Allahabad High Court
Smt. Alka vs Rajendra Kumar on 12 December, 2011
Bench: Yatindra Singh, Dinesh Gupta

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

Reserved

Case :- FIRST APPEAL No. - 394 of 2006

Petitioner :- Smt. Alka

Respondent :- Rajendra Kumar

Petitioner Counsel :- Anil Kumar Respondent Counsel :- Komal Mehrotra Hon. Yatindra Singh, J Hon. Dinesh Gupta, J (Delivered by Hon. Dinesh Gupta, J)

1.The instant appeal is directed against the judgment dated 05.08.2006 passed by Principal Judge, Family Court, Meerut in Case No.37 of 2002 (Rajendra Kumar vs. Smt. Alka and others) under section 13 of the Hindu Marriage Act for the relief of divorce.

2.The facts giving rise to this appeal are that the opposite party no.1 the husband (the Opposite party) filed a suit against his wife ( the Appellant) for the relief of dissolution of marriage which was registered as Hindu Marriage Petition No.37 of 2002 with the allegations:

That the marriage of the parties was solemnized in accordance with Hindu rites and customs on 14.02.1990 at Meerut;

That after marriage the opposite party gave all love and affection to the appellant and provided all facilities to her according to his capacity, but she was not happy with the said marriage and from the very beginning she started making disturbance in the family and used abusive language against the respondent;

That the behaviour of the appellant was cruel and several times she said that the marriage was solemnized without her wishes;

That the opposite party and his family members tried their level best to settle the differences between the two and also asked the appellant to adjust herself in the family, but all in vain;

That on 10.10.1991 the appellant left the house of the opposite party without any sufficient reason and even without informing the opposite party and his family members and since then she is living with her mother;

That there was no issue from the said wedlock;

That since then the opposite party several times went to the house of the appellant and requested her to come back to stay with him but she refused to come;

That thereafter the opposite party was compelled to file a Divorce Petition No.123 of 1994 (Rajendra Kumar vs. Smt. Alka Rani) on the ground of cruelty which was dismissed in default; and That thereafter the opposite party filed another suit being Suit No. 447 of 1997 (Rajendra Kumar vs. Smt. Alka Rani) on the ground of cruelty which was also dismissed on 20.08.1998.

After dismissal of both the petitions the appellant started having illicit relationship with one Ravindra, the opposite party was compelled to file another Petition No.351 of 2000 on the ground of adultery against the appellant, but due to threatening attitude of Sri Ravindra who was a person of criminal mind, the opposite party under compulsion withdrew the said suit on 06.02.2001;

That after withdrawal of the said petition the appellant again started living in adultery with one Rajiv Kumar son of Sri Om Prakash, opposite party no.2 and after getting knowledge of the said adulterous relationship the opposite party went to the house of the appellant and saw the appellant and the opposite party no. 2 in compromising position and when he objected, they started abusing language against the opposite party;

That thereafter on several occasions the opposite party had seen the appellant with opposite party no.2 at different public places like market, hotels, picture halls etc. and when the appellant refused to refrain herself from her adulterous act, the opposite party was compelled to file the aforesaid petition. The opposite party no.2 being a necessary part was also impleaded in the petition and the opposite party sought the following relief:-

" That by a decree of divorce in favour of the petitioner against the O. P. No.1, the marriage of the petitioner with the O.P. No.1 be dissolved."

3.The appellant Smt. Alka contested the said petition and stated that the marriage with the opposite party is admitted;

That at the time of marriage sufficient dowry and house hold articles etc. were given by her father to the opposite party no.1 and his family. All the allegations of cruel behaviour or desertion by the appellant are false and fabricated.

The appellant always wants to live the opposite party and even today she is willing to live with the opposite party, but his behaviour was not cordial and she was beaten by the opposite party on the ground of bringing insufficient dowry and it was the opposite party who took the appellant with him and left her at her parent's house.

The opposite party initially filed one suit no. 123 of 1994 on the ground of cruelty in which the appellant filed an application us/. 24 of the Hindu Marriage Act for the grant of maintenance and the court directed the opposite party to pay Rs.800/- per month to the appellant along with Rs.1200/- as expenses. When that amount was not paid to the appellant, the court dismissed the petition on that ground. Thereafter no restoration application was moved by the opposite party nor any appeal was filed against the said order.

Thereafter another Suit No.447 of 1997 was filed by the opposite party on the ground of cruelty which was dismissed on 20.08.1998.

The third petition being Case No.351 of 2000 was filed by the opposite party on the ground of adultery and in the said case it was shown that the appellant was living in adultery with one Ravindra in which the opposite party moved an application on 06.02.2001 for withdrawal of the suit, but the family court instead of granting permission of withdrawal, dismissed the suit.

The present case is also a link in the chain of different petitions filed by the opposite party and as such this petition is barred by Section 11 of the Code of Civil Procedure and Section 115 of the Indian Evidence Act.

She stated that all the allegations of adultery are false and frivolous and have been made just to give colour to the petition.

4.On the basis of the pleadings of the parties, the Family Court framed the following issues:

1.Whether the appellant is living in adultery as alleged by the opposite party?

2.Whether the present petition is barred by Resjudicata?

3.Whether the petition is barred by principles of Estoppel?

4.Whether the opposite party is entitled to any relief?

5.In the Family Court in support of his petition the opposite party examined himself and also one Vivek as P.W.1 and P.W.2. respectively. No documentary evidence was filed by the opposite party. The appellant examined herself as D.W.1 and her real brother Sanjay Pandit as D.W.2 and also filed the order and judgments passed in previous petitions filed by the opposite party, the voter list and the copy of ration card.

6.After considering the pleadings of parties, evidence lead by the parties, legal submissions and the decisions relied on by both the parties the Judge, Family Court decided issue no1. which was in respect of adulterous relationship of the appellant with opposite party no.2 in negative and also decided that the petition is not barred by res judicata and further the petition is not barred by principles of estoppel. However, while deciding issue no.4 the court below held that the relations with the appellant and the opposite party are so strained that it has become impossible to live together and came to the conclusion there is a irretrievable breakdown of marriage between the appellant and the opposite party and granted the decree of divorce in favour of the opposite party.

7.Feeling aggrieved, the appellant preferred this appeal.

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

9.The counsel for the appellant submits that-

The opposite party earlier filed three suits for dissolution of marriage by the court which were dismissed, and the fourth petition on the same ground as was taken in earlier case no.351 of 2002 which was dismissed, and the appellant raised the plea of maintainability of Petition No.37 of 2002 before the Family Court, but that was not decided;

The trial court by the impugned judgment decided issue no.1 regarding adultery in favour of the appellant and against the opposite party and clearly held that the opposite party has failed to establish the charge of adultery, in such a situation the decree of divorce cannot be granted; and The court below has failed to consider the compelling circumstances of the appellant under which she is residing separately from the opposite party. In fact, the opposite party does not want to live with the appellant and is bent upon to obtain a decree of divorce right from 1994 continuously by filing one petition after another and the court below without considering this aspect, granted the decree of divorce.

10.The learned counsel for the opposite party submitted that:

The evidence lead by the opposite party has clearly established the charge of adultery against the appellant but the Family Court decided the issue on wrong assumptions and merely on the basis of surmises and conjectures.

While deciding the issue of adultery the Court below has failed to discuss the legal position.

The counsel although conceded on the point that the trial court has decided Issue no.1 which was in respect of adulterous relationship against the opposite parties, but he tried to convince the court that finding on Issue no.1 was against the evidence available on record.

11.We are unable to accept the contention raised by the counsel for the opposite party. The opposite party has not filed any appeal/ cross objection against the judgment passed by the family court. In absence of such cross objection or appeal the opposite party cannot be permitted to challenge the

finding of the court below on Issue No.1.

WHETHER GROUND OF CRUELTY WAS AN ISSUE BETWEEN THE PARTIES?

12.The counsel for the opposite party submits that although the opposite party has pleaded the facts which leads to the cruelty by the appellant against the opposite party but the family court did not frame any issue on this point.

13.The counsel drew our attention to the petition and submitted that paragraphs 3,4,5 and 7 clearly constitute the ground of adultery but the family court did not frame any issue on this point also. He relied upon the statement of D.W. 1 the appellant and submits that the witness alleged illegal demand of dowry by the opposite party and his family members and also alleged cruel behaviour of the opposite party and his family members with her. She also alleged that her child was aborted when beaten by the opposite party. All these allegations constitute cruelty by the appellant against the opposite party but the family court failed to consider this aspect of the matter.

14.The counsel for the appellant argued that the opposite party has not alleged any facts constituting the cruelty and also has not based his petition on the ground of cruelty. Moreover his petition was based on the sole ground of adultery as is evident from paragraph 15 which discloses the cause of action. Further, at the time of framing of issues or at the time of disposal of the petition no objection was raised by the counsel for the opposite party when the court did not frame any issue regarding cruelty.

15.From a bare reading of the petition itself, it is clear that the opposite party in a cursory manner stated the facts which lead parties to live separately but based his petition solely on the ground of adultery and also lead evidence only on the point of adultery. Even he did not raise any objection at the time of non framing of the issue of cruelty by the family court and also did not file any cross objection in the present appeal and thus the plea of cruelty is not available to the opposite party at this stage.

POINT FOR DETERMINATION BY THE COURT WHETHER THE DIVORCE CAN BE GRANTED ON THE GROUND OF IRRETRIEVABLE BREAKDOWN OF MARRIAGE IF THE PARTY SEEKING DIVORCE ON THIS GROUND IS HIMSELF/HERSELF AT FAULT FOR THE BREAKDOWN?

16.The counsel for the opposite party submitted that the family court has rightly held while deciding issue no.4 that the relationship between the parties are so strained that it is not possible to live together and in such a situation keeping in mind the interest of justice the decree of divorce is the best suitable solution for them.

17.The counsel relied upon following decisions of the apex court and the High Courts:

G.V.N.Kameswara Rao v. G. Jabilli AIR 2002 Supreme Court 576 Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi AIR 202 SC 88 Rajendra Kumar Jajodia v. Puja Jajodia, AIR 2008 Calcutta 199 Vineeta Saxena v. Pankaj Pandit AIR 2006 Supreme Court 1662 A. Jayachandra v.

Aneel Kumar AIR 2005 Supreme Court 534 Naveen Kohli v. Neelu Kohli AIR 2006 SC 1675 Rishikesh Sharma v. Saroj Sharma (2007) 2 Supreme Court Cases 263 V. Bhagat v. D. Bhagat (Mrs.) (1994) 1 SCC 337 Chetan Das v. Kamla Devi (2001) 4 SCC 250 S.S.Kohli v. Sushma Kohli (2004) 7 SCC 747 Romesh Chander v. Savitri (1995) 2 SCC 7 Chanderkala Trivedi v. Dr.S.P.Trivedi (1993) 4 SCC 232 Ashok Hurra v. Rupa Bipin Zaveri 1997(3) AWC 1843

18.All these decisions are based on the legal proposition that when the marriage is irretrievable then whether the decree of divorce can be granted.

19.In the case of G.V.N. Kameswara Rao (supra) the apex court referring to the facts of the case observed in para 12 as below:-

"12. The Court has to come to a conclusion whether the acts committed by the counter-petitioner amount to cruelty, and it is to be assessed having regard to the status of the parties in social life, their customs, traditions and other similar circumstances. Having regard to the sanctity and importance of marriages in a community life, the Court should consider whether the conduct of the counter- petitioner is such that it has become intolerable for the petitioner to suffer any longer and to live together is impossible, and then only the Court can find that there is cruelty on the part of the counter-petitioner. This is to be judged not from a solitary incident, but on an overall consideration of all relevant circumstances."

The apex court further observed in para 18 as below:-

"18. We do not think that this is a case, where the appellant could be denied relief by invoking Section 23(1)(a) of the Hindu Marriage Act. On the other hand, various incidents brought out in the evidence would show that the relationship between the parties was irretrievably broken, and because of the non-cooperation and the hostile attitude of the respondent, the appellant was subjected to serious traumatic experience which can safely be termed as 'cruelty' coming within the purview of Section 13(1)(ia) of the Hindu Marriage Act. Therefore, we hold that the appellant is entitled to the decree for dissolution of marriage under Section 13(1)(ia) of the Hindu Marriage Act. However, we make it clear that any order of maintenance passed in favour of the respondent will stand unaffected by this decree for dissolution of the marriage. We also make it clear that if any rights have been accrued to the respondent in the joint assets of both, she would be at liberty to take appropriate action to enforce such rights. The appeal is allowed. Parties to bear their respective costs."

In this case the petition was filed on the ground of cruelty and the husband was unsuccessfully fighting litigation for the past more than 15 years for snapping his marital ties with the respondent wife. There was counter allegations by the respondent wife of this case also and the family court came to the conclusion that the respondent wife had treated the husband with mental cruelty and decree of divorce was granted. When the matter was challenged by the respondent before the High Court, a division bench reversed the decision of the family court holding that the husband was at fault and he had been trying to take advantage of his own wrongs, hence he was not entitled to grant of a decree in his favour and when it was challenged before the apex court, the court came to the

conclusion that the act constituted by the respondent wife is within the ambit of marriage and thereafter the court also considered the fact that the charges are for living separately for more than 15 years and there is a irretrievable marriage and the court granted the decree of divorce.

It is significant to mention here that in the present case there was no charge of cruelty against the wife nor the charge of adultery was proved. In the absence of any ground of divorce as mentioned in the Hindu Marriage Act the decree of divorce cannot be passed.

20.In the case of Adhyatma Bhattar Alwar (supra) the apex court in paragraph 9 observed as below:-

".....In the first place, there must be conduct on the part of the deserted spouse which affords just and reasonable cause for the deserting spouse not to seek reconciliation and which absolves her from her continuing obligation to return to the matrimonial home. In this one has to have regard to the conduct of the deserted spouse. But there is one other matter which is also of equal importance, that is, that the conduct of the deserted spouse should have had such an impact on the mind of the deserting spouse that in fact it causes her to continue to live apart and thus continue the desertion. But where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse."

In this matter, the case was filed on the ground of desertion and after considering the evidence on record and the circumstances, the subordinate court held that the respondent was guilty of having deserted the husband for a continuous period of more than two years and, therefore, the decree of divorce was granted. The order was challenged in appeal and the High Court allowed the appeal and held that the wife did not have at any time the necessary animus to put an end to matrimonial relationship and on the appeal by the husband the apex court allowed the appeal. This case is also distinguishable from the present case.

21.In the case of Vineeta Saxena (supra) the Supreme Court observed as below:-

"50. The appellant was 24 years of age when she got married. The marriage lasted for four to five months only when she was compelled to leave the matrimonial home. The marriage between the parties was not consummated as the respondent was not in a position to fulfil the matrimonial obligation. The parties have been living separately since 1993. 13 years have passed they have never seen each other. Both the parties have crossed the point of no return. A workable solution is certainly not possible. Parties at this stage cannot reconcile themselves and live together forgetting their past as a bad dream. Parties have been fighting the legal battle from the year 1994. The situation between the parties would lead to a irrefutable conclusion that the appellant and the respondent can never ever stay as husband and wife and the wife's stay with the respondent is injurious to her health. The appellant has done her Ph.d. The respondent, according to the appellant, is not gainfully employed anywhere. As a matter of fact, after leaving his deposition incomplete during the trial, the respondent till date has neither appeared before the trial Court nor before the High Court.

51.The facts and circumstances of the case as well as all aspects pertain to humanity and life would give sufficient cogent reasons for us to allow the appeal and relieve the appellant from shackles and chain of the respondent and let her live her own life, if nothing less but like a human being."

In the above case the petition was filed by the wife for the decree of divorce. The petition being dismissed by the trial court, an appeal was filed before the High Court and the High Court also dismissed the appeal. The matter having been challenged before the Supreme Court, considering all aspects, the court granted decree of divorce, which is not the case here.

22.The next case cited before us is A. Jayachandra (supra) in which the apex court observed as below in paragraphs 16 and 17:-

"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 respondent. 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 finalized. 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.

17. Several decisions, as noted above, cited by learned counsel for the respondent to contend even if marriage has broken down irretrievably decree of divorce cannot be passed. In all these cases it has been categorically held that in extreme cases the Court can direct dissolution of marriage on the ground that the marriage broken down irretrievably as is clear from paragraph 9 of Shiv Sunder's case (supra). The factual position in each of the other cases is also distinguishable. It was held that long absence of physical company cannot be a ground for divorce if the same was on account of husband's conduct. In Shiv Sunder's case (supra) it was noted that the husband was leading adulterous life and he cannot take advantage of his wife shunning his company. Though the High Court held by the impugned judgment that the said case was similar, it unfortunately failed to notice the relevant factual difference in the two cases. It is true that irretrievable breaking of marriage is not one of the statutory grounds on which Court can direct dissolution of marriage, this Court has with a view to do complete justice and shorten the agony of the parties engaged in long drawn legal battle, directed in those cases dissolution of marriage. But as noted in the said cases themselves those were exceptional cases."

In this case the petition was filed on the ground of cruelty and the family court passed the decree for judicial separation. The matter went to the High Court where the respondent's appeal was dismissed and wife's appeal was allowed and the matter being challenged before the Supreme Court it was held that there was irretrievable breakdown of marriage and decree of divorce was granted. The facts of this case are different from the present case.

23.In the case of Naveen Kohli (supra), the apex court observed as below:-

"68. The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes cruelty in each particular case and as noted above, always keeping in view the physical and mental conditions of the parties, their character and social status. A too technical and hyper- sensitive approach would be counter-productive to the institution of marriage. The Courts do not have to deal with ideal husbands and ideal wives. It has to deal with particular man and woman before it. The ideal couple or a mere ideal one will probably have no occasion to go to Matrimonial Court.

70. In Lalitha v. Manickswamy, I (2001) DMC 679 SC that the had cautioned in that case that unusual step of granting the divorce was being taken only to clear up the insoluble mess when the Court finds it in the interests of both the parties. Irretrievable Breakdown of Marriage.

71. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. Because of the change of circumstances and for covering a large number of cases where the marriages are virtually dead and unless this concept is pressed into services, the divorce cannot be granted. Ultimately, it is for the Legislature whether to include irretrievable breakdown of marriage as a ground of divorce or not but in our considered opinion the Legislature must consider irretrievable breakdown of marriage as a ground for grant of divorce under the Hindu Marriage Act, 1955.

72. The 71st Report of the Law Commission of India briefly dealt with the concept of Irretrievable breakdown of marriage. This Report was submitted to the Government on 7th April, 1978. We deem it appropriate to recapitulate the recommendation extensively. In this Report, it is mentioned that during last 20 years or so, and now it would around 50 years, a very important question has engaged the attention of lawyers, social scientists and men of affairs, namely, should the grant of divorce be based on the fault of the party, or should it be based on the breakdown of the marriage? The former is known as the matrimonial offence theory or fault theory. The latter has come to be known as the breakdown theory.

73. In the Report, it is mentioned that the germ of the breakdown theory, so far as Commonwealth countries are concerned, may be found in the legislative and judicial developments during a much earlier period. The (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920, included for the first time the provision that a separation agreement for three years or more was a ground for making a petition to the court for divorce and the court was given a discretion (without guidelines) whether to grant the divorce or not. The discretion conferred by this statute was exercised in a case in New Zealand reported in 1921. Salmond J., in a passage which has now become classic, enunciated the breakdown principle in these words:

"The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this court, as prima facie a good ground for divorce. When the matrimonial relation has for that period ceased to exist de facto, it should, unless there are special reasons to the contrary, cease to exist de jure also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous."

74. In the Report it is mentioned that restricting the ground of divorce to a particular offence or matrimonial disability, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked. The marriage has all the external appearances of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a fagade, when the emotional and other bounds which are of the essence of marriage have disappeared.

75. It is also mentioned in the Report that in case the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce, then the parties alone can decide whether their mutual relationship provides the fulfillment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.

76. On May 22, 1969, the General Assembly of the Church of Scotland accepted the Report of their Moral and Social Welfare Board, which suggested the substitution of breakdown in place of matrimonial offences. It would be of interest to quote what they said in their basic proposals:

"Matrimonial offences are often the outcome rather than the cause of the deteriorating marriage. An accusatorial principle of divorce tends to encourage matrimonial offences, increase bitterness and widen the rift that is already there. Separation for a continuous period of at least two years consequent upon a decision of at least one of the parties not to live with the other should act as the sole evidence of marriage breakdown."

Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties.

77. A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; divorce courts are presented concrete instances of human behaviour as bring the institution of marriage into disrepute.

78. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases do not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

79. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

80. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist.

81. Some jurists have also expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for grant of the decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems then are sought to be solved.

82. The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.

83. When we carefully evaluate the judgment of the High Court and scrutinize its findings in the background of the facts and circumstances of this case, then it becomes obvious that the approach adopted by the High Court in deciding this matter is far from satisfactory."

In this case the husband filed a petition for divorce on the ground of cruelty which was allowed and decree of divorce was passed against which First Appeal was preferred before the High Court which was allowed and the apex court in the aforesaid circumstances allowed the appeal and the marriage between the parties was dissolved. The Apex Curt also opined that the irretrievable broke down is no ground of divorce under Hindu Marriage Act.

24.In the case of Rishikesh Sharma (supra) the Supreme Court observed as below:-

"5. In our opinion it will not be possible for the parties to live together and therefore there is no purpose in compelling both the parties to live together. Therefore the best course in our opinion is to

dissolve the marriage by passing a decree of divorce so that the parties who are litigating since 1981 and have lost valuable part of life can live peacefully in remaining part of their life."

In the above case, the husband filed petition for divorce on the ground of mental cruelty and desertion by the respondent without any reasonable cause the petition was dismissed, the first appeal before the High Court was also dismissed and on the matter coming to the Supreme Court, the apex court observed as quoted above.

25.The counsel for the appellant also relied on the following cases:-

Ram Babu Babeley Vs.Smt. Sandhya 2006 (1) AWC 183 Dr. Tara Charan Agarwal vs. Smt. Veena Agarwal 2011 ADJ 118 Vishnu Dutt Sharma V. Manju Sharma JT 2009 (7) SC 5 In the case of Ram Babu Babeley (supra) the apex court observed as below:-

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

i.The irretrievable beak 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 Vs. Prem Chand Pandey and V. Bhagat Vs. 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 Vs. Kamla Devi, Savitri Pandey Vs. Prem Chand Pandey and Shyam Sunder Kohli Vs. 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 Vs. 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 Vs. D.Bhagat, Romesh Chander Vs. Savitri, Ahok Hurra Vs. Rupa Bipin Zaveri and A.Jayachandra Vs. 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 Vs. Sushma Kohli(supra).

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 Vs. Kamla Devi, Savitri Pandey Vs. Prem Chandra Pandey and Shyam Sunder Kohli Vs.Sushma Kohli (supra)."

26.In the case of Dr. Tara Charan (supra) a division bench of this court observed that the appellant cannot take advantage of his own fault. The bench observed as below:-

"We have our doubts whether marriage has broken down irretrievably or not as the Respondent is willing to resume husband-wife relationship, if the Appellant drops the immoral compromise. However, it is not necessary to decide whether marriage has broken down irretrievably or not, as even if it has so broken, divorce cannot be granted. For the purpose of the appeal, we assume that the marriage has broken down irretrievably.

Incompatibility in marriage or irretrievability of a marriage, or marriage being broken down irretrievably is not a ground for divorce though recommended by the Supreme Court in Naveen Kohli vs. Neelu Khli: AIR 2006 SC 675 for consideration to amend the Act. It may amount to mental cruelty entitling a party to divorce but it should be without any fault or at least fault of both sides. This is not the case here. In this case, the fault is of the Appellant: he has been cruel to the Respondent by insisting for the immoral compromise."

27.Last but not the least in the case of Vishnu Dutt Sharma (supra) the apex court held as under:-

"10. In this connection it may be noted that in Section 13 of the Hindu Marriage Act, 1955 (for short 'the Act') there are several grounds for granting divorce e.g. cruelty, adultery, desertion etc. but no such ground of irretrievable breakdown of the marriage has been mentioned for granting divorce. Section 13 of the Act reads as under:

13. Divorce--(1) Any marriage solemnized, 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) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or (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; or

(ii)has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

xx xx xx xx xx xx

(iv) has been suffering from a virulent and incurable form of leprosy; or

(v) has been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

11. On a bare reading of Section 13 of the Act, reproduced above, it is crystal clear that no such ground of irretrievable breakdown of the marriage is provided by the legislature for granting a decree of divorce. This Court cannot add such a ground to Section 13 of the Act as that would be amending the Act, which is a function of the legislature.

12. Learned Counsel for the appellant has stated that this Court in some cases has dissolved a marriage on the ground of irretrievable breakdown. In our opinion, those cases have not taken into consideration the legal position which we have mentioned above, and hence they are not precedents.A mere direction of the Court without considering the legal position is not a precedent. If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts. Hence, we do not find force in the submission of the learned Counsel for the appellant."

28.From the above narration, the following legal position emerges:-

I. The irretrievable break down of marriage is not a ground for divorce by itself.

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.

III. The decree of divorce on the ground that the marriage had been irretrievably broken down can be a ground 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 cannot live together.

IV. The decree of divorce on the ground that the marriage had been irretrievably broken down can be a 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.

V. The power to grant divorce on the ground of irretrievable break down of marriage should be exercised with much care and caution in exception circumstances only in the interest of both the parties.

29.The counsel for the appellant submits that there is a maxim of law 'NULLUS COMMODUM CAPERE POTEST DE INJURIA SUA PROPRIA'. It is a maxim of law recognised and established, that no man shall take advantage of his own wrong.

30.The counsel further submits that it was the opposite party husband who filed a chain of petitions to get divorce on one ground or the other and his attempts continuously failed. The first petition was filed by the opposite party on the ground of cruelty, but the said petition was dismissed when the opposite party failed to pay the maintenance amount to the wife. The said petition was neither restored nor any appeal was filed against it. Thereafter another petition was filed on the ground of cruelty which was dismissed on merit. The counsel drew our attention to the judgment passed in Case No.447 of 1997 in which the allegation of cruelty was disbelieved and the suit was dismissed. No appear was filed against the said judgment. Again another petition was filed on the ground of adultery and in this case the name of adulterer was mentioned as Rajiv Kumar. The said petition was dismissed by the court although the opposite party moved an application for withdrawal of the said petition. No appeal was filed against that order also and Petition No.32 of 2002 was filed on the ground of adultery again. However, the name of the adulterer was changed from Ravindra Singh to Rajiv Kumar. The family court again disbelieved the opposite party on the ground of adultery and this issue was decided against him. From this, it is clear that it was the opposite party who soon after the marriage started filing frivolous petitions for divorce on one ground or the other and it was the husband opposite party who was not keeping his wife with him and now after the lapse of 15 years he cannot take advantage of the fact that both the husband and wife had been living separately for such a long period and the marriage has come to an end. The counsel further submitted that finding of the court that since the marriage has come to a irretrievable end, the decree of divorce should be granted.

31.The counsel for the opposite party argued that the relationship between the husband and wife has come to an end and it is so strained that it is not possible for the husband and wife to live jointly and virtually the marriage has come to an end and has reached irretrievable point and in such a situation the trial court has committed no illegality in granting the decree of divorce.

32.We are unable to accept the contention raised by learned counsel for the opposite party. It is true that it was the opposite party who is continuously trying to get a decree of divorce and has been continuously filing frivolous petitions one after another. Even he has gone to the extent that he levelled charges of adultery against his own wife and subsequently was unable to prove the same. It is the opposite party who himself is living separately without any sufficient reason and now he cannot say that since they are living separately for more than 15 years, the court has committed no illegality in granting the decree of divorce.

33.So far as the decree of divorce passed on the ground of irretrievable breakdown of marriage is concerned, it has been rightly held by the apex court in the case of Vishnu Dutt Sharma (supra) that the ground of divorce as mentioned in Section 13 of the Hindu Marriage Act nowhere permits divorce on the ground of irretrievable breakdown of marriage. Even if the Supreme Court in exceptional cases granted a decree of divorce on the ground of irretrievable breakdown of marriage, it cannot be treated as precedent. Mere direction of the court without considering the legal position is not a precedent. If the divorce can be granted on the ground of irretrievable breakdown of marriage then it will amount to adding to Section 13 of the Act a new ground of divorce being irretrievable breakdown of marriage. A new ground can only be added by the legislature. The same legal position is also observed by the apex court in the case of Naveen Kohli (supra).

34.Whether the decree of divorce can be passed when the ground mentioned in the petition was not proved on the consideration of irretrievable breakdown of marriage. As argued by learned counsel for the appellant, it is clear that the only ground taken by the opposite party in his petition is adultery which was not proved and the issue adultery was decided against the opposite party. There was no other ground taken by the opposite party which is available to him under section 13 of the Hindu Marriage act. Thus, only on the allegation of irretrievable breakdown of marriage the decree of divorce cannot be granted . Therefore, the order passed by the family court suffers from a patent error of law, it is liable to be set aside and the appeal deserves to be allowed.

35.In view of the above discussions, the appeal is allowed. The judgment dated 05.08.2006 passed by Principal Judge, Family Court, Meerut in Case No.37 of 2002 (Rajendra Kumar vs. Smt. Alka and others) is set aside and case no. 37 of 2002 (Rajendra Kumar Vs. Smt. Alka and others) is dismissed. Considering the facts of the case, parties to bear their cost.

Order Date:- 12.12.2011 PK