ASHOK HURRA

v.

RUPA BIPIN ZAVERI

MARCH 10, 1997.

[M.M. PUNCHHI AND K.S. PARIPOORNAN, JJ.]

Hindu law:

Hindu Marriage Act, 1955: Section 13-B.

Divorce—By mutual consent—Petition for—Jointly filed by husband and wife under S.13-B (1)—Husband alone filed application for decree of divorce under S.13-B (2) six months after presentation of divorce petition—Wife filed application for withdrawal of consent for divorce after expiry of 18 months from date of presentation of divorce petition—Husband remarried during pendency of divorce petition—Trial Court refused but Single Judge granted divorce on ground of irretrievable breakdown of marriage—Division Bench reversed it—Held : Marriage broken down irretrievably due to various factors though each one of such factors by itself did not afford ground for divorce by mutual consent—There being no chance of reviving and continuation of marital relationship and there being a long lapse of time since filing of the divorce petition, grant of decree of divorce in exercise of Supreme Court's jurisdiction under Art. 142 warranted—Husband, a Doctor and well-to-do person, directed to pay Rs. 10 lakhs as maintenance and Rs. 50,000/- as cost of his wife—Constitution of India, 1950, Arts 136 and 142.

Section 13-B—Divorce—By mutual consent—Withdrawal of—By one of the spouses—After expiry of 18 months from date of presentation of joint divorce petition—Grant of decree of divorce—Continuation of mutual consent till passing of decree of divorce, even though divorce petition not withdrawn within the period of 18 months—Held : Questions left open—Decision by Supreme Court in Sureshta Devi's case requires reconsideration in appropriate case.

The respondent-wife left the matrimonial home and started residing separately. Thereafter, a joint petition for divorce was filed by the husband and wife under Section 13-B of the Hindu Marriage Act, 1955 stating that all the matters regarding ornaments, clothes and other movables were

A settled between them and the wife had renounced her right to claim maintenance. The parties simply sought a decree of dissolution of the marriage by mutual consent. Subsequently, the husband alone moved an application praying for passing a decree of divorce. On this motion, the court issued notice to the wife. Hearing of the petition commenced but the case was adjourned from time to time mostly on the requests made jointly B by advocates appearing for the parties mentioning that talks of compromise/settlement were going on. Meanwhile, the appellant-husband remarried and a child was born out of the said wedlock. Thereafter, the wife filed an application withdrawing her consent for divorce praying that the petition for divorce by mutual consent be consent for divorce praying C that the petition for divorce by mutual consent be dismissed. This submission was objected to by the appellant, denying the averments made in the application and also stating further that the wife had no right to withdraw or revoke the consent after the period of 18 months. The appellant-husband also prayed that consistent with the prayer made in the joint Hindu D Marriage Petition a decree for divorce by mutual consent by passed. The wife filed an objection thereto.

The trial court held that since consent was withdrawn before the decree could be passed, it had to be accepted and, in this view, dismissed the petition for divorce by mutual consent. In the appeal filed by the E husband, a Single Judge of the High Court, after reviewing the entire facts of the case and in view of the fact that the marriage between the husband and wife had irretrievably broken down and reunion was not at all possible set aside the order passed by the trial court and passed the decree of dissolution of marriage from the date of the petition. In the Letters Patent F Appeal filed by the respondent-wife, a Division Bench of the High Court set aside the other of the Single Judge. Hence this appeal.

Disposing of the appeal, this Court

HELD : 1.1. The appellate court has not disputed the following:

G

(a) the marriage between the parties is dead and has irretrievably broken down;

(b) there are allegations and counter- allegations between the parties H and also litigation in various courts and no love is lost between them;

(c) there is delay in the disposal of the matter; A

(d) the husband has married again and has got a child;

(e) the wife has not withdrawn her consent lawfully given for a period of 18 months and it is not a case where the consent given is revoked on the ground that it is vitiated by fraud or undue influence or mistake etc.; and B

(f) that the joint petition filed in court by the parties stated (a) that the parties have settled all the matters and the wife had renounced her right to claim maintenance and (b) what the parties prayed for, was only a decree of disolution of the marriage by mutual consent. [891-B-F] C

1.2. The appellate court was swayed by the fact that the appellant-husband has not come to court with clean hands; in that he married during the pendency of the proceedings. It may be, as expressed by the appellate court that factors such as the marriage is dead and has broken down irretrievably, that there was no chance of reunion, that there were allegations and counter-allegations made by the parties, that the parties were residing separately for nearly 13 years-each one of the above factors by itself (individually) may not afford a ground for divorce by mutual consent. [891-G-H] D

E

1.3. During the pendency of the appeal in this Court there were attempts to settle the mater. But, finally counsel on both sides reported that there was no scope for settlement between the parties. There is no useful purpose served in prolonging the agony any further and the curtain should be rung at some stage.

F

2.1. The *cumulative effect of the various aspects* in the case indisputably point out that the marriage is dead, both emotionally and practically, and there is no chance at all of the same being revived and continuation of such a relationship is only for name-sake and that no love is lost between the parties, who have been fighting like "Kilkenny cats" and there is long lapse of years since the filing of the petition and existence of such a state of affairs warrant the exercise of the jurisdiction of this Court under Article 142 of the Constitution and grant a decree of divorce by mutual consent under Section 13-B of the Hindu Marriage Act, 1955 and dissolve the marriage between the parties, in order to meet the ends of justice, in all the circumstances of the case subject to certain safeguards. Appropriate G H

A **safeguard or provision for the respondent-wife to enable her to have a decent living should be made. The appellant is a well-to-do- person and is a Doctor. He seems to be affluent being a member of the medical fraternity. But his conduct during litigation is not above board. Although the conduct of the husband is blame-worthy in that he married a second time and got child during the pendency of the proceedings yet that factor cannot be** B **blown out of proportion or viewed in isolation, nor can it deter this Court to take a total and broad view of the ground realities of the situation when adjustment of human relationship is dealt with. [892-B-D, G-H]**

2.2. The suggestion or offer of a lump sum payment of rupees four to C **five lakhs, towards provision for wife, is totally insufficient, in modern days of high cost of living and particularly for a woman of the status of the respondent. At least, a sum of about Rs 10,000/- p.m. will be necessary for a reasonable living. Taking into account all aspects appearing in the case, more so the conduct of the parties and the admissions contained in the joint petition filed in court, it must be held that the respondent (wife) should be** D **paid, a lump sum of rupees ten lakhs (Rs. 10 lakhs) and her costs in this litigation assessed at Rs. 50,000/- on or before 10-12-1997** *as a condition precedent* **for the decree passed by this Court to take effect. [892-E-F]**

2.3. The observations of this Court in *Sureshta Devi's case* **to the** E **effect that mutual consent** *should continue till the divorce decree is passed, even if the petition is not withdrawn by one of the parties with the period of 18 months,* **appears to be too wide and does not logically accord with Section 13-B (2) of the Act. However, it is unnecessary decide this vexed issue in this case, since conclusion has been on the fact situation of the present case. The decision in** *Sureshta Devi's* **case may require reconsidera-** F **tion in an appropriate case. [888-C-E]**

Chandrakala Menon **v.** *Union of India,* **[1993] 2 SCC 6;** *Chandrakala Trivedi* **v.** *Dr. S.P. Trivedi,* **[1993] 4 SCC 232;** *V. Bhagat* **v.** *D. Bhagat,* **[1994] 1 SCC 337;** *Romesh Chander* **v.** *Smt. Savitri,* **JT (1995) 1 SC 362 and** G *Surestha Devi* **v.** *Om Prakash,* **[1991] 1 SCR 274, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1843 of 1997 Etc.

From the Judgment and Order dated 9.9.96 of the Gujarat High H Court in L.P.A. No. 373/96 in F.A. No. 1050/87.

R.K. Jain, A.P. Medh and Ganpathi for the Appellant. A

Arun Jaitley, Janak Shah, Mayur Shah and Ms. Kamini Jaiswal for the Respondents.

The Judgment of the Court was delivered by

B

PARIPROORNAN, J. Special Leave granted in both cases. The main appeal is the one arising out of Special Leave Petition (c) No. 20097 of 1996. The said appeal is filed against the judgment and order of the Gujarat High Court rendered in L.P.A. No. 373 of 1996. The appellant in both the appeals is Sri Ashok G. Hurra (the husband) and the respondent in both the appeals in Rupa Ashok Hurra (the wife). We will deal with the facts in the main appeal which is covered by Special Leave Petition No. 20097 of 1996. C

2. The marriage between the appellant (husband) and the respondent (wife) was solemnized on 3.12.1970 according to the Hindu rites and custom at Ahmedabad. The Couple have no issue. It seems difference of opinion cropped up between the parties. Presumably it persisted and so they could not stay together. On 30.6.1983, the wife left the matrimonial home. Thereafter, the couple started residing separately. On 21.8.1984, a joint petition for divorce was filed under section 13 B of the Hindu Marriage Act. It was signed by both the parties and both of them appeared before Court. Both of them are highly educated and intelligent and managing their own affairs and business. In the joint petition, it was averred that all the matters regarding ornaments, clothes and other movables were settled between them and the wife renounced her right to claim maintenance. The parties simply sought a decree of dissolution for the marriage by mutual consent. D E F

3. Under Section 13B (2) of the Hindu Marriage Act (hereinafter refereed to as 'the Act'), on a motion by both the parties, six months after the date of presentation of the petition under sub- section (1) of the Act, and not later than eighteen months, the Court, shall after enquiry, pass a decree of divorce by mutual consent. On 4.4.1985, the husband *alone* moved an application praying for passing a decree of divorce. On this motion, the Court issued notice to the wife. It is seen that the hearing of the petition commenced on 15.4.1985. On that day, on the joint application of the advocates of both the parties, the case was adjourned. Subsequently, G H

A the case stood posted to various dates and for one reason or other, it got itself adjourned. In the meanwhile, attempts were made by the trial judge to bring about reconciliation between the husband and the wife. But, it was not successful. Such attempts were made on 30.9.1985, 10.10.1985, 30.10.1985, 9.12.1985, 16.12.1985, 10.1.1986 etc. Most of the requests for adjournments were made jointly by the advocates appearing for the parties. B In all such requests, mention was made that talks of compromise/settlement between the parties were going on.

4. On 27.3.1986, the wife filed an application withdrawing her consent for divorce. She prayed that petition for divorce by mutual consent may be C dismissed. This submission was objected to by the appellant, denying the averments made in the application and also stating further that the wife has no right to revoke the consent which she has legally granted. The husband filed an affidavit-in-reply on 9.4.1986 and contended that the wife has no right to withdraw or revoke the consent after the period of 18 months. He also prayed that consistent with the prayer made in the joint D Hindu Marriage Petition filed on 21.8.1984 a decree for divorce by mutual consent may be passed. The wife seems to have filed an objection thereto.

5. After hearing the parties, the learned city civil judge (the trial Court) held that since consent was withdrawn before the decree could be E passed, it has to be accepted and, in this view, dismissed the petition for divorce by mutual consent. In the appeal filed by the husband, a learned single Judge of the Gujarat High Court in First Appeal No. 1070 of 1987, by judgment dated 15.3.1996, after a review of the entire facts and the relevant law on the subject, came to the following conclusions:-

F (1) that all the ingredients of section 13B (1) of the Act were satisfied when the petition was filed;

(2) that for a period of six months thereafter the parties have continued to live separate and have not cohabited or stayed G together as husband and wife;

(3) that the wife withdrew her consent *after* the expiry of the period of 18 months from the date of the institution of the petition;

(4) that the revocation of consent after the prescribed period under H section 13B (2), (18 months) by the wife was not based on true or

correct ground but a false pretext, ruse, or non-existent ground put forward by her to justify revocation of her consent; A

(5) that under section 13B (2), once the period of interregnum or transitional period starting from six months from the date of presentation of the petition till expiry of the period of 18 months from the date of the petition was over, and if the petition is not withdrawn or consent is not revoked in the meantime, the Court shall pass a decree and the limited enquiry to be made under section 13B (2) is to the effect that : B

(i) the marriage has been solemnised; C

(ii) the averments made in the petition, namely,

(a) that the parties have separated for a period of one year or more, and

(b) they have not been able to live together; and D

(c) that they have mutually agreed that the marriage should be dissolved."

6. On the basis of the above and in view of the fact that the marriage between the husband and wife has *irretrievably broken down* and reunion is not at all possible, the learned single Judge set aside the order passed in Hindu Marriage Petition No. 248 of 1984 dated 17.10.1986 by the trial court and passed the decree of dissolution of marriage from the date of the petition. E

F

7. In the Letters Patent Appeal No. 373/96, filed by the respondent herein (the wife), a Division Bench of the Gujarat High Court, by judgment dated 9.9.1996, set aside the order of the learned single judge and concluded thus :

".....the wife withdrew her consent even before the trial court could make an inquiry. The trial court was, therefore, right in dismissing the application submitted under section 13B of the Act. There is no requirement in law that the party withdrawing consent must give reasons or the withdrawal must be based on reasonable grounds. Irretrievable breakdown of marriage by itself is not a G H

A sufficient ground for dissolution of a marriage, as held by the Apex Court. In the result, we quash and set aside the order passed by learned single judge granting decree of dissolution of marriage solemnized between the parties herein and the order passed by the trial court is restored. We direct the Principal Judge, City Civil Court, Ahmedabad to forthwith assign HMP No. 328 of 1994 filed B by husband to a learned judge of that court, with a request to dispose of the petition within a period of two months from the receipt of the writ."

It is against the judgment of the Division Bench rendered in the Letters C Patent Appeal No. 373 of 1996, the husband, as appellant, filed this appeal after obtaining special leave.

8. Certain facts which are discernible from the records and have some impact in the decision to be rendered, deserve to be noticed, at this stage :

D

The learned single judge in his judgment rendered in First Appeal No. 1070 of 1987 has stated that the appellant/husband remarried with one Sonia on 18.8.1985 and a male child named Prasad was born out of the said wedlock. The respondent/wife filed a suit on 1.8.1994 in the City Civil Court E for a declaration that the Judgment and decree of the City Civil Court dated 17.10.1986 in Hindu Marriage Petition was still subsisting and that relation of appellant-husband with Sonia was illegal and that the child out of such marriage was illegitimate and that the appellant-husband should be restrained from describing Sonia as his wife. It also appears that on 15.9.1994 the appellant/husband filed another petition for dissolution of F marriage against respondent/wife (HMP No. 328 of 1994) on the ground of unchastity of the respondent/wife alleging large number of pornographic relations which she is alleged to have with her father and other persons and also under Sec. 13 (1) alleging that the wife has for a continuous period of not less than two years immediately proceeding the presentation of the G petition deserted the husband. (See-paragraphs 54 and 55 in F.A. No. 1070 of 1987). Regarding the subsequent petition filed by the husband and the reply thereto filed by the wife, the learned single Judge, in paragraph 56, has stated thus:

".....The allegations made therein by each against the other are H so vulgar and centering round the science of pornography that this

Court feels that detailed reference to such facts would even pollute the present matrimonial proceeding. This Court has, therefore, refrained itself from making reference to such allegations made in the subsequent petition by the husband against wife and the allegations made by the wife against the husband in her reply. Undoubtedly, a very strong feeling and impression is created in the mind of this *Court that not only no re-union or reconciliation between the spouses was possible at any stage after the institution of petition for divorce by mutual consent under sec. 13B on 21.8.1984 the parties were convinced that the marriage was irretrievably broken.* This Court also finds that no useful purpose would be served by prolonging and/or procrastinating the miseries of two spouses when the very purpose of happy married life was lost."

(emphasis supplied)

On 15th September, 1994, the appellant/husband also filed a criminal complaint under Section 497 and 498 read with Section 347 of the Indian Penal Code. The respondent-wife filed a criminal complaint on 14th November, 1994 against the appellant/husband and Sonia under Section 494 of the Indian Penal Code on the ground that second marriage of the husband with Sonia was bigamous marriage and was prohibited under Section 17 of the Act.

9. We heard counsel.

10. Mr. R.K. Jain, Senior Counsel, for the appellant submitted thus :

(1) The trial Court erred in dismissing the joint application filed by the parties under Section 13B of the Act. The respondent/wife had no locus or competency to withdraw her consent after the period of 18 months specified in Section 13B (2) of the Act.

(2) The trial court as well as the Division Bench of the Gujarat High Court which heard the Letters Patent Appeal overlooked the crucial words occurring in Sections 13B (1) and 13B (2) of the Act. Under Section 13B (1) of the Act, a petition for dissolution of marriage by a decree of divorce should be presented by both the parties *together.* But, under Section 13B (2), for making the motion for passing a decree, after the period of six

A months, both the parties need not be present. In this case, the joint petition for dissolution of marriage by a decree of divorce was presented by the husband and wife together in compliance with Section 13B (1) of the Act. All the three ingredients were satisfied when the joint petition was filed by the parties, namely, (a) that they have separated for a period for one year B or more; (b) that they have not been able to live together and (c) that they have mutually agreed to dissolve the marriage. The motion for passing a decree was made after six months of the date of presentation of the petition by the husband for which the wife notice and this is sufficient compliance of Section 13B (2) of the Act. Since the wife had not withdrawn her consent within the period of 18 months after the date of presentation of the C petition, the trial court was obliged to pass a decree of divorce after hearing the parties.

(3) In any view of the matter, from the strained relationship between the parties for over 13 years, and the "Kilkenny fight" between the parties, who are educated persons, it is evident, that the marriage has irretrievably D broken down with no chance of re-union and so this Court by taking into account, the totality of the facts and circumstances in this exceptional case, should pass a decree of divorce, with appropriate directions, in order to do complete justice in the matter.

E 11. On the other hand, Mr. Jaitley, Senior Counsel for the respondent stated thus :

(1) It is true, that a joint petition for dissolution of marriage by a decree of divorce was made by both the parties together and the requirements of Section 13B (1) are satisfied. Under Section 13B (2) of the Act, F in order to pass a decree after the period of six months, a motion should be made by *both* the parties. It is not so in this case. The motion was made *only* by the husband. It is incompetent.

(2) The respondent/wife had withdrawn the consent before the enquiry, at any rate, before the decree under Section 13B (2) could be passed. G Consent for dissolution should be present at the time of filing the joint application as also on the date when the decree has to be passed. The expiry of 18 months from the date of filing of the petition is irrelevant.

(3) Notwithstanding the strained relationship between the parties H and other factors urged to show that the marriage has broken down

irretrievably, the conduct of the appellant/husband disentitles him to any relief. Indeed, when the proceedings were still pending in the trial court the appellant married a second time and got a male child. Thereby, he committed a wrong. He cannot take advantage of his own wrong, and cannot invoke the jurisdiction of this court by urging it as a ground for passing a decree of divorce in order to do complete justice in the matter.

12. Counsel on both sides placed their respective interpretation of Section 13B of the Hindu Marriage Act. Section 13B of the Act reads as follows :

> "13B. (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage *together,* whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.
>
> (2) On the *motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date,* if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such enquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."
>
> (emphasis supplied)

13. Mr. Jaitley, counsel for the respondent, heavily relied on the decision of this Court in *Sureshta Devi* v. *Om Prakash*, [1991] 1 SCR 274 = AIR 1992 SC 1904 and contended that it is open to one of the parties at any time till the decree of divorce is passed to withdraw the consent given to the petition, and mutual consent to the divorce is a sine qua non for passing a decree for divorce under Section 13B of the Act. Mutual consent should continue till the divorce decree is passed. It is positive

A requirement for the Court to pass a decree of divorce. Since this crucial of vital aspect is absent in this case, counsel argued that the matter is concluded and that it is unnecessary to consider the other aspects urged regarding Section 13B of the Act or to focus attention on the totality of the circumstances to consider whether any other appropriate orders should be passed by this Court at this juncture.

B

14. On the other hand, counsel for the appellant Mr. Jain, contended that the actual issue involved in *Surestha Devi's* case (supra) was in a narrow compass, namely, whether the consent given can be unliaterally withdrawn. In that case, the consent was withdrawn within the period of 18 months and no question arose as to whether the consent can be withdrawn 18 months after the filing of the joint petition and so the decision is distinguishable. But the Court considered the larger question as to whether it is open to one of the parties till the decree of divorce is passed, to withdraw the consent given to the petition. The decision on the larger question is only obiter and the decision requires reconsideration. That apart, this Court has got the power to consider the totality of the circumstances, including the subsequent events, in order to do complete justice in the matter, which are the following :

C

D

E

The pendency of the proceedings for a long period of over 12 years, the acrimonious battle between the parties, the allegations and counter-allegations made by the parties, the fact that the marriage is dead or has broken down irretrievably without any chance of re-union between the parties, that continuance of the stalemate is only a futility leading to a tortious life for both and continued agony and that the parties are living separately for more than 13 years--these should weigh with the Court to grant a decree for divorce by mutual consent under Section 13B of the Act and dissolve the marriage between them and give appropriate directions including provision of reasonable/adequate funds for the wife to have a decent living and it was indicated that a lump sum payment of Rs. 4/5 lakhs may be reasonable. Counsel also stressed the fact that in the joint petition filed for divorce, it is stated that all matters regarding ornaments, clothes, moveables, etc. were settled between parties and the wife has renounced her right to claim maintenance and this should be taken into consideration. Counsel on both sides brought to our notice few decisions of the different High Courts and of this Court to substantiate their pleas.

F

G

H

15. We are of opinion that in the light of the fact situation present in this case, the conduct of the parties, the admissions made by the parties in the joint petition filed in Court, and the offer made by appellant's counsel for settlement, which appears to be *bonafide*, and the conclusion reached by us on an overall view of the matter, it may not be necessary to deal with the rival pleas urged by the parties regarding the scope of Section 13B of the Act and the correctness or otherwise of the earlier decision of this Court in *Surestha Devi's* case (supra) or the various High Court decisions brought to our notice, in detail. However, with great respect to the learned judges who rendered the decision in *Surestha Devi's* case (supra), certain observations therein seem to be very wide and may require reconsideration in an appropriate case. In the said case, the facts were :

The appellant (wife) before this Court married the respondent therein on 21.11.1968. They did not stay together from 9.12.1984 onwards. On 9.1.1985, the husband and wife together moved a petition under Section 13B of the Act for divorce by mutual consent. The Court recorded statements of the parties. On 15.1.1985, the wife filed an application in the court stating that her statement dated 9.1.1985 was obtained under pressure and threat. She prayed for withdrawal of her consent for the petition filed under Section 13B and also prayed for dismissal of the petition. The District Judge dismissed the petition filed under Section 13B of the Act. In appeal, the High Court observed that the spouse who has given consent to a petition for divorce cannot uniliterally withdraw the consent and such withdrawal, however, would not take away the jurisdiction of the Court to dissolve the marriage by mutual consent, if consent was otherwise free. It was found that the appellant (wife) gave her consent to the petition without any force, fraud or undue influence and so she was bound by that consent. The issue that came up for consideration before this Court was, whether a party to a petition for divorce by mutual consent under Section 13B of the Act, can unilaterally withdraw the consent and whether the consent once given is irrevocable. *It was undisputed that the consent was withdrawn within a week from the date of filing of the joint petition under Section 13B. It was within the time limit prescribed under Section 13B (2) of the Act.* On the above premises, the crucial question was whether the consent given could be unilaterally withdrawn. The question as to whether a party to a joint application filed under Section 13B of the Act can withdraw the consent beyond the time limit provided under Section 13B (2) of the Act did not arise for consideration. It was not in issue at all. Even so, the Court

A considered the larger question as to whether it is open to *one* of the parties *at any time* till a decree of divorce is passed to withdraw the consent given to the petition. In considering the larger issue, conflicting views of the High Courts were adverted to and finally the Court held that the mutual consent should continue till the divorce decree is passed. In the light of the clear B import of the language employed in Section 13B (2) of the Act, it appears that in a joint petition duly filed under Section 13B (1) of the Act, motion of both parties should be made six months after the date of filing of the petition and *not later than 18 months,* if the petition is not withdrawn in the meantime. In other words, the period of interregnum of 6 to 18 months was intended to give time and opportunity to the parties to have a second C thought and change the mind. If it is not so done within the outer limit of 18 months, the petition duly filed under Section 13B (1) and still pending shall be adjudicated by the Court as provided in Section 13B (2) of the Act. It appears to us, the observations of this court to the effect that mutual consent *should continue till the divorce decree is passed, even if the petition* D *is not withdrawn by one of the parties within the period of 18 months,* appears to be too wide and does not logically accord with Section 13B (2) of the Act. However, it is unnecessary to decide this vexed issue in this case, since we have reached the conclusion on the fact situation herein. The decision in *Surestha Devi's* case (supra) may require reconsideration in an appropriate case. We leave it there.

E

16. Now we shall advert to the findings arrived at by the learned single judge and the Division Bench in the Letters Patent Appeal. In paragraph 56 of the judgment, the learned single Judge has found thus :

F

> "Undoubtedly, *a very strong feeling and impression is created in the mind of this Court that not only no re-union of reconciliation between the spouses was possible at any stage after the institution of petition for divorce by mutual consent under Section 13B on 21.8.1984, the parties were convinced that the marriage was irretrievably broken. This Court also finds that no useful purpose would be served by* G *prolonging and/or procrastinating the miseries of two spouses when the very purpose of happy married life was lost*.....Parties have now resorted to various civil and criminal proceeding against each other."

H

(emphasis supplied)

Again in paragraph 59 of the judgment, the Court found thus : A

> "The fact situation which prevails before this Court though not fully comparable to the facts can be said to be identical, the rupture in the marital tie is created much earlier and admittedly the parties have started residing separately since 1983 and after full understanding and consideration of facts they had filed petition for divorce by mutual consent in the year 1984. The husband has thereafter remarried Sonia and had a child out of such wedlock. The wife has thereafter filed Civil suit for declaration about the status of second wife and child born out of such marriage and also criminal complaint. The husband has also in his turn filed petition for dissolution of marriage and also a criminal complaint. *The fact that there is no possibility of reunion is clearly established and is in no uncertain terms admitted by the wife before the Court. The obvious conclusion is that she has resolved not only to live in agony but to make life of her husband miserable too.* .... In the fact situation obtaining before this Court it can safely conclude that the marriage between the parties has been irretrievably broken and that there is no chance of their coming together or living together."
>
> (emphasis supplied)

B C D E

Again in paragraph 72 of the judgment, the learned single judge stated thus :

> "However, in my opinion, in view of the decisions of the Apex Court, in the subsequent decision, namely in the case *Chandrakala Menon* v. *Vipin Menon,* [1993] 2 SCC 6; in the case of *V. Bhagat* v. *D. Bhagat,* [1994] 1 SCC 337; in the case of *Chandrakala Trivedi* v. *Dr. S.P. Trivedi,* [1993] 4 SCC 232 and in the case of *Romesh Chander* v. *Smt. Savitri*, JT (1995) 1 SC 362 when the Court comes to the conclusion that the *marriage is irretrievable broken and that there was no possibility of reunion or reconciliation between the parties* and that ingredients or Sec. 23(1)(bb) where non-existent; i.e. there was free consent to a joint petition for divorce by mutual consent by both the parties, the Court can and shall have to pass a decree for dissolution of marriage by mutual consent as the very legislative intent behind enacting such a provision would be rendered meaningless if it would render the provision to lead to

F G H

A position of perpetuation or procrastination of agonies and miseries of the separated spouses *despite the realisation that no reconciliation was possible.*"

(emphasis supplied)

B 17. In the Letters Patent Appeal, the Division Bench entered the following findings :

(i) Irretrievable break down of marriage is not a ground by itself to grant a decree of dissolution of marriage;

C (ii) Even if a decree of dissolution could have been granted, it could not have been granted from the date of the petition, but it could have been granted only from the date of the decree;

D (iii) In the facts and circumstances of the case, even if discretion is vested in this Court, this Court would not like to exercise the discretion looking to the conduct of husband, i.e. (1) remarriage during the subsistence of the first marriage and during the pendency of the petition, (2) participating in reconciliation proceedings knowing fully well that he cannot E accept appellant as his wife any more as he has remarried, and (3) unnecessarily prolonging the matter;

(iv) We would just say that this Court has no power similar to Article 142 of the Constitution and even if similar powers are conferred, in the peculiar facts and circumstances of the F instant case, it would not be proper on our part to exercise such powers;

(v) Summing up, we must say that there is not a single case where the consent was withdrawn before the stage of inquiry and yet the Court passed decree of divorce with effect from the G date of the application; there is not a single case where either the husband or wife remarried during the subsistence of the first marriage and yet the Court has passed a decree of dissolution of the first marriage which would benefit a party who has committed a wrong. On the contrary, the Apex Court H has refused to grant a decree on the ground of irretrievable

break down of marriage as during the pendency of the appeal, husband remarried. The paramount consideration should be that a party who comes to the Court with clean hands should be assisted. Power may be exercised in favour of the party who comes to the Court with clean hands.

18. After considering the matter in detail, we find that the appellate Court has not disputed the following :

(a) the marriage between the parties is dead and has irretrievably broken down;

(b) there are allegations and counter-allegations between the parties and also litigations in various courts and no love is lost between them;

(c) there is delay in the disposal of the matter;

(d) the husband has married again and has got a child; and

(e) the wife has not withdrawn her consent lawfully given for a period of 18 months and it is not a case where the consent given is revoked on the ground that it is vitiated by fraud or undue influence or mistake etc.

(f) That the joint petition filed in court by the parties stated (a) that the parties have settled all the matters and the wife had renounced her right to claim maintenance and (b) what the parties prayed for, was only a decree of dissolution of the marriage by mutual consent.

19. It appears to us that the appellate Court was swayed by the fact that the appellant/husband has not come to court with clean hands; in that he married during the pendency of the proceedings. It may be, as expressed by the appellate Court that factors such as the marriage is dead and has broken down irretrievably, that there was no chance of re-union, that there were allegations and counter-allegations made by the parties, that the parties were residing separately for nearly 13 years--*each one* of the above factors *by itself* (individually) may not afford a ground for divorce by mutual consent.

A 20. When the matter was pending in this Court, there were attempts to settle the matter. But, finally counsel on both sides reported that there is no scope for settlement between the parties.

21. We are of the view that *the cumulative effect of the various aspects* B in the case indisputably point out that the marriage is dead, both emotionally and practically, and there is no chance at all of the same being revived and continuation of such relationship is only for name-sake and that no love is lost between the parties, who have been fighting like "Kilkenny cats" and there is long lapse of years since the filing of the petition and existence of such a state of affairs warrant the exercise of the jurisdiction of this C Court under Article 142 of the constitution and grant a decree of divorce by mutual consent under Section 13B of the Act and dissolve the marriage between the parties, in order to meet the ends of justice, in all the circumstances of the case subject to certain safeguards. Appropriate safeguard or provision for the respondent/wife to enable her to have a D decent living should be made. The appellant is a well to do person and is a Doctor. He seems to be affluent being a member of the medical fraternity. But his conduct during litigation is not above board. The suggestion or offer of a lump sum payment of rupees four to five lakhs, towards provision for wife, is totally insufficient, in modern days of high cost of living and particularly for a woman of the status of the respondent. At least, E a sum of about Rs, 10,000/- p.m. will be necessary for a reasonable living. Taking into account all aspects appearing in the case, more so the conduct of the parties and the admissions contained in the joint petition filed in court, we hold that the respondent (wife) should be paid, a lump sum of rupees ten lakhs (Rs. 10 lakhs) (and her costs in this litigation as estimated F by us) on or before 10.12.1997 as mentioned hereinbelow, *as a condition precedent* for the decree passed by this Court to take effect.

22. There is no useful purpose served in prolonging the agony any further and the curtain should be rung at some stage. In coming to the above conclusion, we have not lost sight of the fact that the conduct of the G husband is blame-worthy in that he married a second time and got a child during the pendency of the proceedings. But that factor cannot be blown out of proportion or viewed in isolation, nor can deter this Court to take a total and broad view of the ground realities of the situation when we deal with adjustment of human relationship. We are fortified in reaching the H conclusion aforesaid by a decision of this Court reported in *Chandrakala*

Menon v. *Vipin Menon,* [1993] 2 SCC 6. *Earlier decisions of this Court in Chandrakala Trivedi* v. *Dr. S.P. Trivedi,* [1993] 4 SCC 232; *V. Bhagat* v. *D. Bhagat,* [1994] 1 SCC 337 and *Romesh Chander* v. *Smt. Savitri,* JT (1995) 1 SC 362 also afford useful guidelines in the matter. A

23. A few excerpts from the seventy-first Report of the Law Commission of India on the Hindu Marriage Act,1955 -- "Irretrievable breakdown of marriage" -- dated April 7, 1978 throw much light on the matter : B

> "Irretrievable breakdown of marriage is now considered, in the laws of a number of countries, a good ground of dissolving the marriage by granting a decree of divorce. C
>
> Proof of such a breakdown would be that the husband and wife have separated and have been living apart for, say, a period of five or ten years and it has become impossible to resurrect the marriage or to reunite the parties. It is stated that once it is known that there are no prospects of the success of the marriage, to drag the legal tie acts as a cruelty to the spouses and gives rise to crime and even abuse of religion to obtain annulment of marriage. .... D
>
> The theoretical basis for introducing irretrievable breakdown as a ground of divorce is one with which, by now, lawyers and others have become familiar. Restricting the ground for divorce to a particular offence or matrimonial disability, it is urged, causes injustice in those cases where the situation is such although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked. The marriage has all the external appearances of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a facade, when the emotional and other bounds which are of the essence of marriage have disappeared. E F G
>
> After the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce. The parties alone H

A can decide whether their mutual relationship provides the fulfilment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon B which they may regulate their relationship in the changed circumstances. .... Moreover, the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the C matter and of the spirit and from showering love and affection on one's offspring. Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage --"breakdown"-- and if it continues for a fairly long period, it would indicate destruction of the essence of marriage -- "irretrievable D breakdown."

24. S.L.P. No. 6443 of 1995 was filed earlier by the appellant herein praying that this Hon'ble Court may be pleased to invoke Article 142 of the Constitution of India and pass appropriate orders granting a decree of divorce. The Special Leave Petition was filed against the order of a single E judge of the Gujarat High Court in Civil Application No. 949 of 1995 dated 17.2.1995 dismissing the application of the appellant for granting a decree of divorce in respect of the marriage between the appellant and the respondent. It is unnecessary to advert to the facts stated therein and other matters since consideration of the appeal arising out of S.L.P. No. 6443 of F 1995 has become academic and unnecessary in view of the final orders passed in the main appeal. We hold accordingly. No separate orders are necessary in the Civil Appeal arising out of S.L.P. No. 6443/95.

25. The appeal (filed from S.L.P. 20097/96) is allowed. Subject to the fulfilment of the following conditions, a decree of divorce for dissolution G of marriage by mutual consent solemnized between the appellant and the respondent is passed under Section 13B of the Act. It is made clear that the decree is conditional and shall take effect only on payment or deposit in this Court of the entire sum of rupees ten lakhs by the appellant to the respondent, as ordered herein and also the cost as assessed below on or H before 10.12.1997. The appellant shall pay or remit the amounts ordered

before the said date, in two instalments-a sum of Rs. 5 lakhs + Rs. 50,000/- (the assessed cost) as ordered hereinbelow, on or before 10.8.1997 and the balance of Rs. 5 lakhs (rupee five lakhs) on or before 10.12.1997. The assessed costs required to be paid the appellant shall be Rs. 50,000/- towards the entire proceedings to he respondent. If default is made in the payment of the instalment due on 10.8.1997 together with cost, then also, this decree shall not take effect and the appeal shall stand dismissed. If the amounts ordered herein are duly deposited in this Court by the appellant, the respondent can withdraw the said amounts, without further orders. We further declare and hold that all pending proceedings, more particularly referred to in para 8 of this judgment, including the proceeding under Section 494 IPC read with Section 17 of Hindu Marriage Act, 1955 between the parties shall stand terminated, but only on payment or deposit of the amounts ordered by us in this judgment. This is made clear.

The appeals are disposed of in the above terms.

V.S.S. Appeals disposed.