

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

**SHRI JUSTICE SUJOY PAUL
&
SHRI JUSTICE PRAKASH CHANDRA GUPTA**

FIRST APPEAL No. 16 of 2010

BETWEEN :-

**KUNAL KANT SAXENA S/O LATE RADHIKA
PRASAD, AGED ABOUT 51 YEARS, R/O 7
SHASTRI NAGAR SHIVPURI PRESENTLY
RESIDING AT 86 PINK CITY EASTERN RING
ROAD INDORE (M.P.)**

...APPELLANT

(BY SHRI P.S. GAHARWAR – ADVOCATE)

AND

- 1, SMT. SANGEETA SAXENA W/O KUNAL
KANT SAXENA, D/O CHANDRA SAROJ
SAXENA AGED ABOUT 45 YEARS, R/O
F-48/6 SOUTH T.T.NAGAR BHOPAL
(MADHYA PRADESH).**
- 2. ASHUTOSH PANDEY S/O D. N. PANDEY,
R/O 216-4, GOVT. QUARTER KOTRA,
SULTANABAD, DISTT. BHOPAL (M.P.)**

...RESPONDENTS

(BY SHRI AMIT VERMA – ADVOCATE)

Reserved on	:	08/12/2022
Pronounced on	:	20 /12 /2022

*This First Appeal having been heard and reserved for judgment, coming on for pronouncement this day, **Hon'ble Shri Justice Prakash Chandra Gupta**, delivered the following:*

J U D G M E N T

Appellant/ husband filed this appeal u/s 19 of the family courts act, 1984 r/w section 28 of the Hindu marriage act, 1955, against the judgment and decree dated 10/12/2009 passed by the IInd additional principal judge, family court, Bhopal in RCS no. 433A/2004, whereby the learned trial court has dismissed the petition u/s 13(1) of the Hindu Marriage Act, 1955, filed by the appellant.

2. It is an admitted fact that marriage of appellant/ husband and Respondent no.1/ wife was solemnized on 27.06.1985, as per Hindu rites and customs in Jhansi, Uttar Pradesh. From wedlock of both the parties, son, Sandal Saxena (PW/ 2) and daughter, Sargam Saxena (PW/ 1) were born on 01/06/1986 and 28/01/1991 respectively. Husband was transferred on 20/08/2001 from Bhopal to Indore, thereafter, he used to live in Indore with his children. Husband was posted at Shivpuri from 1985 to 1992, at Gopalganj (Bihar) from 1992 to 1995, at Sagar from 1995 to 1996, at Khurai from 1996 to 1997, at Bina from 1997 to 1999 and at Bhopal from 1999 to 2001. It is also an admitted fact that the wife was appointed as a teacher in 1988 in Government Girls School Mangrauni, distt.- Shivpuri. She used to up-down from Shivpuri to Magrauni. An intimation was given by wife that on 29/09/2000, husband had physically assaulted Sandal Saxena (PW/

2), an FIR was lodged against the husband and after investigation a charge-sheet was filed u/s 323 and 294 of the Indian Penal Code against the appellant/ husband.

3. The appellant/ husband filed a petition u/s 13 of the Hindu Marriage Act, 1955, stating that after solemnization of marriage, wife came to husband's home at Shivpuri and after 2-3 days, she went to her parental home and she lived there for approximately 2 months. When husband was transferred to Ringnod, distt- Ratlam, wife had denied to go with him. During posting of husband at Shivpuri (1985-1992), relation between the parties had become strained and she repeatedly used to go to her parental home. She used to leave home without informing about the same to anyone in the house. She used to misbehave with her husband and his parents. After 5 months from the birth of Sandal (PW/2), she left the home without informing to her husband. Then her husband on 01/11/1986 had reported at P/S Shivpuri. Thereafter, she was found in the house of Anant Trivedi at Jhansi. She told on being asked, that she likes Anant Trivedi, she wanted to marry him but her parents solemnized the marriage with the appellant without her will. During posting of Mangrauni, she had relation with Irshad. In year 1989, she was transferred to Masoori, Distt.- Bhind on the post of lecturer. Alongwith Irshad she used roam in street and go to hotel and rest-house on his motorcycle and used to come late at night.

4. During posting of Gopalganj, Bihar of husband, wife used to go to him but her behaviour was not good. She always used to quarrel and intimidate. Wife and children used to live in Bhopal while the husband was posted at Sagar, Khurai, Bina and Bhopal (1995-2001), the wife

was posted as a lecturer as Kasturba Girls School North TT Nagar, Bhopal. At that time respondent no.2 was also posted as an assistant teacher in that school, during which wife/ respondent no 1 and respondent no 2 developed a strong bond which resulted into love affair. Husband stopped wife to meet respondent no. 2 and taught her but she did not agree. In the month of February 1992, the wife fought with the husband and torn her clothes herself, broke and threw the articles of house, resultingly she attempted suicide, past 2 days of the incident, husband got her admitted in a Akshay hospital in Bhopal and intimated about the incident at P/S Habibganj, but a cousin of wife, Upmanyu Saxena (DW/ 2) was posted as SI at P/S Habibganj, who suppressed the matter.

5. On the occasion of birthday of Sargam Saxena (PW/ 1) on 28/01/2000, the wife had left the house before several invited guests had come and came back after 2 days on 30/01/2000, meanwhile the husband saw his wife with respondent no. 2, roaming around on his motorcycle on 29/01/2000. Behaviour of wife had led to husband's mental distress, his reputation was diminishing in the society, therefore, he filed application before Parivar Paramarsh Kendra for counselling. But despite calling repeatedly by summons, she was never present for counselling. Thereafter, wife, her-real brother Amar Choudhary and Upmanyu Saxena threatened to kill the husband and his children. Due to cruel behaviour of wife the husband left home on 09/08/2000 and filed a written complaint at P/S Habibganj, Bhopal. On 10/08/2000, Upmanyu Saxena (DW/ 2) alongwith respondent no 1, wife, came at husband's office and apologised and assured that in

future wife will not misbehave with him, husband returned to home on the same day.

6. On 29/09/2000 on a small cause the wife assaulted Sandal (PW/2) with tongs and on being intervened by the husband, she ripped off her clothes and bit her lips with teeth, lodged a false report against the husband, there upon police filed a charge-sheet against the husband u/s 323 and s.294 of IPC in Bhopal court. Therefore, on being seriously bothered by the wife, he left home on 20/05/2001 and started living in the training hostel of Bank. He intimated the police but no action was taken. On 18/01/2001 when appellant was in Jaipur, respondent no 2 came to his home at night and then both of his children had seen wife and respondent no 2 in an objectionable position, then the wife asked children to sleep and locked them in a room. After a while, respondent no 2 left the house and followed by the wife, who left at 01:00 AM by scooter. She returned at 05:00 AM. Husband returned from Jaipur on 20/01/2001, both the children and guard Ramphal told him about the aforementioned incident. Appellant/ husband inquired with the wife, then she verbally abused and quarrelled with him. Therefore, the appellant/ husband finally left his home on 20/05/2001 to live in a rented apartment.

7. Appellant/ husband also pleaded that thereafter respondent no 2 used to come frequently at night to make illicit relationship with wife of appellant. This incident has been witnessed by several colony members and the guard and they had intimated about the same to the appellant. From the behaviour of respondent/ wife both the children went directly to the appellant's house on 01/08/2001 to live with him and respondent/ wife was alone in his house. Then respondent no 2

went to house of appellant at night and was seen by guard while the wife and respondent no 2 were indulged in an obscene act. The same was told by guard Ramphal to the patrolling police at night. Then on 02/08/2001 at 04:00 AM patrolling police caught respondent no 2 while he was leaving. The police took him to the P/S but because of influence of SI Upmanyu Saxena (DW/ 2) no action was taken against respondent no 2. The wife has not been contacted with husband and children since 03/10/2001.

8. Respondent no. 1/ wife has denied all averments. In her written statement, except admitted fact and has stated that after the marriage, behaviour of appellant/ husband was not good with her. At the beginning husband and his family members wanted money as dowry and used to taunt her for less dowry. Husband is an alcohol addict. He always physically assaults respondent no1/ wife after getting intoxicated and later on he used to apologise for his act after getting normal. Looking at the future of family and children, respondent no.1/ wife used to forgive him. Husband got a house constructed after taking loan from bank and sold the ornaments worth Rs. 60,000/- of the wife without her consent. Father of the wife also gave appellant/ husband a sum of Rs. 45,000/- for the construction of house. Husband was annoyed from the birth of daughter, Sargam Saxena (PW/ 1), and used to say that respondent has created a load on him. Respondent no.1/ wife has always taken responsibility of maintenance of children, appellant/ husband never took this responsibility. Respondent no 1/ wife has always supported the appellant/ husband. In 1997, appellant bought a Maruti car, then the margin money was paid by the wife. Appellant/ husband used to put on false allegation on the wife and

stated that he is making distinct stories to get divorced from his wife and started to complain to police for small causes. At last he blackmailed the children and without the will of the wife took the children with him.

9. Respondent no. 1/ wife also pleaded that criminal case no. 35278/2006 State of Madhya Pradesh V. Mohan Kumar and ors. was instituted on the report of appellant/ husband and was decided on 20/09/2006 by Judicial Magistrate Ist class, Bhopal. Thereby, respondent no.1/ wife was acquitted, therefore, it is clear that the allegations levelled by the appellant/ husband on the respondent no 1./ wife were false and fabricated. Respondent no.1 / wife has never left her matrimonial home without telling the appellant. She has never had illicit relationship with Anant Trivedi, Irshad and Ashutosh Pandey (respondent no. 2). She never misbehaved with appellant/ husband and never deserted him. All allegations levelled by the appellant/ husband upon respondent no. 1/ wife are baseless, false and frivolous. The appellant/ husband himself deserted the respondent no. 1 and had a cruel behaviour with her. Therefore, petition filed by the appellant, is liable to be dismissed with cost.

10. Respondent no.2 filed a separate written statement and denied all averments of the petition and pleaded that all the allegations levelled upon him by the petitioner are false, frivolous and baseless. Hence, petition is liable to be dismissed.

11. The learned trial court has framed 4 issues. Petitioner has examined Sargam Saxena (PW/ 1), Sandal Saxena (PW/ 2), himself Kunal Saxena (PW/ 3) and elder brother Kamalkant Saxena (PW/ 4) in

support of the petition whereas defence, the wife, Sangeeta Saxena examined herself (DW/ 1), cousin Upmanyu Saxena (DW/ 2), younger sister Sarika alias Deepa, father Chandra Saroj Saxena and mother Sudha Saxena. Respondent no. 2 also examined himself. The learned trial court after appreciating the evidence, did not believe the husband and his witnesses and has dismissed the petition of divorce.

12. Shri PS Gaharwar learned counsel for appellant/ husband has submitted that impugned judgment and decree is perverse. The learned trial court has erred by disbelieving the statement of petitioner/ husband and his witnesses. The learned trial court has committed a grave error in holding that the appellant could not prove the cruelty, desertion and adultery by respondent no. 1. findings of the learned trial court in respect of issues are against the evidence available on the record. Learned counsel for the appellant has placed reliance on the case of Dinesh Nagda V Shanti Bai [2011 (3) JLJ 299]; Prem Narayan Sahu V Smt. Manorma Sahu [F.A. no. 60/2002, decided on 21/11/2013]; A. Jaya Chanda V Aneel Kaur [2005 (1) Supreme 626]; Narendra V K. Meena [Civil Appeal no. 3253/2008, decided on 06/10/2016] and Rani Narsimha Sastry V Rani Suneela Rani [Civil Appeal no. 8871/2019 decided on 19/11/2019].

13. Learned counsel for the respondent No. 1, Shri Amit Verma, supported the impugned judgment and decree and submitted that the learned trial court has rightly given findings on the issues on the basis of evidence available on the record. Learned counsel for the respondent no 1 placed reliance upon the case of Shyam Sundar Kohli V Sushma Kohli @ Satya Devi [2004 (7) SCC 747]; Asha Soni V Ram Swarup Soni [1991 (2) DMC 615]; Krishna Kumar Sinha V The Kayastha

Pathshala (Prayag) [AIR 1966 Allahabad 570]; Jyotishwar Sen V Anjana Sen [I (2011) DMC 18 (Guwhati)]; Savitri Pandey V Premchand Pandey [(2002) 2 SCC 73]; Avadhesh Mani Mema V Saroj Amita Mema [1990 (1) DMC 327] and Bharati Devi V Sheo Narayan [I (1984) DMC 150 (MP)].

14. We have heard learned counsels for the parties and perused the records.

15. During pendency of this appeal, respondent no.1/ wife has filed an application, I.A. no. 13356/2013, under order 41 rule 27 of the Code of Civil Procedure on 20/11/2013 for taking additional documents on record. We have also heard the parties on I.A. no 13356/2013.

16. Learned counsel for the respondent no.1/ wife submits that in criminal case no. 35278/2006, respondent no.1 has been acquitted by judgment dated 20/09/2006 (Annexure R1), copies of mark-sheet of Sandal Saxena (PW/ 2) (Annexure R2, R3), copies of manual deposit receipt of Sandal Saxena (PW/ 2) (Annexure R4), a copy of manual deposit receipt of Sargam Saxena (PW/ 1) (Annexure R5), copy of the SBI account statement of respondent no.1/ wife (Annexure R/6), photographs of a woman namely Manisha Saxena and appellant and others (Annexure R7-R9) are necessary documents for the purpose of determining material question in controversy between the parties. Therefore, application may be allowed and annexed documents may be taken on record as additional evidence. Application is supported by affidavit of respondent no.1/ wife.

17. Appellant has not chosen to file reply of I.A. no. 13356/2013. learned counsel for the appellant submits that the annexed documents

are not necessary to decide the case, therefore, the application is liable to be rejected.

18. The Apex court in the case of **Sanjay Kumar Singh V State Of Jharkhand [2022 LiveLaw (SC) 268]**, has held as under:-

“4. It is true that the general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. It may also be true that the appellate court may permit additional evidence if the conditions laid down in this Rule are found to exist and the parties are not entitled, as of right, to the admission of such evidence. However, at the same time, where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed. Even, one of the circumstances in which the production of additional evidence under Order 41 Rule 27 CPC by the appellate court is to be considered is, whether or not the appellate court requires the additional evidence so as to enable it to pronouncement judgment or for any other substantial cause of like nature. As observed and held by this Court in the case of A. Andisamy Chettiar v. A. Subburaj Chettiar, reported in (2015) 17 SCC 713, the admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. It is further observed

that the true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced.”

19. In the instant case the respondent no.1/ wife, in paragraph 20A of her written statement has clearly pleaded that she was acquitted on 20/09/2006 in criminal case no. 35278/2006. Therefore, on the ground of acquittal it shows that the allegations levelled by the appellant against respondent no.1/ wife were false and it proves that the aforementioned allegation was framed in order to get divorced, and because of the aforementioned case, the respondent no.1/ wife had to bear a lot of mental agony. The appellant has not denied the aforementioned pleadings in his petition. Therefore, it is clear that the appellant has not disputed the factum of acquittal of respondent no.1/ wife in the aforementioned criminal case.

20. Alleged judgment of criminal case was passed on 20/09/2006 and the impugned judgment was passed on 10/12/2009. The Respondent no.1/ wife could have filed the alleged judgment before the trial court but she had not filed before the learned trial court. Learned counsel for the appellant is unable to show that why the annexed documents are necessary for the proper adjudication of the matter. Perusal of the case it appears that the annexed documents are neither a sine qua non for the removal of the clouds of doubt in the instant matter nor have a direct and important bearing on the main issue in the suit and in interest of justice clearly renders it imperative that it may be allowed to be permitted on record. Therefore, IA no. 13356/2013 is rejected.

21. The appellant/ husband filed a petition before the learned trial court for divorce against respondent no. 1, wife, on the basis of 3 grounds namely- adultery, cruelty and desertion, as provided u/s 13(1) (i), 13(1)(ia) and 13(1)(ib) respectively. It apposite to discuss the relevant part of the provision of the Hindu Marriage Act, 1955, i.e. section 13 and section 23, which is reproduced 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]...”

“23. Decree in proceedings.- (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that ;

(a) any of the grounds for granting relief exists and the petitioner [except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5] is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified in clause (i) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the

petition is cruelty the petitioner has not in any manner condoned the cruelty,”

22. In respect of cruelty, in the case of **A. Jaya Chanda (Supra)**, a coordinate bench of this court has held as under:-

“12. To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

23. In the case of **Prem Narayan Sahu (Supra)**, a coordinate bench of this court has held as under:-

“6. As regards the allegation of desertion, the wife has admitted in para 10 of her evidence that she has

not gone to her matrimonial home since 1986. The husband had sent a legal notice dated 25.3.1986, Ex.P1, to the wife to return home but to no avail. It is, therefore, clearly established that the wife is living separately from her husband since last 27 years. As already stated above, after about five months from the date of passing of ex-parte decree of divorce in favour of husband, he remarried to a widow Saroj with whom he has two children. The marriage of the husband with wife has irretrievably broken down. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. In K. Srinivas Rao (supra) the Supreme Court has held that this is because marriage involves human sentiments and emotions and if they are dried up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree. The husband is, therefore, entitled for divorce on the ground of desertion also. We accordingly set aside the judgment and decree passed by the trial court and allow the husband's petition for divorce.

24. In the case of **Dinesh Nagda (Supra)**, a coordinate bench of this court has held as under:-

“20. So far as the issue of desertion is concerned, Section 13(1)(ib) of the Act requires desertion for a continuous period of not less than two years immediately preceding the presentation of the divorce petition. In the present case, the respondent Shantibai has admitted that she is living separately with her parents since 1995-1996 (since 9-10 years prior to giving the affidavit before the trial Court, on 26/7/2005). The statement of the appellant also indicates that the respondent is living separately with her parents since 1995-96. The appellant has stated that he had no marital relation with the respondent since last 10-11 years. He has stated that for that reason he is having “dry life” for last several years.

The aforesaid position is also reflected from the statements of the other witnesses. The respondent's plea that she is living separately on account of the second marriage of the appellant cannot be accepted because the respondent has failed to produce any reliable evidence establishing the second marriage of appellant with Radhabai. The reliance on the affidavit (Ex.D.15) given by Radhabai does not establish second marriage since she has only stated that she is living in the appellant's protection for certain reasons, but she has not stated that she is living as wife of the appellant. Though the respondent has stated that she is ready to live with the appellant, but the father of the respondent has categorically stated that it is not possible for the respondent to live with the appellant. The respondent has failed to establish any reasonable cause for living separately for last about 15 years. Thus, it is clear that the respondent has deserted the appellant and ground for divorce under Section 13(1) (ib) of the Act is made out.

25. In the case of **Narendra (Supra)**, Apex court has held as under:-

“15. Taking an overall view of the entire evidence and the judgment delivered by the trial Court, we firmly believe that there was no need to take a different view than the one taken by the trial Court. The behaviour of the Respondent wife appears to be terrifying and horrible. One would find it difficult to live with such a person with tranquility and peace of mind. Such torture would adversely affect the life of the husband. It is also not in dispute that the Respondent wife had left the matrimonial house on 12th July, 1995 i.e. more than 20 years back. Though not on record, the learned counsel submitted that till today, the Respondent wife is not staying with the Appellant. The daughter of the Appellant and Respondent has also grown up and according to the learned counsel, she is working in an IT company. We have no reason to disbelieve the aforestated facts because with the

passage of time, the daughter must have grown up and the separation of the Appellant and the wife must have also become normal for her and therefore, at this juncture it would not be proper to bring them together; especially when the Appellant husband was treated so cruelly by the Respondent wife.

26. In the case of **Rani Narsimha Sastry (Supra)**, the following was held:-

“14. In view of the forgoing discussion, we conclude that the appellant has made a ground for grant of decree of dissolution of marriage on the ground as mentioned in Section 13(1)(i-a) of the Hindu Marriage Act, 1955.

27. In case of **Krishna Kumar Sinha (Supra)**, division bench of Allahabad High Court has held as under:-

“65. It was contended by Mr. Bhargava that since there is no evidence in rebuttal on behalf of the plaintiff, the evidence produced by the appellant regarding the nucleus of joint family property is entitled to acceptance despite its infirmities we however, fail to see how a finding regarding the existence of nucleus of joint family property can be recorded on the basis of the evidence produced by the appellant in this case. It is true that in judging the acceptability of an evidence the absence of contrary evidence is also a factor to be taken into consideration, but the falsity of even an unrebutted evidence may be so patent or the evidence may be so unworthy of credence or so unsatisfactory that the Court cannot regard the fact which is sought to be proved by such evidence as having been proved an evidence may be destroyed or it may be said, sufficiently rebutted by its inconsistencies its improbabilities and its inherent defects and thus cease

to be a fit basis for a finding. For the rejection of such evidence no evidence in opposition is necessary.

28. In the case of **Asha Soni (Supra)**, single bench of this court has held as under:-

“3. Having heard the learned counsel for the parties, I find it difficult to support the impugned decree for divorce passed by the Court below. Cruelty is a ground for divorce under section 13(1)(ia) of the Act, but the term “cruelty” has not been defined. The accepted legal meaning of this expression has been conduct of such a character as to have caused danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger. It may be said that in order to constitute cruelty for the purpose of divorce, there must be such treatment of the petitioner which causes suffering in body or mind whether in realization or apprehension in such a way as to render cohabitation harmful or injurious having regard to the circumstances of each case, keeping always in view the character and condition of the parties. In this context, I find nothing on record to warrant a conclusion that the respondent was entitled to a decree for divorce on the ground of cruelty. In paragraph 5 of his deposition as A.W. 1, the respondent Ram Swarup stated that the behaviour of the appellant was disrespectful. How it was disrespectful, he tried to explain by saying that the appellant refused to work by saying that she was not a maid servant and that she threatened to leave the matrimonial home, if she was asked to work. According to his father Hariram Soni (AW 3), the relations became strained, because the respondent refused to take the appellant to her parents, as the wife of his elder brother had undergone operation. In paragraph 4 of his deposition, he said that the behaviour of the appellant was good for a period of about one month from the date of marriage, but thereafter, it became indecent. How the behaviour became indecent was not explained by furnishing necessary details of relevant facts, which

might have provided basis for forming an opinion about legal cruelty justifying a decree for divorce. The respondent was, therefore, not entitled to any decree for divorce on the ground of cruel treatment.

29. In the case of **Avadhesh Mani Mema (Supra)**, division bench of this court has held as under:-

“8. Before examining the series of acts and conduct constituting cruelty it is essential to refer 23(1)(b) of the Act which casts an obligation on the Court to consider the question of condonation. Condonation operates as bar to the granting of relief. If the Court is satisfied from the evidence on record that petitioner has condoned the cruelty, the Court has no discretion in the matter. Condonation need not be express, it may be implied from the conduct of the parties and circumstances of the case.

There may not be an agreement in the strict sense but there must be an intention to forgive on the part of the offended spouse and willingness to be forgiven by the other.

30. In the case of **Shyam Sundar Kohli (Supra)**, Hon'ble the Supreme Court has held as under:-

“12. On the ground of irretrievable breakdown of marriage, the court must not lightly dissolve a marriage. It is only in extreme circumstances that the court may use this ground for dissolving a marriage. In this case, the respondent, at all stages and even before us, has been ready to go back to the appellant. It is the appellant who has refused to take the respondent back. The appellant has made baseless allegations against the respondent. He even went to the extent of filing a complaint of bigamy, under Section 494 IPC against the respondent. That complaint came to be dismissed. As stated above, the evidence shows that the respondent was forced to leave the matrimonial home. It is the

appellant who has been at fault. It can hardly lie in the mouth of a party who has been at fault and who has not allowed the marriage to work to claim that the marriage should be dissolved on the ground of irretrievable breakdown. We, thus, see no substance in this contention.

31. In the case of **Jyotishwar (Supra)**, division bench of Guwhati High Court has held as under:-

“14. During the course of argument, learned counsel for the appellant placing reliance upon the judgment of the Supreme Court, in the matter of Durga Prasanna Tripathi v. Arundhati Tripathy (AIR 2005 SC 3297) submitted that if the marriage is irretrievably broken then there would be no use compelling the parties to live together and the Court should make every endeavour to break the marriage ties. The facts in the matter of Durga Prasanna Tripathy (supra) were altogether different. There it was proved before the Court that the parties had developed an absolute disliking for each other and despite that the wife on one side and the husband on the other were contesting litigation. In paragraph 29 of the said judgment the Supreme Court observed that in the three cases considered in the said judgment disclosed that reunion was impossible. The Court also observed that it was a matter of record that dislike for each other was burning hot. In the present matter, undisputedly the dislike is one way traffic. The husband asserts that he does not like the wife because she is unchaste. Unfortunately, on any imaginary foundation if the husband develops a disliking for the wife then the husband cannot be allowed to take advantage of his own wrong. It is not the case of the plaintiff-appellant that he wife prior to 1992 was living an unchaste life. If prior to 1992 the wife was living an adulterous life then the husband should have pleaded the said ground in his earlier petitions.

15. Reliance was also placed upon the judgment of the Supreme Court in the case of Naveen Kohli v. Neelu

Kohli (AIR 2006 SC 1675) to contend that the endeavour of the Court should be to bring an end to the marriage which does not survive and where the parties are unnecessarily suffering. In the said matter again the facts were totally different. The Supreme Court came to the conclusion that if the marriage has irretrievably broken then only the Court should pass a decree. In paragraph 96 of the said judgment, the Supreme Court further observed that the Government should take into consideration to make a law that irretrievable breaking of marriage should also provide a ground for divorce. ”

32. In the case of **Savitri Pandey (Supra)**, the apex court has held as under:-

*“17.The marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in *V. Bhagat v. D. Bhagat [(1994) 1 SCC 337 : AIR 1994 SC 710]* held that irretrievable breakdown of the marriage is not a ground by itself to dissolve it. ”*

33. In the case of **Bharati Devi (Supra)**, a single bench of this court has held as under:-

“3. The first contention in support of the appeal had been that out of the two specific acts of cruelty sought to be established at the stage of trial one namely the assault by he on the sister-in-law of the respondent, was not pleaded therefore, and, that part of the evidence must be

ignored. In this the learned counsel for the appellant seems to be right. It is now well settled that specific acts of cruelty must be pleaded to enable the opposite party to meet those allegations and fake and general complaint will not help any party. As the assault on respondent's sister-in-law was not specifically pleaded, any evidence led on this issue will have to be ignored."

34. Now the evidence produced by both the parties in the case is to be considered in the light of legal provisions and principles laid down in the aforementioned judgments.

35. In respect of issue no. 1, relating to cruelty, husband Kunal Kant Saxena (PW/ 3) has stated that his wife had denied to go with him when his posting was in Ringnod Central Bank. During 1985-1992 when he was posted at Shivpuri and used to live in joint family, his wife used to insist him to let her go to maternal home repeatedly. Her behaviour was not good and scornful with his parents and siblings. She used to go to Jhansi, giving excuse of birthday celebration or any other function of her friend, Rekha Sharma, but on being asked to Rekha, she denied about occurrence of any function on the given dates of function by wife. After 01/06/1986 when Sandal Saxena (PW/ 2) was born, respondent no.1/ wife went to her maternal home, without his will. On 05/11/1986 she had left home with her son, stating that she is going to market but she did not return. He started searching for her. He reached Jhansi at 10:00 PM and told about the incident to his in-laws. Thereafter, he returned to Shivpuri and intimated the police. During inquiry ASI Bhadoriya went to Jhansi alongwith this witness and with the help of Uttar Pradesh Police, recovered his wife and child from the house of Anant Trivedi. Thereafter, he took his wife and child to Shivpuri.

36. Brother of husband, Kamal Kant Saxena (PW/ 4) has stated that after marriage both the husband and the wife used to live in Shivpuri and respondent no 1/ wife used to go to her maternal home frequently and she used to meet alone with unknown persons. Her husband used to object for the same, which led to arguments between the two.

37. Sangeeta Saxena (DW/ 1) stated that she never denied to go Ringnod alongwith her husband on place of his posting. When her husband was posted at Gopalganj (Bihar), Sagar, Khurai, Bina etc., she has always been with him. Earlier, they were having a cordial relationship. But later on he started having liquor and used to physically assault her after getting intoxicated.

38. Statement of Kunal Kant Saxena (PW/ 3) is not fully supported by his brother Kamal Kant Saxena (PW/ 4). Rekha Sharma and ASI Bhadoriya were material witnesses in this point but the appellant has not examined them. The appellant has not produced alleged report, which he had lodged at P/S Shivpuri, however the appellant has produced an alleged handwritten statement (Ex.P/ 1) of himself dated 14/11/1986 but there was no sign and seal of the concerning Police Station for the receiving of it. Therefore, aforementioned statement of appellant is not trustworthy.

39. Kunal Kant Saxena (PW/ 3) stated that on 28/01/2000 on occasion of birthday of his daughter, on arrival of the guests, his wife denied to come from the school in the birthday function on being asked by the husband. Thereafter, she did returned home during night on 30/01/2000. Per contra as per pleading, on 28/01/2000 before coming

of the guests she left the home. Therefore, the aforementioned statement of appellant is not reliable.

40. Kunal Kant Saxena (PW/ 3) has stated that respondent no 1/ wife has attempted suicide twice. At first instance it was committed by her when she was confronted by her husband about Ashutosh Pandey. She told him that she has consumed poison but soon after that he took her to Akshay hospital and intimated the police. Police seized a suicide note from the wife but the case was suppressed by Upmanyu Saxena (DW/ 2). Thereafter in year 1999 on occasion of birthday of son, an argument took place between the parties, following which she attempted to hang herself in furtherance to commit suicide, which was stopped by the witness with the help of neighbours by breaking in the room locked by her. Meanwhile the wife called Upmanyu Saxena (DW/ 2). Upmanyu Saxena (DW/ 2) came and took wife and children along with him. In this respect Sandal Saxena (PW/ 2) in paragraph 21 of cross-examination has stated that her mother consumed poison when he was studying in class 7th due to consumption of poison. His mother was admitted in Akshay hospital for treatment. But in respect of first instance of attempt to suicide, Kamal Kant Saxena (PW/ 3) admitted in his cross-examination that he came to know that Sangeeta Saxena (DW/ 1) is admitted in hospital in consequence of food poisoning. Sangeeta Saxena (DW/ 1) has denied in her cross-examination that she attempted to commit suicide. Upmanyu Saxena (DW/ 2) has also denied in his cross-examination that Sangeeta Saxena (DW/ 1) has attempted suicide and the incident was reported in the P/S Habibganj, but he suppressed the matter. Appellant has not produced the alleged report and documents relating to the treatment of wife. Appellant has

neither examined the neighbours, who helped him to break-in nor the doctors who treated respondent no.1/ wife. Therefore, statement of appellant is not reliable and it is not proved that respondent no.1/ wife has attempted to commit suicide.

41. Kunal Kant Saxena (PW/ 3) deposed that, respondent no.1/ wife took the children forcefully with her and he filed a written complaint (Ex.P/ 19) to the P/S Shahjahanabad. Kamal Kant Saxena (PW/ 4) in paragraph 9 of cross-examination stated that Sarika Saxena took Sandal Saxena (PW/ 2) to her home from his home and his mother allured him and took alongwith her from there. But Sandal Saxena (PW/ 2) stated that when he used to live in uncle's house, his aunt (mouisi) Sarika had come to meet him and asked him to come home, so he went alongwith her. He wrote a letter (Ex.P/ 1) on being asked by aunt (mouisi) if he wants to live with his parents. He again wrote a letter (Ex.P/ 2) but in cross-examination he admitted that no one pressurized him to write the two letters. Sandal Saxena (PW/ 2) also stated that his mother took him to her home from her aunt's (mouisi) home. Sarika alias Deepa stated that Sandal Saxena (PW/ 2) met her at home of Kamal Kant Saxena (PW/ 4) and Sandal Saxena (PW/ 2) came with her voluntarily, thereafter, Sangeeta Saxena (DW/ 1) came to her house and Sandal Saxena went with his mother voluntarily. Her statement is also supported by Sangeeta Saxena (DW/ 1).

42. Appellant has filed an intimation (Ex.P/ 20) in P/S Shahjahanabad on 20/08/2001 whereby he intimated the police that Sandal Saxena (PW/ 2) has returned home younger sister of respondent no1/ wife, Sarika alias Deepa stated that Sandal Saxena had come to her house with his own will and when she intimated Sandal Saxena

(PW/ 2) that his mother is upset, thereafter, Sandal Saxena (PW/ 2) went to his home with his mother. Therefore, statement of appellant and his witnesses is not reliable and it does not appear that the respondent no1/ wife had forcefully taken Sandal (PW/ 2) with her from appellant's home. Apart from that respondent no 1/ wife being mother of child, if she had taken her children with her, it cannot be assumed that she forcefully took the children with her.

43. Kunal Saxena (PW/ 3) stated that respondent no. 1/ wife used to deny to make relationship with him. She had stopped to take care of children. But he has not clarified that what was the type of relationship denied by her to be made with him. Sargam Saxena (PW/ 1) in paragraph 15 of cross-examination stated that she and her brother used to live with their mother at Bhopal and their mother used to take care of them. At that time respondent no.1/ wife was in service. Her mother used to go for duty and she used to live in Jhula Ghar and she used to give tiffin to her in Jhula Ghar. She further admitted that during this period her mother regularly took care of her. Therefore, it does not appear that the respondent no.1/ wife had denied over to make relation with appellant and stopped taking care of children.

44. Kunal Saxena (PW/ 3) stated that he denied his wife for sterilization surgery, and he sent registered letter (Ex.P/ 13) to his wife but she had denied to receive the letter (Ex.P/ 13). In paragraph 27 of cross-examination she admitted that in June 2001, she got TT surgery done. In this respect it appears that the respondent no.1/ wife is a government servant and she was already having 2 children, therefore, the learned trial court has rightly held that, the aforementioned act of wife does not come in ambit of cruelty.

45. Kunal Saxena (PW/ 1) stated that the respondent no.1/ wife had threatened to kill him. In this respect he had filed a written complaint (Ex.P/ 7) and (Ex.P/ 10) to P/S Habibganj, but (Ex.P/ 7) is a letter to intimate the SHO Habibganj that appellant left home due to misbehaviour of wife and he also intimated his new address. It has not been mentioned in the letter that the respondent no.1/ wife had threatened to kill the appellant/ husband. There is no readable signature in the letter (Ex.P/ 7 and P/10) and does not bear seal of concerning Police Station. Therefore the learned trial court has rightly not relied on the statement of appellant and complaint (Ex.P/ 7 and P/10).

46. Kunal Kant Saxena (PW/ 3) stated that on 29/09/2000 respondent no.1/ wife had assaulted his son Sandal Saxena mercilessly without any reason. Thereafter she lodged a report against the appellant. In which he was acquitted. He produced case diary statement (Ex.P/ 8) of Sandal Saxena (PW/ 2) and deposition sheet (Ex.P/ 9). Statement of Kunal Kant Saxena (PW/ 3) is also supported by Sandal Saxena (PW/ 2) and Sargam Saxena (PW/ 1). Sangeeta Saxena (DW/ 1) stated that in year 2000, appellant had put on allegations of theft on Sandal Saxena (PW/ 1) and was beating him mercilessly, where she intervened and she lodged a report in police station alongwith her son. As per case diary statement (Ex.P/ 8), Sandal Saxena had given statement that his father was putting on allegations that he took Rs.500/- from his pocket, then his mother said why are you doubting on child, then his father verbally abused his mother and physically assaulted her with fist and kicks. His mother's nose was bleeding. But in his deposition (Ex.P/ 9), Sandal Saxena (PW/ 2) has not supported the case of prosecution and prosecution has declared him hostile and

cross-examined him. Then he admitted that he had given statement to police that his father had interrogated him about theft of Rs.500/-, where he denied the allegation. Further he denied that his mother intervened in between, then his father had beaten her by fist and kicks. Further he admitted that blood was oozing out of his mother's mouth and he clarified that the blood was not oozing out of because of any fight but because of intervening. Therefore, it appears that acquittal of aforementioned criminal case is not disputed by respondent no.1/ wife. It also appears that Sandal Saxena (PW/ 2) was declared hostile by the prosecution in the criminal case and Sandal (PW/ 2) has admitted that his father appellant interrogated him for the theft of Rs.500/- and the mother was injured during intervening, which supports the statement of Sangeeta Saxena (DW/ 1) that appellant had beaten her. Therefore, it does not appears that respondent No. 1 has lodged a false FIR against the appellant, hence, the learned trial court has rightly held that aforementioned statement of Kunal Kant Saxena (PW/ 3) is not reliable that the respondent no.1/ wife had beaten his son and on intervening, respondent had also beaten him.

47. Kunal Kant Saxena (PW/ 3) stated that on being asked by the respondent no.1/ wife on 27/12/2003 and 29/12/2003, Mohan Mishra and Murlu Mishra had come to the bank hiding their identity had a conversation to take loan and tried to get to know the address of the appellant. On having doubt appellant/ husband, he filed a complaint (Ex.P/ 27) about the same in P/S Sanwer, Indore and also filed a complaint (Ex.P/ 28) to S.P. Indore. In this respect he also produced a cutting of the newspaper but none of them was admitted as they were just a cutting piece of newspaper and not the whole newspaper

alongwith the publisher was not examined by the appellant, therefore, aforementioned cutting pieces of newspaper are not admissible.

48. Kunal Saxena (PW/ 3) further stated that the police had filed chargesheet (Ex.P/ 32), thereafter a supplementary charge-sheet (Ex.P/ 36) was also filed against the respondent no.1/ wife. It appears from the aforementioned documents that on the basis of the written complaint filed by the appellant an FIR (Ex.P/ 33) was lodged and chargesheet was filed against Mohan Mishra, Murli Sharma, V.S. Rajput and Sangeeta Saxena (DW/ 1). Sangeeta Saxena (DW/ 1) admitted in her cross-examination that a criminal case was tried against her and other co-accused persons.

49. Respondent no.1/ wife in para 20A of her written statement clearly pleaded that criminal case no. 35278/2006 State of M.P. v Mohan Kumar and ors. was pending before judicial magistrate first class, Indore and she was acquitted on 20/09/2006. The appellant has not denied aforesaid pleading in his petition. Therefore, it appears that in the aforementioned criminal case, which was instituted on complaint of appellant, the respondent no.1/ wife was acquitted by the court. Hence, it also appears that the appellant had lodged false complaint against respondent no.1/ wife in which she was acquitted after the trial, which shows cruelty by appellant/ husband upon respondent no.1/ wife.

50. Sangeeta Saxena (DW/ 1) stated that appellant used to demand money as dowry, her husband used to drink liquor and used to assault her for which she complained to the police. In year 1990, her husband took loan from the bank to construct a house, at that time he sold

ornaments of her worth Rs.75,000/-. Her father had also given him Rs.45,000/-. In year 1998, appellant bought a Maruti car then she had given him a sum of Rs.70,000/-. Her husband used to say that he will plot such stories that children will come in his side. He further denied her to meet with the children and asked to get divorced in order to meet with the children. Father of respondent no.1/ wife, Chadra Saroj Saxena also stated that he has given a sum of Rs.45,000/- to the appellant on being demanded by him. In paragraph 8 of cross-examination he denied that the appellant had returned the sum of money which was demanded by him in furtherance of construction of house, which was given by the witness, therefore, it appears that the appellant has admitting that he demanded and took a sum of Rs.45,000/- from his father in law i.e. Chandra Saroj Saxena but the appellant has not filed any document to show that he returned the aforementioned sum of money to his father in law. Letter (Ex.D/ 7) has been filed by Sangeeta Saxena (DW/ 1), in which Kunal Kant Saxena (PW/ 3) was demanding for a sum of Rs.45,000/- from the father of respondent no.1/ wife for the construction of the house, therefore, statement of respondent no.1/ wife and her father is also supported by letter (Ex.P/ 7) which was sent by appellant. No amount of cross-examination could cause a scratch on the correctness of the statement of respondent no.1/ wife and Chadra Saroj Saxena. Hence, their statement is reliable. Hence, the learned trial court has rightly held that the behaviour of appellant/ husband has been cruel with his wife and it does not appear from the statement of appellant and his witnesses that respondent no.1/ wife committed cruelty on her husband.

51. Therefore, the learned trial court in issue no. 1, has rightly held that the appellant/ husband has failed to prove that the respondent no.1/ wife, after solemnization of marriage, has caused cruelty upon the appellant.

52. In respect of issue no. 2, which relates to desertion, Kunal Kant Saxena (PW/ 3) stated that his wife, brother in law Amar Choudary and Upamanyu Saxena (DW/ 2) threatened to kill him on 08/08/2000, hence, he left home permanently on 09/08/2000 and gave information (Ex.P/ 7) to the police, but he returned back to home on advice of other bank co-workers on 10/08/2000. He further said that thereafter, there was no improvement in the behaviour of his wife and he was worried that his wife can falsely implicate him and he can lose his job. Hence, he left the home again on 20/05/2001 and he gave intimation (Ex.P/ 10) to the police. In paragraph 37 of cross-examination, he admitted that he was living with his wife since 10/08/2000-20/05/2001. It is not disputed by respondent no.1/ wife that firstly, appellant had left her on 09/08/2000 and lastly on 20/05/2001, therefore, it appears that the appellant is living separately from his wife since 20/05/2001 and he filed divorce petition on 05/10/2004.

53. From the statement of appellant it appears that he himself left his house lastly on 20/05/2001 and started living in a different place. It is not found proved that the respondent no.1/ wife had done cruelty upon appellant/ husband, furthermore, no evidence shows that respondent no.1/ wife had compelled the appellant/ husband to live separately. Therefore, it does not show that the respondent no.1/ wife has deserted the appellant for a continuous period of more than 2 years immediately preceding the presentation of the petition.

54. In view of the statement of Kunal Kant Saxena (PW/ 3) and Sangeeta Saxena (DW/ 1), it appears that appellant/ husband himself left home firstly on 09/08/2000 and lastly on 20/05/2001. It has not been found that the respondent had deserted the appellant, therefore, it appears that the appellant himself left home. Hence, as provided under Section 23 of the Hindu Marriage Act, 1955, he cannot take advantage of his own wrong in respect of desertion.

55. In respect of issue no. 3, the learned trial court has not framed issue in respect of illicit relationship of Sangeeta Saxena (DW/ 1) with Anant Trivedi and Irshad. In paragraph 29 of impugned judgment, learned trial court discussed that, as per rule, the appellant has mentioned name but has not given date, place and address of the persons with whom the respondent no.1/ wife had sexual intercourse, in the petition. In this respect, Single Bench of this court in the case of Jaideep Shah V Rashmi Shah Miss Rashmi Vyas 2011(2)MPLJ680, has opined as under:-

“7. In a petition under Section 13(1)(i) of the Hindu Marriage Act, 1955, an allegation of voluntary sexual intercourse by the spouse with a third party is required to be adjudicated. The High Court in exercise of power under Section 14 and 21 of the Hindu Marriage Act, 1955 has framed Rules. Under Rule 2(7)(e)(2) of the Rules, in a petition seeking dissolution of marriage on the ground of adultery, the date and place of the adultery and the name and address of the person with whom the adultery was committed by the respondent is required to be stated. Rule 5 enjoins a duty on the Court to issue notice to the respondent and co-respondent, if any. The aforesaid Rule is in consonance with the principles of natural justice as the finding recorded in the suit would adversely affect the reputation of the concerned person and, therefore, such a person should

have an opportunity to defend his reputation before such a finding is recorded. My aforesaid conclusion finds support from a Division Bench decision of Karnataka High Court reported in Arun Kumar Agrawal, supra. So far as the reliance placed by the learned counsel for the respondent No. 2 on the decision of this Court in Neelam Tiwari, supra is concerned, in the said case, the adulterer was not impleaded as a party in the petition for divorce before the trial Court. In appeal, an objection was raised that since the adulterer was not impleaded as co-respondent, therefore, the petition filed under Section 13 of the Hindu Marriage Act, 1955 was bad on account of non-joinder of necessary party. In the aforesaid context, the learned Single Judge of this Court held that Rules framed by this Court does not mandatorily require the impleadment of the adulterer. The ratio laid down in the aforesaid case is of no assistance to learned counsel for the respondent No. 2, in the facts and circumstances of the case. .”

56. Therefore, it is clear that, as per Rule 2(7)(e)(ii) of Madhya Pradesh High Court rules under the Hindu Marriage Act vide (M.P. Rajpatra Part 4(G), dated 17 May, 1957) in a petition of divorce on the ground of adultery, rape or sodomy, the date and the place of the act/ acts and the name and address of the person/ persons with whom these acts were committed by the respondent are required to be mentioned. In this case the respondent only mentioned the name of Anant Trivedi and Irshad, but has not made him a party or has not given their complete address, date and place of the act. Therefore the learned trial court has rightly held that on the aforementioned ground in respect of Anant Trivedi and Irshad, the petition is not acceptable.

57. Apart from that the learned trial court has also considered the evidence in respect of alleged act of respondent no.1/ wife with Anant

Trivedi and Irshad and held that it is not found proved that respondent no.1/ wife had sexual intercourse with Anant Trivedi and Irshad.

58. In this respect, Kunal Kant Saxena (PW/ 3) stated that the respondent no.1/ wife has strong relationship with Anant Trivedi and Irshad, but has not stated that the respondent no.1/ wife had sexual intercourse with them. Sangeeta Saxena (DW/ 1) has denied that she made strong relationship with Anant Trivedi and Irshad. The appellant has not given any suggestion in the cross-examination of Sangeeta Saxena (DW/ 1) that she had sexual intercourse with Anant Trivedi and Irshad. Hence, aforementioned statement of appellant is not reliable. Therefore, the learned trial court has rightly held that it is not proved that respondent no.1/ wife had sexual intercourse with Anant Trivedi and Irshad.

59. So far as the issue no. 3 is concerned in respect of sexual intercourse by respondent no.1/ wife with Ashutosh Pandey/ respondent no. 2, Kunal Kant Saxena (PW/ 3) stated that respondent no.1/ wife was posted at Kasturba Higher Secondary School, Bhopal and used to live in Kamla Nagar. Respondent no. 2, Ashutosh Pandey was also posted in the same school. At that time this witness was posted at Bina and Khurai and used to come home late at night in Bhopal and there he came to know that in his absence, Ashutosh Pandey used to come. Thereafter he shifted to Kotra, Sultanabad, Bhopal with his wife and children. Then he saw his wife and Ashutosh Pandey used to sit on Sofa and talk when he used to come early from the regular time. His wife and Ashutosh Pandey were having a strong bond. They both used to shake hands in front of the witness. On objection made by the husband, wife used to reply that it is modern era

and all this is common. When Ashutosh Pandey used to come to home, his wife used to send the children out of the house, at that time Upmanyu Saxena also started coming to his home.

60. Kunal Kant Saxena (PW/ 3) further stated that from January 1999, he started to live in Shahpura, P/S Habibganj Bhopal, in a rented house and there too Ashutosh Pandey started to come in his absence. He further stated that on a night he did not return home from his workplace i.e. Khurai, when he returned the next day in evening to his home, then guard told him that a person i.e. Ashutosh Pandey had come alongwith respondent no.1/ wife in Maruti car and that person stayed in his house throughout the night. His children also informed him that they were locked in their room by their mother and at 10:00 PM she went somewhere by car, then this witness was sure that his wife was having illicit relationship with Ashutosh Pandey. He also stated that he intimated the aforementioned incident to Upmanyu Saxena (DW/ 2). Thereafter Upmanyu Saxena (DW/ 2) called the guard and Ashutosh Pandey and guard had identified Ashutosh Pandey as the one who came alongwith Sangeeta Saxena (DW/ 1) in the night.

61. Kunal Kant Saxena (PW/ 3) stated that he was in Jaipur and returned from there on 20/01/2001 then, his children told him that in his absence on 18/01/2001, at night Ashutosh Pandey had came to his home. Between 12:00-01:00 AM, a quarrel took place between his wife and Ashutosh Pandey. Ashutosh Pandey locked the door from outside and went from there. Then respondent no.1/ wife started to shout to open the door, which was opened by the guard, after which at 01:00 AM, wife went out on her scooter and returned at 05:00 AM. On 01/08/2001, his children had directly come to him from school. His

wife was alone at his home, then respondent no 2, Ashutosh Pandey went to house of appellant at night which was seen by the guard Ramphal. The same was told by guard Ramphal to the patrolling police at night. Then on 02/08/2001 at 04:00-5:00 AM patrolling police caught Ashutosh Pandey while he was leaving. The police locked him up in P/S Habibganj, but by influence of Upmanyu Saxena, he was released later.

62. On the basis of aforementioned statement of Kunal Kant Saxena (PW/ 3), it appears that he is a direct witness to only a few incidents which are, when respondent no.1/ wife and Ashutosh Pandey/ respondent no.2 used to sit on Sofa and talk when this witness used to come early from the regular time. They both used to shake hands in front of the witness. It also appears that he is hear-say witness to all the other averments made by this witness as they were either told to him by his children or by guard Ramphal.

63. Children of Kunal Kant Saxena (PW/ 3), Sargam Saxena (PW/1) and Sandal Saxena (PW/ 2) have supported the statement of appellant but these witnesses have given a general statement and have not given specific date of incidents.

64. Sangeeta Saxena (DW/ 1) in paragraph 27 of the cross-examination, denied that Ashutosh Pandey used to come in the absence of husband and then she used to lock the children in a room, she had a strong relationship with Ashutosh Pandey. In paragraph 29 of cross-examination she has denied that, after her husband used to leave house, Ashutosh used to come at night and she used to go alongwith him and return in the morning. In paragraph 30 of cross-examination she has

denied that Ashutosh Pandey was caught by police while he had come but Upmanyu Saxena (DW/ 2) suppressed the matter. Upmanyu Saxena (DW/ 2) in paragraph 10 of cross-examination has denied that in February, 1999, Ashutosh Pandey was caught by police from the house of Kunal Kant Saxena (PW/ 3) in his absence, but he (DW/ 2) suppressed the matter.

65. Ashutosh Pandey stated that he never went to the home of appellant and all the allegations levelled by appellant in respect of illicit relationship with respondent no.1 are false. In paragraph 4 of cross-examination he denied that on 29/01/2000, the appellant saw Sangeeta Saxena (DW/ 1) with Ashutosh Pandey on his motorcycle. In paragraph 5 of cross-examination, he denied that he used to go to the house of Sangeeta Saxena (DW/ 1) in the absence of appellant and used to stay there throughout the night. In paragraph 6 of cross-examination he also denied that on 18/01/2001 when appellant was in Jaipur, he went to home of appellant and was caught by children in an objectionable state. In paragraph 7 of cross-examination, he denied that on 01/08/2001, he went to meet Sangeeta Saxena (DW/ 1) and police had caught him red-handed.

66. Therefore, it appears that Sangeeta Saxena (DW/ 1), Upmanyu Saxena (DW/ 2) and Ashutosh Pandey have denied all the suggestion of the appellant in their cross-examination. It also appears that the appellant has not dared to ask Sangeeta Saxena (DW/ 1) in cross-examination that she had sexual intercourse with the Ashutosh Pandey/ respondent no. 2. The appellant could have examined the guard Ramphal and those patrolling police personal who caught the respondent no.2 and took him to the police station, but he did not

examine the aforementioned witnesses. Therefore, statement of appellant and his witnesses is not reliable.

67. Apart from that Sangeeta Saxena (DW/ 1) stated that the appellant had written letters (Ex.D/ 8 & D/9), in which he was apologised. On perusal of the case it appears that letter (Ex.D/8) was written on 27/01/2001 and date is not mentioned on letter (Ex.D/ 9). As per letter (Ex.D/ 8), the appellant had written that, he has no doubt on the character of respondent no.1/ wife. As per letter (Ex.D/ 9), appellant has apologised to respondent no.1/ wife and has written that his wife has been a subject of atrocity by him and he has doubted as well as levelled allegations on her character. He promised that he will not repeat these type of mistakes in future. He will try to live happily alongwith her. In paragraph 38 of cross-examination, Sangeeta Saxena (DW/ 1), denied suggestion of appellant that appellant has not written letter (Ex.D/ 9) and she has misused his signature on blank page. In paragraph 39 of cross-examination she further denied that the appellant had written letter (Ex.D/ 8) in sake of future of children. Therefore, it appears that the appellant has admitted his signature on (Ex.D/ 9) and also admitted letter (Ex.D/ 8) is written by him. He has not proved that he had signed on blank paper of letter (Ex.D/ 9), which was misused by respondent no.1/ wife. In this situation, it appears that the appellant has written letters ((Ex.D/ 8 & D/9). Therefore, even for the sake of arguments, if it is considered that respondent no.1/ wife had strong relation with Ashutosh Pandey/ respondent no.2, then too appellant/ husband has forgiven for her acts.

68. Therefore the learned trial court has rightly held in issue no.3 that the appellant has failed to prove that the respondent no.1/ wife had sexual intercourse with Ashutosh Pandey/ respondent no. 2.

69. Though admittedly, it shows that the husband and wife are living separately since 20/05/2001 i.e. for more than 20 years. On this ground learned counsel for the appellant submits that marriage of the parties has irretrievably broken down and marriage is dead for all purpose, therefore, on this ground decree of divorce may be granted.

70. Per-contra learned counsel for the respondent no.1/ wife submits that there is no provision for divorce on the ground of irretrievable breaking down of marriage in the Hindu Marriage Act, 1955. Therefore, on this ground divorce cannot be granted in the favour of the appellant.

71. In this respect, there is no provision for divorce on the basis of irretrievable breaking down of marriage in the Hindu Marriage Act, 1955. The Apex Court in the case of **Navin Kohli (Supra)** in para 96 observed that the government should take into consideration to make a law that irretrievable breaking of marriage should also provide a ground for divorce. The apex court can pass a decree for divorce in case of irretrievable breaking down of marriage by exercising its inherent power under article 142 of the Constitution of India.

72. On the foregoing discussion, it appears that the learned trial court has rightly assessed the evidence available on record. The learned trial court has not committed any error by passing the impugned judgment and decree. Therefore, the appeal is liable to be dismissed.

73. Consequently, the appeal is dismissed. Impugned judgment and decree is affirmed. The parties to bear their own cost.

74. Decree be drawn accordingly.

(SUJOY PAUL)
JUDGE

(PRAKASH CHANDRA GUPTA)
JUDGE

MISHRA