway under the Controller of Stores and he used to earn sufficient extra money by virtue of his position, he used to spend lavishly for maintenance of his family, including the children. The respondent had enjoyed excessive affection from her parents which made her a spoilt child. The petitioner has denied that his relationship with his sister-in-law Kabita over crossed the level of decency. On the other hand, their relationship was sweet and the respondent aided by her father was giving out such allegation of illicit relationship between the two, basing on a letter which was written by the petitioner for making practical jokes. It is further alleged that he found out a love letter written by the respondent some days before the institution of the suit, but he did not disclose the said facts in his petition. It is further alleged that due to false imputation against the petitioner (implicating him having a illicit relationship with his sister-in-law), the petitioner suffered serious mental pain and agony. It is also alleged that the respondent/wife had been indifferent to the need of the petitioner and she was very cold sexually and always tried to avoid the society of the petitioner. From the very beginning of material life till her living separately on and from February, 1984 she hardly stayed 10 days in a month at her matrimonial home and due to unsatisfied sex the

petitioner suffered both mentally and physically.

5. On the basis of the aforesaid pleadings, the learned trial Judge raised certain issues including issue No. 3 touching the question whether the respondent/wife treated the petitioner with cruelty or not and through the judgment impugned came to a finding that the respondent did not treat the petitioner with cruelty after solemnization of the marriage and in view of such a finding dismissed the suit. The only point for our consideration here is whether the petitioner/appellant is entitled to get a decree for divorce on the ground of cruelty and whether the learned trial Court improperly dismissed the suit without due consideration of the evidence and relevant circumstances on record?

6. At the very outset we should note down that the petitioner/husband through his original petition seeking divorce made certain vague allegations in different paragraphs without disclosing the specific instances which constitute the basis of such allegations. Through Para-4A of such petition, the petitioner merely alleged that the respondent/wife deliberately failed to recognise the petitioner as her husband and deliberately refused to discharge her marital obligations towards him which caused deterioration of the health of the petitioner or through Clause-B of the same para, it has been alleged that the respondent/wife used to neglect the petitioner in all respects without citing a single instance of such neglect. But after the written statement has been filed by the respondent/wife in connection with the suit, the petitioner with the leave of the Court amended his petition and through such amendment the petitioner for the first time made certain specific allegations like that the respondent/wife was sexually cold towards the petitioner/husband and in most of the time, the petitioner was denied having sexual pleasure from the wife, that the petitioner/husband's family was poverty stricken one. The petitioner had to maintain a large family consisting of unmarried sisters unemployed brothers and also his father staying at a very small flat whereas the respondent came from an affluent family and the real reason behind the strained relationship between the parties was the poverty of the petitioner, that wife's conduct regarding her raising an allegation of illicit relationship between her husband and her younger sister only on the basis of her suspicion, was an act of cruelty on the part of the wife. Now, let us see how far the petitioner is in a position to establish the specific allegations through the evidence. Petitioner has examined in all 6 witnesses including himself. PW1, Dipak Kr. Sarkar, the petitioner has stated in his evidence that his marriage with the respondent took place on 6.12.1976 and at the time of such marriage his six sisters, 3 brothers and also his father used to reside with him in the Government Flat, namely, one L.I.G. Flat at Belgachia Road. He was at the relevant point of time L.D. Clerk attached to Calcutta Dock Labour Board. Except the petitioner there was no other earning member in the family at the time of their marriage. His father-in-law was an employee in the Eastern Railway, in the Stores Department. It is his further evidence that their matrimonial relationship was not good since marriage. The respondent refused to cohabit with him. It is also his evidence that as his wife used to refuse to share bed with him, he had to pass night on the floor. His wife refused to cook for them, used to abuse brothers and sisters. It is his further evidence that due to her ill-treatment his father, sisters and brothers left his Belgachia Government Quarters. In the evidence, the petitioner has further disclosed that he had occasional sexual intercourse with his wife but after February, 1984 (erroneously noted as Feb., 1964) he had no sexual intercourse with his wife. In the examination-in-chief itself, the petitioner disclosed the reason why he was unable to live with his wife since February, 1984. According to him, the respondent/wife was in her father's house since

December, 1983. She reported to the petitioner in January, 1984 that she was pregnant. It is the further evidence of the petitioner that when he challenged there was an altercation and the respondent told him that she would not live with him any longer and threw out his bed from their bed room and since then he started to sleep on the dining space. It is his further evidence that when this incident took place, at that time his father, sisters, brothers all used to stay in that flat and these relatives left his flat only on 3.2.85. In the cross-examination, the witness stated that he was shocked as well as surprised to know in the last part of January, 1984 that his wife was pregnant. In this way, it transpires that the petitioner has tried to introduce a new allegation regarding cruel treatment of the respondent/wife by imputing that his wife became pregnant when he had no access to his wife as the wife was staying in her father's house all alone and In this way by implication, the petitioner tried to raise a serious allegation that he was not the father of the second child of his wife. Before we proceed to consider the allegation, it must be noted that these allegations did not find any place within the four corners of the petition even after elaborate amendment of the original petition as indicated above. So such allegations are of doubtful nature which in our considered opinion were made only to improve the case of cruelty. Let us now proceed to examine the conduct of the petitioner at the relevant time and the other facts and circumstances to find out whether such grave allegations could be established by the petitioner. Admittedly, the third sister of the respondent/wife got married in December, 1983. According to the evidence of the petitioner, the respondent/wife went alone to her father's house and stayed there since December, 1983. According to the respondent/wife she went along with her husband to her father's house the day before the marriage and remained in the father's house for 7 days with her husband. The wife has further disclosed that the marriage of her sister took place on 9.12.83 and in that connection she altogether stayed in her father's house with her husband for 7 days. But in the cross-examination of the wife/respondent at page 119(P.B.) it was suggested that her husband was not with the respondent/ wife when she stayed in her father's house for seven days. The wife/ respondent denied such suggestion, but from such suggestion it can be said that the petitioner has no consistent case regarding how long the wife stayed in her father's place in connection with her sister's marriage. In one place suggestion was given that the wife in connection with such marriage, going to her father's place remained there for two months. So it is not at all possible to come to a conclusion that in the facts and circumstances, the husband had no access to his wife the pregnancy occurred. Be that as it may, here we find that coupled with the total absence of such allegation in the petition, some admitted conduct of the petitioner/husband at the relevant point of time, clearly go to show that the husband raised such allegation without any basis and malafide. The wife/respondent has disclosed in her evidence that when she informed her husband about her conception, her husband accompanied her to Matrisadan for the purpose of consultation in the middle of January, 1984. When the wife was referred to R.G. Kar Hospital for medical advise and treatment, her husband accompanied her there. Her husband also went to private chamber of Gynaecologist, Dr. Smt. P. Chatterjee. It is further evidence that when the wife gave birth to the second issue a son, her husband purchased medicine and when in connection with the birth of the child the wife remained in the hospital for 3 days, her husband visited her there. These statements have not been challenged effectively in the cross-examination. On the other hand, the petitioner in his cross-examination admitted that after the delivery of his second child in R.G. Kar Medical College he got his wife discharged from the hospital and took her back. The specific allegation of the husband/petitioner that the wife was cold regarding sexual relationship, has not been established in the oral testimony of the husband. The husband in his

evidence at Page 66(P.B.) has stated that their matrimonial relationship was not good since marriage as his wife refused to cohabit with him and she turned very cold towards him sexually. We find from the cross-examination of the petitioner that after marriage he and his wife went to visit Darjeeling before the birth of his first issue and Bombay after the birth of the first issue and they had occasional sexual intercourse. It has also come into evidence that at the relevant point of time, the petitioner used to live with his large family consisting of his father, 3 brothers 6 sisters, in a very small flat consisting of one comparatively big bed room another small bed room, one passage, kitchen and bath-room. The petitioner after the marriage started to live with his wife in that house along with all those members of the family. In this situation, it is evident that after the marriage, the parties did not get enough privacy to engage them in frequent sexual act and it may be that the husband/petitioner might not be satisfied sexually, but under the circumstances it cannot be said that would be an act of cruelty on the part of the wife. It is not even the case of the petitioner/husband that the wife refused to have sexual intercourse with him when asked for prior to February, 1984. Of course, it is the case of the petitioner that the relationship between the parties became strained when he came to know about the second pregnancy of his wife. But we have already found that the allegation which the petitioner has wanted to level against the wife regarding such pregnancy is totally baseless. That apart the case of the petitioner why and how the relationship between the husband and wife became strained, is not consistent. While in his petition, it is the clear case of the petitioner/ husband that the real cause for such strained relationship between the husband and wife was the poverty of the husband's family, in the evidence the husband/petitioner has tried to establish that such relationship became sour when he came to learn about the pregnancy of the wife at a time when he had no access to her. To top it all, it transpires that only a suggestion had been given to the wife in her cross-examination that she was sexually cold towards her husband, which suggestion has been denied by the wife but there is no suggestion given to the wife that she ever refused to have sexual intercourse with her husband.

7. There are of course certain other allegations which in our considered opinion not very important like the wife/respondent used to behave rudely with her in-laws or that she refused to cook the food etc. About these, it can be said that when the petitioner/husband in his evidence has testified in support of such allegation, the wife/respondent in her oral testimony has denied such allegation. No doubt, some of the relatives of the petitioner came before the Court to support the case of the petitioner on this point. Thus PW2 Nikhil Kumar Sarkar one of the brothers of the petitioner stated in his evidence that the respondent did not behave well with them that is to say the brothers and sisters of the witness and their father. The witness further alleged that the respondent also did not help in cooking the meal and used to quarrel with them. PW6 IIa Sarkar, an elder sister of the petitioner, in her evidence stated that the respondent/wife did not behave with them properly and even did not give a glass of water to her father. It should be mentioned here that both The witnesses have only stated regarding the ill behaviour of the respondent/wife without citing a single instance of such conduct on the part of the respondent. So their evidence on this point is nothing but a sweeping comment on the conduct of the respondent/wife. That apart PW6 is not even competent to depose on this point in view of the simple fact that she at the relevant point of time was not a resident of that small flat where so many of her siblings used to occupy along with their father and respondent. Through this witness a futile attempt was made from the side of the petitioner that the respondent/wife was a lady of loose character. The witness at the bottom of Page 96(P.B.) deposed

that subsequent to the marriage of the parties it was revealed that the character of the petitioner was not good. In the cross-examination, the witness disclosed that she never visited the house of the father of the respondent and she learnt from one Tultul Paul, stated to be a relation of the respondent's father that respondent was not of good character, after going to the house of the said Tultul Paul. But at the same time, the witness disclosed that she did not know the address of Tultul. The petitioner in his evidence has stated that due to ill-treatment on the part of the respondent/wife his father, brothers and sisters had to leave the flat. It is significant to note that this specific allegation made by the petitioner in his evidence is not supported by the evidence of only brother who was examined in connection with this proceeding as PW 2. His specific evidence is that he left the flat where the parties used to live after his marriage and in the cross-examination at Page 84(P.B.), the witness admitted that due to large number of their family members they used to live in difficulty in the flat of his elder brother. In these facts and circumstances, it can be said without hesitation that the allegation of rude behaviour etc. raised against the wife/respondent has not been proved through the evidence.

8. In the written statement, the wife/respondent has specifically alleged that there was a clandestine live affair between petitioner/husband and her own sister who was 10 years younger than the respondent and when the affair was discovered by the respondent her husband wanted her to support the same. But the wife/respondent could not. Then her husband threatened to marry the said sister Kabita Paul after obtaining divorce from the respondent. Through the subsequent amendment in the plaint, the petitioner alleged that the allegation of an affair between the petitioner and his younger sister-in-law had no basis, but the said allegation was made by the respondent/wife merely out of suspicion. It was the specific allegation of the husband that such false allegation made by the respondent/wife was a good instance of cruelty on the part of the wife. So let us now examine whether the allegation thus raised is completely baseless and therefore is a good instance of a cruelty on the part of the wife or not. The respondent/wife in her evidence at Page 108 (P.B.) stated that in January, 1985 she first come to know about the clandestine love affair between her husband and her younger sister Kabita. At that time she got one letter written by Kabita to her husband from the office file of her husband. After getting the letter the respondent went to her father and showed him the letter and afterwards she asked her husband about the said letter, her husband told her to return the letter. At first the respondent did not return the letter on the plea that the letter was kept in the house of her father. In the meantime, she made a copy of the said letter in another paper and thereafter she returned the original letter to her husband. The letter in the hand-writing of the wife was produced by the petitioner and marked Ext-1. The respondent further stated that another letter written by her husband to her sister had been traced out by her father from the bathroom and that letter has been marked Ext-B. The husband in his evidence has admitted at Page-78(P.B.) that he wrote the letter to his sister-in-law Kabita but according to him that was not a love letter. But he wrote the letter "by joke". So from the evidence on record, we find that the petitioner admitted that he was the writer of the letter marked Ext-B at Page 20(P.B. Part II). He has given an explanation that he wrote the letter as a joke. But on going through the letter, we find that this could not be a letter written by husband of the elder sister to his younger sister-in-law in a light mood without meaning anything serious. At the very outset, we find from such letter that it has given an indication that the petitioner and his sister-in-law used to exchange letters regularly, it gave an indication that the two used to meet at a place and they were in deep love. The petitioner

expressed the feeling in the following language:

"Our love is sacred, great and deep so we should not be afraid..... Now it is the time to go away I become really mad if there is delay from your side. I know you become mad also, but what shall I do now?.....You have written further that you have no other way to proceed without me. If it is necessary to proceed you shall proceed with me or you shall finish with me. I agree with you."

It can be said without hesitation that on going through the letter in its entirety an impression will be created that the writer of the letter is in extreme love with the person to whom such letter is addressed. In the instant case, admittedly the letter was written by the petitioner to his younger sister-in-law. In her evidence we have already noted that the respondent has disclosed that she came to know all about the clandestine love affair on getting a letter written by her sister to her husband from the office file of the petitioner and that original letter was returned to her husband as per his request but the respondent kept a copy of the letter in her custody. Thereafter, the letter in question Ext-B was discovered by her father from the bathroom and the same was handed over to the respondent. Subsequently, it is alleged that the copy of the letter which the respondent made from a letter written by her sister was stolen by the petitioner. It was her further evidence that Sunil Chowdhury was her father's friend and Sunil was also known to the respondent. Her father reported the aforesaid conduct of her husband to him and Sunil tried to intervene in the matter. Both the petitioner and sister of the respondent went to the office of Sunil. It is also her evidence that her husband wanted to marry her sister in presence of Sunil. The father of the respondent (DW2) deposed that when he confronted the petitioner about his illicit connection with his younger daughter, the petitioner told him that he would marry Kabita, the younger daughter and if the witness refused to give consent to such marriage then he would divorce respondent and marry Kabita. It is his further evidence that Sunil Chowdhury a colleague of the witness had been told about the illicit connection between Dipak and Kabita and the witness requested him to deal with the matter. Then Sunil tried to prevent Kabita from taking such a course but she was adamant and told the witness that she would marry Dipak. Then as per request of the Sunil, Kabita wrote a letter to the petitioner to meet her in the office of Sunil. Accordingly both the petitioner and the said Kabita came to the office of Sunil, who found that both of them were adamant to get married. PW6, Sunil Chowdhury substantially corroborated the evidence of the petitioner and her father by deposing that both the petitioner and Kabita met at his office and at that time the petitioner disclosed to the witness that he would first divorce his wife and thereafter would marry Kabita. In this background, it cannot be said for a moment that the allegation regarding the love affair between the petitioner and his younger sister-in-law Kabita had no basis and therefore by raising such allegation, there was an act of cruelty on the part of the wife/respondent.

9. We have found that in the original petition, the petitioner did not raise any allegation regarding his wife's involvement with any other man outside the matrimonial bond. But after the written statement has been filed which contained specific allegation about clandestine affair of the petitioner with his own younger sister-in-law, the petitioner for the first time came up with an allegation by amending sub-para-E of Paragraph-4 of the petition with the insertion of the following words:

At Page 45(P.B.).

"and that the marriage was actually settled in hot haste in order to avoid and to rescue the respondent from the grab of her boy friend with whom she had prenuptial love affair"

Before entering into the question, we must point out that even after the amendment of the petition there was no specific allegation that the wife/respondent had any affair after her marriage. Still then he for the first time in course of his evidence tried to dispute the paternity of the second issue a son and leveled an allegation that the wife wrote a love letter to her unknown lover, such letter is marked Ext-1. Admittedly, the letter is in the hand-writing of the respondent/wife whose case is that actually Ext-1 is a copy of a letter written to her husband by her younger sister Kabita. She copied the letter in her own hand-writing and kept the letter in her custody, but the letter was stolen by her husband. To consider the allegation that Ext-1 was a love letter written by the respondent/wife to her unknown lover, we must first of all point out that there is no such case even after the amendment of the petition. Through such amendment it has only been stated that the petitioner found out a love letter some days before the institution of the suit.

There is no allegation as we have already pointed out leveled against the respondent that she was involved in any love affair with any person after her marriage with the petitioner. On the other hand, we find that it is an admitted position that the letter in question Ext-1 was found by the petitioner even before the filing of the matrimonial suit. No reasonable explanation is forthcoming why such an important fact has not been disclosed by the petitioner at the time of filing the petition. Exhibit-1 at Page-1 of the P.B.(Part-II), shows that the writer of the letter, married the person to whom the letter was addressed on 8th December last. We must once again report that in the absence of any allegation or evidence to show that the wife/respondent at the relevant point of time was deeply involved in a love affair with a male friend, there cannot be any question of getting married on 8th December last. The writer disclosed that after marriage she did not like to eat or sleep alone. The evidence on record goes to show that the petitioner at the relevant point of time used to stay with her children and her husband was in the other room. In short in the absence of any other evidence indicating that there was a man in the life of the respondent other than her husband, we cannot come to the conclusion that the letter was actually written by the wife/respondent to her unknown lover. On the other hand, we have already seen from the evidence on record that at the relevant point of time, the petitioner/ husband was deeply involved with a love affair with his own younger sister-in-law and in that background we are inclined to accept the evidence of the wife that actually the letter was written by her younger sister to the petitioner and she copied the letter to keep the same in her custody, which was taken away by her husband.

10. Thus on careful consideration of the evidence on record and other relevant facts and circumstances, we find that the husband/petitioner has failed to prove that after the marriage, the wife/respondent has treated him with cruelty. But before we conclude the matter, we must mention, some the reported cases cited on behalf of the parties in course of the argument advanced by their respective learned Advocates. On behalf of the respondent/wife, the learned Advocate has cited the case of (1) S. Hanumantha Rao v. S. Ramani, , (2) R. Balasubramanian v. Vijayalakshmi Balasubramanian, , (3) Parmindar Charan Singh v. Harjit Kaur, . The learned Advocate for the

appellant has also referred some reported cases (1) Smt. Santana Banerjee v. Sachindranath Banerjee(1991 CLJ) P.53, (2) Smt. Sheba Ghosh v. Asit Kr. Ghosh 1991(1) CLJ 55, (3) B. Bhagat v. D. Bhagat and (4) Dr. H.G. Dastane v. S. Dastane . On going through these reported cases, we find that ratio of these decisions is that unfounded allegation raised against husband or wife, even which is made in the written statement, is a valid ground, for granting a divorce on the ground of cruelty by the guilty party who has made such allegation. In the case of S. Hanumantha Rao v. S. Ramani (supra), the Apex Court while considering the meaning of mental cruelty as envisaged under Section 13(1)(ia) of the Act, in Para 8 made the following observation:

"Mental cruelty broadly means, when either party causes mental pain, agony or suffering of such a magnitude that it severs the bond between the wife and the husband and as a result of which it becomes impossible for the party who has suffered to live with the other party."

We have already noted that the present case does not fall within any of the circumstances envisaged in the aforesaid reported cases. So it is clear that the petitioner/husband is not entitled to get a decree of divorce on the ground of mental cruelty.

11. Before we finally leave the matter, we must also mention that the learned Senior Advocate for the appellant/petitioner Mr. S.P. Roychowdhury has pointed out that admittedly the parties of the suit have been living separately since the early part of 1984 and long 20 years have passed in the meantime without any sort of reconciliation, so a decree of divorce should be awarded in the instant case on the ground that the marriage has broken down irretrievably beyond any scope of reconciliation. In this connection he has referred us a decision of a Division Bench of this Court in the case of Sukhomoy Bag v. Mrs. Jaya Bag 1996(1) CHN 210. In that case it has been decided that even if the allegations and counter allegations are not proved to the satisfaction of the Court, the Court should grant a decree of divorce under Sections 24 and 27 of the Special Marriage Act, 1954 without looking at the fault of the party, if it finds that the marital bond between the spouses has broken down irretrievably without any chance of any reconciliation. The learned Advocate for the respondent/wife has resisted this argument by submitting that this Court cannot grant a decree of divorce on any other ground except what has been incorporated in Section 13(1) of the Hindu Marriage Act. In support of his contention to that effect he has referred the decision of Rajasthan High Court, in the case of Uma Shankar Joshi v. Rajeshwari and also a decision of the Division Bench of the Bombay High Court, A. Appellant v. H. Respondent . In the Rajasthan case, the learned single Judge has observed that the aforesaid argument has to be rejected on the short ground that no such ground is available under the Act and a Court cannot dissolve the marriage between the parties on a ground which is not specified in the Act. In deciding in that way the Court relied on a decision of the Supreme Court in the case of Raynold Rajmani v. Union of India, . In a recent case a Division Bench of our High Court, (Per.) Samaresh Banerjea and Ashim Kr. Banerjee, JJ, in the case of Swapan Kr. Ganguly v. Smritikana Ganguly (2001)3 Cal. LT 148 held that divorce under Hindu Marriage Act could only be given on any of the grounds under Section 13, that allowing divorce on any of the grounds not mentioned in Section 13 would be an act without any sanction of law; that such power was only with the Apex Court under Article 142. In the case of Nityananda Karmi v. Smt. Kumkum Karmi, 2003(1) ICC 249, speaking on behalf of the Division Bench justice D.K. Seth has held "that the Court shall not contribute to the breakage of matrimonial relation unless it comes to a

firm finding that the marriage has irretrievably broken down and that one of the spouses is not taking advantage of his own wrong of breaking marriage irretrievably to obtain a divorce." In the case of Dilip Kr. Karmakar v. Biju Rani Karmakar (F.A. 107 of 1989) decided on 12.3.2004 Sina reported in (2004)2 Cal LT 1996(HC) by us, one of us (Justice Pradipta Ray) made the following relevant observation in dealing with the concept of irretrievable break down.

"Doctrine of "irretrievable breakdown" of marital relationship is not a new or separate ground outside the purview of Section 13 of the Hindu Marriage Act. It is really a facet or an extension of the concept of mental cruelty. When none of the spouses really intends to live together but one of them pretends an apparent willingness Sina reported In (2004)2 Cal LT 196(HC) with a capricious motive or for revengeful purpose of forcing the other spouse to bear the burden of a unbearable legal relationship and if the Court is satisfied that none of the spouse really wants to live together and that there is no earthly chance of revival of emotional relationship, the Court may regard it oppressive and cruelty to continue such dead relationship and grant a decree for divorce."

In another Division Bench decision of our High Court in the case of Arunima Bhattacharyya v. Shyama Prasad Bhattacharyya 2004 Cal. LT 324(HC) speaking for the Division Bench Justice Arunava Barua has made this relevant observation regarding irretrievable breakdown of the marriage:

"The situation of a so called "irretrievable breakdown of a marriage" relied upon by the husband/respondent and resorted to by the learned Additional District Judge in his impugned judgment is more a make-belief than a reality. It is the husband's own brainchild. If he is hypersensitive, law does not help. If he is a shirker, law looks hard. And if in some ways, he himself is a tormentor, law gets tougher still."

12. If we consider the present case, in the light of aforesaid observations, we find that in the instant case, the husband/petitioner at the relevant point of time had a love affair with his own sister-in-law which perhaps prompted him, to file a petition for divorce to get rid of the marital bond, firstly, with some vague allegations and thereafter as the case proceeded with, some other allegations which the husband/ petitioner was not in a position to establish. He even tried to develop his case by bringing some new allegations in course of the evidence which did not find place either in his original petition or in the amendment which he made after the filing of the written statement. We further find, from the evidence on record, that the husband/petitioner is not at all willing to live with the wife/respondent any more. On the other hand, wife/respondent is still willing to live with her husband. In that background, the husband cannot get a decree of divorce relying on the theory that the marriage between the parties has irretrievably broken down.

13. In result, we hold that the present appeal must fail, and the learned Court below has rightly dismissed the matrimonial suit. The appeal is accordingly dismissed. The judgment and decree passed by the Court below are hereby affirmed. No order as to costs.

Pradipta Ray, J.

14. I agree.