
(2011) 09 CAL CK 0080
In the Calcutta High Court
Case No : F.A.T. No. 81 of 2011

Rajesh Burman

APPELLANT

Vs

Mitul Chatterjee (Burman)

RESPONDENT

Date of Decision : 26-09-2011

Acts Referred:

Constitution of India, 1950 — Article 142
Hindu Marriage Act, 1955 — Section 13(1)
Penal Code, 1860 (IPC) — Section 498A
Special Marriage Act, 1954 — Section 13, 2(1), 2(2), 27(1), 27A

Citation : (2011) 5 CHN 753

Hon'ble Judges : Soumen Sen, J; Pinaki Chandra Ghose, J

Bench : Division Bench

Advocate : Aurobinda Chatterjee, Rini Bhattacharyya, for the Appellant; Ashok Banerjee, Tarun Kumar Banerjee, Anjali Deb Sarkar, Pushan Kar, Souvik Majumdar Tapati Chatterjee, for the Respondent

Judgement

Soumen Sen, J.—An altercation on the edge of the staircase leading to the fall of the wife proved to be fatal for Rajesh Burman in this matrimonial appeal. Two qualified persons have been fighting an acrimonious battle which has resulted in a decree for divorce in favour of the wife in the Matrimonial Suit filed by way of an application u/s 27(1)(d) of the Special Marriage Act, 1954.

2. The proceeding was initiated by Smt. Mitul Chatterjee (Burman) praying for divorce against the appellant, husband Sri Rajesh Burman.

3. On 26th January, 2000, their marriage was registered u/s 13 of the Special Marriage Act, 1954 through negotiation. After solemnization of the marriage and within a short span of time acrimony arose between the parties. The wife would contend that the petitioner was subjected to outrageous behaviour, slandering and insult, abuse, frayed temper, rough and tough behaviour, the husband would contend that all such allegations are baseless and frivolous.

4. The main incident which can be said to be the starting point of this litigation is

the showdown on the night of 16th June, 2001 or the early morning of 17th June, 2001 at around 1.30 a.m. when the husband returned home late and on being asked by the wife for such midnight homecoming, the husband alleged to have flared up and during such outrage slapped the wife and tried to leave the flat. During such commotion the respondent wife followed the petitioner husband almost to the end of landing of staircase and while they were three or four steps away from the ground level, the husband appellant in such outrageous mood allegedly pushed the wife respondent along the stairs by reason whereof the respondent fell down from the staircase to the landing and had suffered severe injury in her left arm and shoulder. The wife had referred to Exhibit 9/1 being a certificate issued by the Apollo Hospital to show that she was admitted in the Nursing Home on 30th April, 2002 for surgical management of non-union of fractured shaft 1/3 of the left humerus. The nature of injury recorded in the said Discharge Summary dated 8th May, 2002 is reproduced hereinbelow:

On 17th June, 2001, patient sustained fractured shaft of humerus, following a fall from the staircase. She also had fractured ribs for which she was treated, but had haemothorax at that time. Open Reduction with Plaster cast application was done but removed immediately due to malalignment and so 19th June, 2001. I M nailing with interlocking done; but she presents with non-union.

5. She was discharged with the following observation which would appear from the Discharge Summary dated 8th May, 2002, relevant portion whereof is reproduced here in below:

27-year old Ms. Mitul Chatterjee presented with non-union left humerus following a fracture left humerus due to a fall and had undergone I M nailing with Interlocking elsewhere.

On 2nd May, 2002, after preliminary investigations, she underwent Implant removal of A O nail with Interlocking screws, ORIF left humerus and Plate osteosynthesis and bone grafting. She had an uneventful postoperative period. She was discharged with stable vitals and the following advice.

6. The respondent wife has relied upon a discharge card issued by the Bellevue Nursing Home from which it appears that the wife was admitted on 17th June, 2001 for displace of fractured of humerus shaft and was released on 18th June, 2001. The wife would further rely upon the admission of guilt by the husband and would contend that his father-in-law was all throughout supporting her.

7. Both the parties had referred to some other incidents that had occurred prior to the fateful night but it appears that the situation became volatile and the relationship became irreconcilable after the said fatal fall of the wife on that fateful night.

8. On the basis of the pleadings of both the parties and the documents filed before the Court, the Court below had framed the following issues for adjudication;

1. Is the suit maintainable in law and facts of this case?
2. Has the petitioner/wife any cause of action for the suit?
3. Is the respondent guilty for perpetration cruelty both mental and physical, upon the petitioner?
4. Has the petitioner suffered permanent physical injury alleged to have been caused by the respondent?
5. Is the petitioner entitled to get a decree as prayed for?
6. To what other relief of relief, if any, is the petitioner entitled to get in law and equity?
9. The issues Nos. 3 and 4 are the principal issues. If the wife plaintiff succeeds on these two issues then it would entitle her to a decree.
10. On the basis of the evidence that was adduced with regard to the incident that had taken place on that fateful night, the Court below had come to the following finding:

So under the above stated attending facts and circumstances it appears from the evidence on record that when the parties ruined their lives in mutual acrimony and estrangement caused by misunderstanding and when the couple is still fighting out a contested divorce case and the petitioner/wife is very much reluctant to live together as husband and wife seeking annulment of her marriage with the respondent owing to the absence of mutual love, trust, self-sacrifice, affection, consortium and society between the parties which are inhabitable in leading the happy conjugal life of a happy married couple and when the marriage under the circumstances has been irretrievably broken down and there is no possibility of their reunion, under the circumstances it is just, proper and prudent way to allow both the parties to spend the remaining period of their life happily according to their choice and will, instead of compelling them to lead and to linger their present malicious conjugal relation in order to avoid happenings of social evil under which circumstances there is no hardels to pass a decree for dissolution of marriage to avoid perpetuation of agonies and miserings of the separated spouse.

So in view of the above made discussions and observation and findings as our evidence on record along with other materials on record it is held that the petitioner has been able to prove her case on the ground of cruelty difference in temperament and habits and she is entitled to get a decree u/s 27(1)(2) of the Special Marriage Act, 1954.

11. The learned Judge appears to have on appreciation of evidence held that the state of affairs was such which would cause an apprehension in the mind of the wife that it would be harmful or injurious for her to live with the husband henceforth. The learned Judge further held that it would appear from the evidence on record that the spouses led their normal conjugal life even after a

series of acts of mental cruelty by the respondent which goes to show that the wife condoned that cruelty but after February, 2001 the marital relation between the spouses started becoming bad to worse till the date of the incident which had occurred on 17th June, 2001 and since thereafter.

12. The finding of the Trial Court with regard to the fall of the wife from the staircase is that the husband was and is liable for the falling down of the wife which resulted in injury on her left arm and it had happened due to rude and acrimonious behaviour towards his wife. The relevant observation of the Trial Court on this regard is reproduced hereinbelow:

It was been already observed hereinbefore about the merit of ext. 6 even assuming that it is not a case of intentional pushing, in that case, it appears after scanning the entire evidence of p.w.1, p.w.2 and D.W.1 that the incident of falling down the stairs was due to the rude and acrimonious behaviour and dealing of the respondent with his wife at the relevant time. So such argument of the Ld. Lawyer is not acceptable since such evidence demonstrates both mental and physical cruelty upon the petitioner.

13. The divorce proceeding was initiated by the wife primarily on the ground of cruelty, difference in temperament, habit, and bad taste of the husband. The marriage between the parties was solemnized on 26th January, 2000. The said marriage was a negotiated marriage and performed under Hindu rituals and customs at Kolkata under the Special Marriage Act, 1954. After the "Boubhat" ceremony was held on 28th January, 2000, the newly married couple left for Mumbai on 2nd February, 2000 by a first class tour and stayed in the flat of the Company allotted to the husband at Mahim. At the time of marriage the wife was doing a Post Graduate course in Management of Information Technology conducted by C.M.C. Ltd. Kolkata and the husband was engaged in his service at Mumbai. The wife appears to have initially complained ill-behaviour of the husband and slandering and insulting language also used by the husband against the members of her father's family and was having unpleasant character. The wife complained that while staying with her mother-in-law at Kharagpur she had to face demand for dowry and threaten with torture if such demand is not fulfilled. However, after staying at Kharagpur which was after 2nd February, 2000 and prior to April, 2000 she again visited to Mumbai in April/May, 2000 when her husband changed his service and was staying temporarily in a hotel accommodation at Dadar and thereafter was shifted in a flat at Chembur. Sometimes, in November, 2000, the husband purchased a flat in Versova and in February, 2001 the wife joined with the husband at Mumbai permanently and in between April/May, 2000 and February, 2001 she visited Mumbai on 4/5 occasions and stayed there with the husband. The evidence goes to show that between 2nd February, 2000 and 2001, the wife was an occasional visitor to the place of the husband.

14. The first complain of cruelty against the husband was of an incident alleged to have taken place in December, 2000 when after returning from a dinner

invitation, the husband asked for a Coke bottle and for some reason the husband got angry with the wife and started beating her behind her ear. Since it is alleged that the said wife was complaining about the ill-treatment she has placed at her in laws at Kharagpur and the demand for dowry made by the mother of the appellant. But the main ground for the divorce occurred on the fateful night of 17th June, 2001 when she asked about his late coming at 1-00/1-30 a.m. (night) he flared up and started abusing her and slapped her on her chick and thereafter made an attempt to leave the house. The wife appears to have resisted the husband from leaving the house and tried to prevent him bodily and physically on the first floor landing and it is claimed that when such thing was going on, the grant parents of the wife who claimed to have been staying in the said house at that point of time came out and tried to persuade the husband to return to the flat. The appeared to have been standing under the door presumably so that the appellant cannot leave the house but the husband did not pay any heed to it. The wife was facing her husband and her back towards the stairs and it is being contended that the husband intentionally and forcefully pushed her down in an attempt to kill her and in such altercation the wife fell down one landing to another landing hitting her head against the v. all and she fell on the left side.

15. On the basis of the evidence on this issue fall from the staircase, the learned Court below held as follows:

It appears from the above referred evidence that at that time the petitioner was facing her husband and her back was towards the stairs and at that time her husband intentionally and forcefully pushed her down the stair and as a result she fell down from one landing to another landing with her head hitting against the wall and fell down on the left side and her father and some neighbour then lifted her and brought into the flat and she sustained severe injuries on her forehead, ribs and left arm was fractured and she could not breathe properly.

16. It appears that she was admitted and the discharge summary certificate records certain fracture and the same has already been noticed in this judgment. It is a fact that Dr. Diwan treated her and she was admitted to the Bellevue Hospital for her medical treatment and she was released. She again had to be readmitted in Mumbai Hospital for better medical treatment and subsequently, the operation was done on her left arm where rod and screws were placed for rejoining her bones and thereafter she was released and came back home on 20th June, 2001. There is no doubt that due to incident of 17th June, 2001 she had suffered physical and mental agony. However, the evidence on record shows that during her stay in the hospital, the husband had frequently visited the said hospital during the period of admission. It also appears that in view of the incidents that have taken place the mother-in-law and the husband was arrested by the Police of Versova P.S. on the complain of assault and torture.

17. At this stage, before we really address on the question of cruelty it is necessary for us to consider some of the decisions with regard to cruelty as a ground for divorce.

18. Divorce on the ground of cruelty has been a matter of consideration since Dr. N.G. Dastane vs. S. Dastane, reported in AIR 1975 SC 1535 and has been followed in a number of subsequent decisions.

19. In a recent decision reported in AIR 2011 SC 111. Gurbux Singh vs. Harminder Kaur, the Hon''ble Supreme Court had the occasion to consider cruelty as a ground of divorce. The Hon''ble Supreme Court while considering the provisions of the Hindu Marriage Act noticed that cruelty has not been defined under the Act. The same is the position with the Special Marriage Act. The Hon''ble Supreme Court has given a guideline for the purpose of determining cruelty which may be summarized as follows:

(i) Even a single act of violence which is of grievous and inexcusable nature satisfies the test of cruelty.

(ii) It is also possible that a particular conduct may amount to cruelty in one case but the same conduct necessarily may not amount to cruelty due to change of various factors.

(iii) Making certain statements on the spur of the moment and expressing certain displeasure about the behaviour of elders may not be characterized as cruelty.

(iv) The ill-conduct must be precedent for a fairly lengthy period where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse one party finds it extremely difficult to live with the other party no longer may amount to mental cruelty.

20. In the said judgment the Hon''ble Supreme Court approved the guidelines laid down in the case of Samar Ghosh vs. Jaya Ghosh reported in 2007 (4) SCO 511; Samar Ghosh vs. Jaya Ghosh in which a three-Judge Bench of the Hon''ble Supreme Court had analyzed of section 13(1)(i-a) of the Hindu Marriage Act considered what would constitute a mental cruelty and have opined that there cannot be any comprehensive definition of the concept of "mental cruelty" within which all kinds of cases of mental cruelty can be covered. In the same judgment in paragraph 101 Their Lordship.-, have indicated some of the situations which would constitute "mental cruelty" in a given situation, relevant portion whereof is reproduced hereinbelow:

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot

reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommodate or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child

from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded 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, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

21. In the *Gurbux Singh vs. Harminder Kaur*'s case, the Hon''ble Supreme Court has given a note of caution in paragraph 12, relevant portion whereof is reproduced hereinbelow:

12. The married life should be assessed as a whole and a few isolated instances over certain period will not amount to cruelty. The ill conduct must be precedent for a fairly lengthy period where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, one party finds it extremely difficult to live with the other party no longer may amount to mental cruelty. Making certain statements on the spur of the moment and expressing certain displeasure about the behaviour of elders may not be characterized as cruelty. Mere trivial irritations, quarrels, normal wear and tear of married life which happens in day to day life in all families would not be adequate for grant of divorce on the ground of cruelty. Sustained unjustifiable and reprehensible conduct affecting physical and mental health of the other spouse may lead to mental cruelty.

22. Now it is to be seen whether the incident on early morning of 17th June, 2001 is such a grievous and inexcusable nature which would satisfy the test of cruelty or it could be said to be mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life. It is also to be taken into consideration that married life should be reviewed as a whole and a few isolated instances over a period of years could not amount to cruelty. The ill conduct must be precedent for a fairly lengthy period where the relationship had deteriorated to an extent that because of the acts and behaviour of a spouse, one party finds it extremely difficult to live with other party in future and long way.

23. In the instant case, the marriage was solemnized on 26th January, 2000, the reception was held on 28th January, 2000 at Kharagpur. Thereafter, the couple left for Mumbai on 2nd February, 2000 being the place of work of the husband. The first incident of physical assault as alleged by the respondent plaintiff happened on December, 2000 followed by slap on March, 2001 on the day of Dol Yatra. On 15th April, 2001, the appellant alleged to have thrown Borosil Glass Bowl and hot cooked food straight from the Gas oven. On 27th April, 2001, the plaintiff claimed to have been mercilessly beaten by the appellant. Then the incident of midnight of 16th June and early morning of 17th June at around 1.30 a.m. took place which appears to be the basis of the Matrimonial Suit instituted

on 2nd July, 2001 u/s 27(1)(d) of the Special Marriage Act, 1954 praying, inter alia, for divorce and other reliefs.

24. It appears that on an earlier occasion the matter went to the Hon"ble Supreme Court and by an order dated 4th of November, 2008, the SLP filed by the husband was dismissed and the husband was directed to reimburse the medical expenses incurred by the wife. An attempt to conciliate in the chamber of Their Lordships in the Supreme Court appears to have failed since the relationship was found to be far from cordial and friendly. The said matter has since been reported in *Rajesh Burmann Vs. Mitul Chatterjee (Burman)*, .

25. The respondent wife had relied upon Exhibit No. 4, 5 & 6 for the purpose of showing that from such exhibited documents, it would be clear that there are strong and satisfactory evidence of cruelty and the relationship between the parties had deteriorated to such an extent that it would be impossible for them to live together without mental agony, torture or distress and the plaintiff wife on the basis of such evidence would be entitled to secure a decree for divorce. It was further argued that there has been no condonation of cruelty as such although the same has been recorded by the learned Trial Judge. In fact, the learned Trial Judge held that there has been a condonation of such cruelty at least upto January, 2001 and it was only thereafter the incidents that had taken place would entitle the wife to get a decree for divorce on the ground of cruelty.

26. The respondent would urge that condonation means forgiveness of matrimonial offences and restoration of having spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things, forgiveness and restoration.

27. The Ld. Counsel for the respondent relying upon *Smt. Santana Banerjee Vs. Sachindra Nath Banerjee*, submitted that mere cohabitation on some occasions in an attempt to repair the relationship will not constitute condonation of cruelty.

28. It was further submitted that intercourse of course is not a necessary ingredient of condonation. Even continuous co-habitation is no evidence of condonation i.e. of forgetting and forgiving. Continuous cohabitation in spite of cruel treatment is not unknown and many women allow themselves to be subjected to humiliation much against their will, and sometimes in the hope of improvement and prefer silence to exposure in order to avoid likely distress to the parents and acquaintance as observed in the decision reported in *Rita Vs. Brh Kishore Gandhi*,

29. Before February, 2001 the respondent/plaintiff casually visited Mumbai to meet her husband, for few days either in hotel or rental house and lastly in the Flat the husband purchased at P.S. Versova, Mumbai. During these 4/5 days (approx) stay the untoward cruel and insulting behaviour of the appellant/defendant to the respondent/plaintiff was not condoned but silently borne optimistically thinking that once she comes permanently to stay in Mumbai her appellant/defendant husband may change his behaviour towards her. For this

reason the respondent/plaintiff only reported the appellant/defendant's behaviour to her father-in-law and mother-in-law only and nobody else which will be reflected in Ext. 4 of Part II Paper book, as father of the respondent/plaintiff had a cerebral attack in 1999 and was sick.

30. In February, 2001 the respondent/plaintiff went to Mumbai to stay permanently with her appellant/defendant and the degree of mental and physical cruelty by various means started increasing day by day. This prompted the respondent/plaintiff to protest which angered him more and cruelty went on increasing through various methods and means, culminated into an attempt to kill her or by pushing her on the staircase at the early morning at around 1.30 a.m. of 17th June, 2001.

31. Exhibit 6 was written by the appellant/defendant on his own which was simply a ploy of the husband and it acted as "confident trickster" which was soon devastated by his going away to his office on 22nd June, 2001 and not returning back in the night leaving his ailing and traumatized wife. Neither the appellant did contact the respondent nor the respondent after several attempts could contact him. Thereafter being worried the wife through her father lodged a missing diary in Versova Police Station on 23rd June, 2001. The appellant along with his mother surrendered to the police station on the night of 23rd June, 2001. After that he along with his mother and few unruly persons came home and started threatening the respondent/plaintiff to leave home immediately. This was the last straw on the camel's back which gave away to whatever confidence the appellant tried to earn out of the respondent wife by writing "confidence trickster" i.e. Ext. 6 to her parents.

32. The statements made by appellant in his written statement in paragraph 37 itself is a ground for cruelty since the appellant though made such wild allegation but did not put it on evidence. The said Paragraph of the written statement is reproduced hereinbelow:

37. The respondent further states that the petitioner likes to live a fast life. She never liked the respondent from the very beginning. She told that her aim was to go abroad and build up her career and that the respondent was misfit for her. On several occasions she demanded respondent should give consent to mutual divorce but the respondent being value-based person did not agree to this. It is further stated that the petitioner refused to become a mother. She was perverse in sex life. She preferred Oral Sex. Her perversity was a galore which will be revealed by the photographs which she sent on the Birthday of the respondent in the year 2000 and the respondent craves leave to produce those photographs at the time of hearing. The respondent states that the petitioner loved to see blue films which were disgusting to the taste of the respondent. She narrated the bed room stories to her friends and also to her sister and her husband openly, When she found that respondent did not follow her in every respect then the petitioner concerned all sorts of baseless allegations and stories in connivance and collusions with her parents to frame up this case against the respondent. It is

further stated that the petitioner in her e-mail message admitted her guilt and promised to mend herself. The respondent craves leave of this learned court to produce the e-mail correspondences between the parties at the time of hearing. That the above suit is, therefore, liable to be dismissed.

33. It was further contended that the degree of cruelty was so grave that there is no question of condonation of cruelty by respondent. In totality there was no marital relationship between the parties since April, 2001. Thus, there has been no condonation of any sort of cruelty mental or physical by the respondent.

34. Regarding Exhibit 6 in cross-examination of DW1 the appellant admitted regarding his admission of writing Exhibit 6 and it was argued that he was not forced to write such letter either to his parents-in-law or wife that. He did not even inform the Police alleging duress or coercion in writing such letter.

35. From the entire evidence, facts and records it clearly proves beyond any reasonable doubt that there are at least five instances of cruelty which went to extreme situation when the appellant/defendant willfully and deliberately pushed the respondent/plaintiff from the staircase which is admitted in Ext. 6 with a clear intention to kill her.

36. It was on that basis submitted that from the entire evidence on record it clearly indicates beyond any reasonable doubt that the respondent was willfully and deliberately pushed down by the appellant from staircase.

37. It was further argued by referring to the decision of the Hon''ble Supreme Court in AIR 1975 SC 1535, Dr. N.G. Dastane vs. S. Dastane, that the Court should consider the fact and totality of the circumstances for the purpose of finding whether alleged lapses are ordinary wear and tear of the married life.

38. Per contra, the husband appellant contended that on a careful reading of the evidence of the father of the plaintiff, namely, P.W.2 along with documentary evidence being Ext. 1 to 14 relied on by the appellant, it would not show that the incident dated 16th/17th June, 2001 was an intentional and forceful pushing of the husband to his wife from the staircase and such finding of the Trial Judge was clearly erroneous and perverse.

39. It was contended that the finding of the learned Trial Judge at the time the petitioner was facing her husband and her back was towards the stair and at that time her husband intentionally and forcefully pushed her, as a result she fell from one landing to another landing by with her head hitting against the wall and fell down on the left side. In order to come to the aforesaid conclusion the learned Judge had taken into consideration the medical papers including medical diagnosis and certificates being Exhibits 7 and 9 series.

40. If that be the situation then it could not be claimed to be an intentional act on the part of the husband. It was contended that the Ext. 7, Ext. 9 or Ext. 9A would not show that such injury was due to intentional pushing by the husband. It was submitted that Ext. 7 is a cash receipt issued by Bharatiya Arogya Nidhi

Sheth Kantilal C. Parikh General Hospital on 16-17th June, 2001. This is a receipt for doing X-Ray, where from no decision can be taken as regard to the intentional pushing off by the husband. The Exhibit 9 is a prescription dated June 29, 2001, where medicines were prescribed. Exhibit 9A is the discharge summary of the petitioner from Apollo Hospital of Chennai. The date at one place is indicated as May 8, 2002, in other place it is indicated as January 10, 2006. In this discharge summary no where it has been indicated that fall from the staircase was caused for pushing or for an accident and by producing the aforesaid discharge summary the wife got the reimbursement from the medical insurance company. It is common knowledge that for any injury caused other than an accident, no medical claim is allowed under the medical insurance.

41. It was argued on the basis of such exhibits that it was not possible from the said documents to arrive at any finding that the husband has intentionally pushed the wife and accordingly the findings arrived at by the learned single Judge that such pushing should be considered to be an act of physical cruelty was clearly perverse. It was argued that the Trial Judge in coming to the conclusion referred to the intentional pushing from the staircase had relied upon the evidence of the plaintiff wife and her father and completely disregarded the evidence of the husband.

42. In disbelieving such evidence the learned Trial Judge had relied upon the evidence of DW1 when he was cross-examined on 3rd August, 2009. The learned Judge had relied upon Exhibit 6 in which a letter was written by the husband immediately after the incident admitting his guilt and in the said letter it is said that due to his hot temper he had pushed her and he was extremely remorseful of his act and expressed his regret over the incident. The said letter was written at 8.55 a.m. in the morning of 17th June, 2001 after the incident occurred during the intervening night i.e. early morning of 17th June. 2001 at 1.30 a.m.

43. It was contended that on wrong appreciation of the evidence and misconstruing the circumstances under which the said letter was written the Trial Court had arrived at an erroneous conclusion. It was further contended that the said letter was written under duress as the husband was threatened with police complain. In fact, on 26th June, 2001 he received a midnight knock and thereafter taken to the police station on the ground that a complain was lodged by the wife with the concerned police station and a case was registered u/s 498A of the IPC. On 26th June, 2001 the said FIR was lodged by the wife and on the basis of such FIR the husband and the Mother-in-law was arrested.

44. The Mother of the appellant was released on 2nd July, 2001 and subsequently, the appellant was released on 5th July, 2001. It was further contended that prior thereto after the release of the wife on 18th June, 2001 on flimsy ground she got admitted to the Apollo Hospital on 19th June, 2001 and she was subsequently discharged on 26th January, 2001. The appellant denied that he was not by the side of the wife during hospitalization. In fact, it was contended that the mother-in-law of the husband rushed to Mumbai to see her

daughter-in-law on 20th June, 2001 and thereafter on 22nd June, 2001 the appellant joined his office. It was contended that on 21st June, 2001 when the mother of the appellant came to see the respondent, the parents-in-law abused her with filthy words and threatened her with dire consequences. In view of such unhealthy atmosphere prevailing and due to shortage of space the appellant removed her mother to another place.

45. On 23rd June, 2001 the appellant received a telephone message from his father from Calcutta that the father-in-law of the appellant had lodged a missing diary at Versova P.S. and receiving such information, the appellant and his mother went to Versova Police Station. Subsequently, as mentioned hereinabove, they were arrested at the midnight of 26th June, 2001.

46. In so far as the incident of 16th June, 2001 is concerned, the husband had a different story to tell. It was contended that on 16th June, 2001 at around 1.30 a.m. when he returned home he found his wife fuming and suddenly she flared up and started abusing the appellant for returning home at 1.30 a.m. The appellant tried to pacify her and being unable to make her calm the appellant attempted to leave the place. During such attempt, the wife followed him and she was wearing a nightgown. According to the husband the said night gown got entangled in the feet of the wife which resulted in her falling down from the staircase and it is not a fact that the wife was intentionally pushed by the appellant.

47. It was on the appreciation of the evidence as summarized by us in the preceding paragraphs, the Court has arrived at a finding on cruelty in favour of the wife and also arrived at a finding that the marriage has irretrievably broken down. It has been argued on behalf of the appellant that the Court has to give a definite finding as to cruelty and no decree could be passed for divorce on the ground of irretrievable break down of marriage. It was further contended that irretrievable break down of marriage is not one of the grounds for granting divorce and the Court has no power to pass a decree for divorce. At the highest the Court may in exercise of its power u/s 27A of the Special Marriage Act if it considers "just" having regard to the circumstance of the case, pass a decree for judicial separation instead of a decree of divorce. The word "just" appeared in section 27A does not give the power to the Court to pass a decree for divorce on just cause and the Court has no jurisdiction to pass a decree of divorce on the ground of irretrievable break down of marriage.

48. It was submitted because the "just" is not equivalent to irretrievable break down of marriage and accordingly the finding of the Court that a decree is required to be passed on the ground of irretrievable break down of marriage is contrary to the provisions of the Special Marriage Act and without jurisdiction.

49. We have considered the exhibits and the evidence on record. It is not in dispute that some untoward incidents happened on the fateful night of 16th June, 2001. It appears that dissension of the wife was brewing and may have

ultimately flared up on 16th June, 2001.

50. The relationship of the husband and wife does not appear to be congenial and even if the marriage can be said to have been consummated that by itself would not mean that the wife would not be entitled to a decree for divorce if she could prove cruelty. The letter of the father-in-law written on 2nd May, 2001 clearly shows that the father of the appellant was extremely unhappy about the conduct and behaviour of his son towards his daughter-in-law. In fact, in the said letter, the father had narrated the past incidents of slapping Mitul by Rajesh in connection with purchase of one "Pepsi bottle" or throwing of Borosil Glass Bowl on the floor of the kitchen and throwing hot cooked chicken on the floor. In the said letter it would give a clear indication that such incidents, in fact, had happened.

51. It would also appear from the said letter that on 27th April, 2001 Rajesh flared up and slapped Mitul since she wanted to know the actual amount which would ultimately be remitted to the mother of the appellant so that the item wise monthly expenditure would be recast. It appears that the father was aware of such incidents and he expressed his regret that the appellant was completely under the influence of mother and hence no effective action would be taken by him except counseling him time to time and reminding him to understand Mitul "closely and independently". There is very interesting line in the letter which we though throw some light on the conduct of Mitul in relation to Rajesh which is reproduced hereinbelow:

During our consoling to both Rajesh & Mitul, they were given full opportunity to spell from their mind which were causing impediments. Rajesh could point out one incident for which Mitul was found on the wrong side. Mitul only ventilated her views to Rajesh but did not act. She immediately realized the mistake and apologized to Rajesh in our presence. On the other hand Mitul could mention numerous irrational behaviour of Rajesh including skirmishes & vocal castigations. Rajesh was found to be tired due to pressure of work, mentally disturbed due to credit card loan or by ill advise from some concern. And exactly, this was reason of flare up. Mitul wanted to set right the disorder and wanted transparency in family expenditure, so that, they could overcome hurdles without the help of both side parents. This, perhaps, hurt the sentiment of Rajesh who never gave accountal to his parents. He started sinking with problems and could not find way out.

52. The said letter also records the unkindly behaviour Mitul received from her mother-in-law and it also records that the said mother-in-law suggested Mitul to get divorce if she could not adjust with Rajesh which was not expressing from her.

53. It seems that during marriage something happened which is reflected from the said letter which is reproduced hereinbelow:

(e) Not greed but grievances out of lack of protocol during marriage time also must have worked in the minds of my wife. But those are now irrelevant.

54. The father-in-law praised Mitul for her calmness even in such difficult situations. It would further appear that the father of Mitul tried to pacify Rajesh and was making all efforts to rectify him. The said father-in-law tried to even mediate in such sensitive situation to bring about a peace in the said family. It further appears that Rajesh was accepted by the family of the Mitul for his taste, efficient management in the office and his ambition to go higher up but at the same time Rajesh could not maintain tranquillity in the home front. These are some of the facts borne out from the letter of the father of Rajesh.

55. However, placing too much reliance on the evidence on 17th June, 2001 for the purpose of arriving at any conclusion of physical cruelty in our view could not be just and proper and stretching it too far. Even going by the testimony of the wife of the incident that had taken place on 17th June, 2001 at 1.30 a.m. she was trying to resist the husband and some altercation had taken place in the staircase which is resulted in a fall. It cannot be said with any certainty on the basis of the evidence on record that such fall of the wife was due to some intentional pushing by the husband. The intensity and/or gravity of the injury also may not be at all times conclusive of the fact that such injury had taken place due to some perpetration of an intentional and deliberate act to cause such injury. Moreover, it cannot be ruled out that there was no provocation on the part of the wife which might have resulted in some altercation and/or reaction on the part of the husband. It is not in doubt that some exchange of words preceded such incident. From the sequence of events it cannot be said that the proximate or immediate cause of such injury was any intentional pushing by the husband. In fact, if the wife was chasing the husband down the staircase, she should be behind the husband and in our view the accidentals slip of the wife resulting in such fall could not be ruled out. Even otherwise if the wife is facing the husband and the husband in his desperation and momentary rage of fits and anger tried to force his way out and in the process the wife gets injured it cannot be contended that it is an act of cruelty. The evidence of the wife also does not inspire any confidence of deliberate and intentional pushing by the husband as the cause of such injury. Significantly there is nothing on record to show that even the hospital authorities informed the police about any injury being caused due to such alleged intentional pushing by the husband.

56. Thus, the conclusion that there has been an intentional pushing and physical assault resulting in the fall cannot be sustained. The past incidents of cruelty which according to the learned Single Judge has been condoned by the plaintiff wife at least upto February, 2001 does not appear to us to be an act as grave as to constitute cruelty. Although there were instances of slapping the wife on few occasions it would appear that the said husband was passing through mental agony and was facing financial stringency and there were other work place-related problems.

57. However, we are of the view that it may be a fit case for judicial separation on "just" cause u/s 27A of the Special Marriage Act and accordingly we modify

the decree of divorce to a decree for judicial separation.

58. We fully agree with the learned Trial Court that the acrimony between the parties have reached to such an extent that they cannot be compelled to live as husband and wife. The incident of 17th June, 2001 has left an impression in the mind of the wife and there is no possibility -of them reunited. Since a definite conclusion on the aspect of physical cruelty cannot be reached on the basis of the incident of 17th June, 2001 and the materials on record and no positive conclusion could be reached with regard to the act of pushing resulting in the fatal fall we are unable to hold it in favour of the wife. In so far as the mental cruelty is concerned on the basis of the evidence on record the past incidents before 17th June, 2001 cannot be said to be such grave incidents which can cause mental cruelty and we have already indicated the reasons earlier in the judgment for not accepting such plea. At the same time, on the basis of the appreciation of evidence it also cannot be ruled out that the relationships between the parties have become bitter and more so after 17th June, 2001 and that is why we convert this decree of divorce into a decree for judicial separation. In view of the aforesaid (he decree for dissolution of marriage on the ground of cruelty is set aside and a decree for judicial separation is passed instead.

59. Before we part with we record that although attempts were made to settle the matter but such attempts had failed. Although it appears to us that it could have been a case of irretrievable breakdown of marriage but having regard to the law laid down by the Hon''ble Supreme Court in Neelam Kumar Vs. Dayarani, the same cannot be considered to be a ground of divorce since the said ground has not been included by the legislature either in the Hindu Marriage Act or in the Special Marriage Act.

60. In this case the parties are separated for more than 11 years and the marriage is dead for all practical purposes and there is no chance of it being retrieved, the continuance of such marriage would itself amount to cruelty in the sense that the marriage has broken down irretrievably but the High Court has no jurisdiction to pass such a decree of divorce on the ground of irretrievable breakdown of marriage.

61. The Hon''ble Supreme Court in exercise of its power under Article 142 granted dissolution of marriage where it appears that such marriage is totally unworkable, immediately dead, beyond salvage and broken down irretrievably, even if facts of case do not provide ground in law on which divorce could be granted. In Manish Goel Vs. Rohini Goel, the Hon''ble Supreme Court has also noticed the legislative gaps in such matters and the divorce on the ground of irretrievable breakdown of marriage was granted in exercise of Article 142 in some cases Neelam Kumar Vs. Dayarani,

62. In Neelam Kumar Vs. Dayarani, the Hon''ble Supreme Court had taken note of its earlier decision in Vishnu Dutt where it has been held that irretrievable breakdown of marriage is not a ground for divorce. The Hon''ble Supreme Court

in Paragraph 15 has considered the said view and held that it is for Parliament to enact or to amend the law and not for the Courts. The Hon"ble Supreme Court in paragraphs 13 and 15 expressly held that it can only be done by legislation and not by Court, the said Paragraphs 13 and 15 are reproduced hereinbelow :- 13. The counsel for the appellant then submitted that the appellant's marriage with the respondent had completely broken down with no hope of revival and compelling them to live together would be very hard and unjust. He made a plea for dissolution of marriage on the ground of its irretrievable breakdown. In support of the submission, learned counsel relied on the judgment of this Court in Satish Sitole Vs. Smt. Ganga, wherein it was held in the last paragraph as follows:

14.... that since the marriage between the parties is dead for all practical purposes and there is no chance of it being retrieved, the continuance of such marriage would itself amount to cruelty, and, accordingly, in exercise of our powers under Article 142 of the Constitution we direct that the marriage of the appellant and the respondent shall stand dissolved...

15. Moreover, in a later decision of this Court in Vishnu Dutt Sharma Vs. Manju Sharma, , it has been held that irretrievable breakdown of marriage is not a ground for divorce as it is not contemplated u/s 13 and granting divorce on this ground alone would amount to adding a clause therein by a judicial verdict which would amount to legislation by Court. In the concluding paragraph of that judgment, the Court observed:

12. 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 Parliament to enact or to amend the law and not for the Courts.

63. However, we feel before we part with that the legislature must give a serious thought to include irretrievable breakdown of marriage as a ground for dissolution of marriage since the marriage cannot be considered to be a gordian knot and it is no more sacramental in view of the codification of Hindu Law resulting in coming into force the Hindu Marriage Act, 1955 and having regard to the prevailing social conditions where both the spouse would like to be independent and there may be an irreconcilable situation. The traditional approach of marriage is replaced by contractual desire as reflected in that Act with "saptapadi" introduced seemingly to give it a flavour of religious sanction. Marriage is now more in the realm of contract with some rules and regulations creating mutual rights and obligations so that the painful episode of "Swetoketu" is not revisited. However, having regard to the present social scenario, the aspiration of the parties and the level of tolerance prevailing the parties cannot be made to remain united artificially with the soul missing and any such compulsion would, in our mind, affect and/or likely to affect the future of the parties who once might have agreed to marry. The Hindu Law has undergone

various changes after codification in 1955 and some amount of flexibility should be introduced in the matters relating to marriage and divorce so that the free will of the parties are honoured, appreciated and at the same time social objective is also achieved. Since at the end of the day, the marriage is a contract and not a sacrament and social problems need to be addressed in its proper perspective, it is high time that legislature should consider it as a ground for divorce in matrimonial laws. Photostat certified copy of this judgment, if applied for, be supplied to the parties.

P.C. Ghose, J.

I agree.