A SANGHAMITRA GHOSH

v.

KAJAL KUMAR GHOSH

NOVEMBER 20, 2006

B [G.P. MATHUR AND DALVEER BHANDARI, JJ.]

Hindu Law:

Hindu Marriage Act, 1955; Section 9:

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Wife tortured by her husband and in-laws—She was driven out of her matrimonial home along with her minor child—Criminal complaint—Filing of a petition by her husband in a District Court for restitution of conjugal rights—Filing of Transfer Petition by wife and later a joint petition along with her husband to grant a decree of divorce setting out terms of compromise—Held: Marriage has been wrecked beyond the hope of salvage—Under the circumstances, it is appropriate to declare defunct dejure the marriage as it is defunct in defecto—All the pending cases between the parties disposed of and a quietus is put to litigation between the parties in the interest of the parties and their minor son—Directions issued.

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Constitution of India, 1950; Article 142:

Matrimonial matters—Exercise of extra ordinary jurisdiction—Held: In order to do complete justice, Supreme Court could exercise jurisdiction in matrimonial matters under Article 142 of the Constitution.

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The marriage of the petitioner was solemnized with the respondent as per Hindu rites and customs and was duly registered with the Registrar of Marriage. A male child was born out of the wedlock but, the parties did not have a smooth marital life. The petitioner alleged that she was physically and mentally tortured by her husband and his parents, and eventually she was driven out of the marital home along with her minor child. Thereafter, the petitioner moved to her parents and started living with them. The respondent never cared to inquire about the petitioner and her child and had never sent any money either for the maintenance of the petitioner or her child. In these circumstances, she was forced to file a criminal complaint under Section 498A

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of the Indian Penal Code read with Sections 3 & 4 of Dowry Prohibition Act. She was totally dependant on her father, who himself was very old and was suffering from cancer and a considerable amount had to be spent on his treatment. In these circumstances, in order to maintain herself and her child, she took up a petty job in a bank on a meagre salary. However, she was transferred to Bangalore, as a result of which it had become extremely difficult for her to attend the court proceedings in West Bengal. Therefore, the petitioner filed a transfer petition praying for transfer of the matrimonial suit filed by her husband and pending in the court of District Judge, Barasat to the court of competent jurisdiction at Bangalore. During the pendency of this petition, the parties, despite persuasion of the Court, have not been able to sort out their differences and decided to live separately. In the meantime, both the parties have prayed that in the peculiar facts and circumstances of this case, this Court may grant a decree of divorce by mutual consent. In connection thereof, the parties have jointly filed a petition indicating therein the Terms of Compromise. The respondent-husband had filed additional affidavit in which detailed particulars of the matters pending *inter se* between the parties have been enumerated.

Disposing of the petition, the Court

HELD: 1. In order to do complete justice in the matrimonial matters, this Court has been less hesitant in exercising its extra-ordinary jurisdiction under Article 142 of the Constitution. In view of peculiar facts and circumstances of this case, it is appropriate to exercise the jurisdiction of this Court under Article 142 of the Constitution. [165-C-D]

Harpit Singh Anand v. *State of West Bengal,* [2004] 10 SCC 505; *Kanchan Devi* v. *Promod Kumar Mittan & Anr.,* [1996] 8 SCC 90 and *Ashok Hurra* v. *Rupa Bipin Zaveri etc.,* [1997] 4 SCC 226, relied on.

2.1. In the instant case, this Court is fully convinced that the marriage between the parties has irretrievably broken down because of incompatibility of temperament. In fact there has been total disappearance of emotional substratum in the marriage. The matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, therefore, the public interest and interest of all concerned lies in the recognition of the fact and to declare defunct *de jure* what is already defunct *de facto.* [167-D-E-F]

Swati Verma v. *Rajan Verma & Ors.,* [2004] 1 SCC 123; *Madhuri Mehta*

A v. *Meet Verma,* **[1997] 11 SCC 81;** *Anita Sabharwal* **v.** *Anil Sabharwal,* **[1997] 11 SCC 490 and** *Naveen Kohli* **v.** *Neelu Kohli,* **[2006] 4 SCC 558, relied on.**

2.2. In order to ensure that the parties may live peacefully in future, it has become imperative that all the cases pending between the parties are directed to be disposed of. Unless all the pending cases are disposed of and B **a quietus is put to litigation between the parties, it is unlikely that they would live happily and peacefully in future. This will not only help the parties, but it would be conducive in the interest of the minor son of the parties.**

[167-F-G-H]

2.3. On consideration of the totality of the facts and circumstances of C **the case, the following directions are issued:**

(i) The parties are directed to strictly adhere to the Terms of Compromise filed before this Court and also the orders and directions passed by this Court;

D **(ii) The cases pending between the parties are disposed of in view of the settlement between the parties. [167-H; 168-A-B-C]**

CIVIL ORIGINAL JURISDICTION : Transfer Petition (C) No.228 of 2004.

Petition Under Section 25 of the C.P.C. for transfer of the Matrimonial E Suit No.437 of 2002 titled as Kajal Kumar Ghosh Versus Sanghamitra Ghosh Pending before the Court of Ld. District Judge, Barasat, West Bengal to the Court of Competent Jurisdiction at Bangalore.

WITH

F TP (Crl. Nos. 105 and 171 of 2004, TP (Civil) No. 727 of 2004 and TP (Civil) No. 168 of 2006.

Awanish Sinha, Prem Ranjan Kumar, B.K. Sharma, Himanshu Shekhar, Vipin Nair and Ms. Kajal Ghosh (for M/s. Temple Law Firm), for the appearing parties.

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The Judgment of the Court was delivered by

DALVEER BHANDARI, J. The marriage of the petitioner was solemnized on 8.11.1999 with the respondent as per Hindu rites and customs and was duly registered with the Registrar of Marriage. The parties have closely H known each other before marriage and the marriage was solemnized according

to the wishes of the petitioner and the respondent. A

A male child was born out of the wedlock but, unfortunately, the parties did not have a smooth marital life. According to the allegations of the petitioner, Sanghamitra Ghosh, she was physically and mentally tortured by the respondent and his parents. According to her, the degree of torture increased day by day and eventually on 14.1.2001 she was driven out of the B marital home along with her minor child. Thereafter, the petitioner moved to her parents and started living with them from 15.1.2001. The respondent never cared to inquire about the petitioner and her child and has never sent any money either for the maintenance of the petitioner or her child.

In these circumstances, she was forced to file a criminal complaint on C 4.8.2002 under Section 498A of the Indian Penal Code read with Sections 3 & 4 of Dowry Prohibition Act.

According to the version of the petitioner, she was totally dependant on her father, who himself was very old and was suffering from cancer and D a considerable amount had to be spent for his treatment. In these circumstances, the petitioner became an additional burden on her parents. In order to maintain herself and her child, she took up a petty job in the ICICI bank on a meagre salary. The petitioner now has been transferred to Bangalore, as a result of which it had become extremely difficult for her to attend the court proceedings in West Bengal. It is very expensive and time consuming. E In these circumstances, the petitioner had filed a transfer petition praying that matrimonial suit no.437 of 2002 titled as "Kajal Kumar Ghosh versus Sanghamitra Ghosh" filed by the respondent-husband under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights and pending in the court of District Judge, Barasat be transferred to the court of competent F jurisdiction at Bangalore.

This Court on 26.3.2004 issued a show-cause notice on the transfer petition. Reply to the transfer petition was filed by the respondent. The datewise sequence of events given by the respondent are contrary to what had been averred by the petitioner. According to the respondent, the G petitioner was not driven out of the matrimonial home. In fact, she had walked out of the matrimonial home. The respondent further submitted that their marriage broke down due to the basic difference in their social status, educational and cultural background, lack of tolerance and inability to adopt and adjust to a life of a middle class family.

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A During the pendency of this petition, the parties have explored the possibility of an amicable settlement. The matter was adjourned from time to time to give the parties adequate time to mutually and amicably settle their differences. The parties, despite persuasion of the Court, have not been able to sort out their differences and decided to live separately. According to the parties, their marriage has been irretrievably broken down and reconciliation B is out of question.

Learned counsel for the parties have prayed that in the peculiar facts and circumstances of this case, this Court may grant a decree of divorce by mutual consent. On 15.9.2006, the parties have jointly filed a petition where they have spelt out the Terms of Compromise. The Terms of Compromise read C as under:

"1. Shri Kajal Ghosh/husband agrees to pay a sum of Rs.10 lacs (Rupees ten lacs) as full and final settlement to his wife Smt. Sanghamitra Ghosh. This amount shall be paid by Shri Kajal Kumar Ghosh in the Court by way of Demand Draft in favour of D the petitioner.

2. Both the parties further agree to let the mother/Smt. Sanghamitra Ghosh have the permanent custody of the minor son.

3. However, the Parties further, Kajal Ghosh will be entitled to have E visitation rights to the child at the residence of the petitioner at a mutually convenient date with prior permission.

4. Both the parties also agree to forthwith withdraw/close all cases filed against each other and pending before the various courts in Kolkata and Bangalore. These cases are:

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(i) Reference Case No.210/2002 pending before the learned SDM Court, Burrackpore, West Bengal.

(ii) MC No.713/2004 pending before the Principal Family Judge, Bangalore.

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(iii) Reference Case No.M-313 of 2003 pending before the learned 5th Judicial Magistrate Court, Burrackpore, West Bengal.

(iv) Matrimonial Suit No.437/2002 pending before the District Judge, Barasat, West Bengal.

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(v) Guardianship Case No.66/2004 pending before the District

Judge, Barasat, West Bengal. A

5. Both the parties undertake that they shall adhere to the terms of compromise/settlement and that they shall not litigate in future and have no claim against each other whatsoever in future."

It may be relevant to mention that on 16.10.2006, respondent Kajal Kumar Ghosh had filed additional affidavit in which detailed particulars of the matters pending *inter se* between the parties have been enumerated. On the same day, the parties had also filed comprehensive terms of their compromise. The said terms are set out as under: B

"Both the parties viz. the petitioner and the respondent have voluntarily and with their free will, arrived at a compromise/settlement, which has been reduced into writing and which reads as under: C

1. Shri Kajal Ghosh/husband agrees to pay a sum of Rs.10 lacs (Rupees ten lacs) as full and final settlement to his wife, Smt. Sanghamitra Ghosh. This amount shall be paid by Shri Kajal Ghosh in Court by way of the following Demand Drafts drawn on Allahabad Bank payable in her favour at Bangalore:- D

(a) DD No.634519 dated 11.9.2006 for Rs.2,50,000/-

(b) DD No.634520 dated 11.9.2006 for Rs.2,50,000/-.

(c) DD No.634521 dated 11.9.2006 for Rs.2,50,000/- E

(d) DD No.634522 dated 11.9.2006 for Rs.2,50,000/-.

2. Both the parties further agree to let the mother/Sanghamitra Ghosh have the permanent custody of the minor son.

3. However, the father/Kajal Ghosh will be entitled to have visitation rights to the child at the residence of his wife at a mutually convenient date with prior permission. F

4. The following cases are pending between the parties before the various courts. These cases are: G

(i) *REFERENCE CASE NO.210/2002* pending before the Learned SDM Court, Burrackpore, West Bengal filed by the wife/ Sanghamitra under Section 498A IPC read with Sections 3 and 4 of the Dowry Prohibition Act.

TP (CRIMINAL) NO.171/2004 which has been filed by the wife H

A before this Hon'ble Court arises out of these proceedings.

(ii) MC NO.713/2004 pending before the Principal Family Judge, Bangalore filed by the wife under Section 13(1)(a) and (b) of the Hindu Marriage Act for grant of divorce.

B *TP (CIVIL) NO.727/2004* which has been filed by the husband before this Hon'ble Court arises out of these proceedings.

(iii) *REFERENCE CASE NO.M-313 OF 2003* pending before the Learned 5th Judicial Magistrate Court, Burrackpore, West Bengal filed by wife under Section 125 CrPC for maintenance.

C *TP (CRIMINAL) NO.105/2004* which has been filed by the wife before this Hon'ble Court arises out of these proceedings.

(iv) MATRIMONIAL SUIT NO.437/2002 pending before the District Judge, Barasat, West Bengal filed by the husband under Section 9 of the Hindu Marriage Act for restitution of conjugal rights.

D *TP (CIVIL) NO.228/2004* which has been filed by the husband before this Court arises out of these proceedings.

(v) *GUARDIANSHIP CASE NO.66/2004* pending before the District Judge, Barasat, West Bengal filed by the husband under Section 25 of the Guardians and Wards Act for custody.

E *TP (CIVIL) NO.168/2006* which has been filed by the wife before this Court arises out of these proceedings.

5. Both the parties humbly request this Court in exercise of its powers to do complete justice to the parties, quash/close all the

F above pending proceedings in view of this settlement as the parties do not intend pursuing the litigation any further.

6. Both the parties humbly request that all the transfer petitions pending in this Court (as mentioned earlier in para 4) to be dismissed as infructuous.

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7. Both the parties submit that their marriage has broken down irretrievably and that there is no possibility of the parties living together. In these circumstances, both parties would humbly request this Court in exercise of its powers to grant a decree of divorce by mutual consent.

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8. Both the parties undertake that they shall adhere to the terms of compromise/settlement and that they shall not litigate any further and will have no claim against each other hereafter." A

Learned counsel appearing for the parties have prayed that in the peculiar facts and circumstances and in the interest of justice, this Court, in exercise of its jurisdiction under Article 142 of the Constitution, may grant a decree of divorce by mutual consent. B

Learned counsel for the parties have also drawn the attention of this Court to the decision of *Harpit Singh Anand* v. *State of West Bengal* reported in [2004] 10 SCC 505. In this case, in almost similar circumstances, this Court in order to put a quietus to all litigations between the parties and not to leave any room for future litigation and on the request of the said parties, exercising the power vested under Article 142 of the Constitution, dissolved the marriage and granted a decree of divorce by mutual consent. C

In the case of *Kanchan Devi* v. *Promod Kumar Mittan & Anr* reported in [1996] 8 SCC 90, where the marriage of the parties was irretrievably broken down, this Court exercised the power under Article 142 of the Constitution of India and passed the following order: D

"6. In view of the peculiar facts and circumstances of the case and being satisfied that the marriage between the appellant and the respondent has irretrievably broken down and that there is no possibility of reconciliation, we in exercise of our powers under Article 142 of the Constitution of India hereby direct that the marriage between the appellant and the respondent shall stand dissolved by a decree of divorce. All pending cases arising out of the matrimonial proceedings and the maintenance proceedings under Section 125 Cr. PC pending between the parties shall stand disposed of and consigned to the records in the respective courts on being moved by either of the parties by providing a copy of this order, which has settled all those disputes in terms of the settlement. This appeal is disposed of in the above terms." E F G

In the case of *Ashok Hurra* v. *Rupa Bipin Zaveri etc.* reported in [1997] 4 SCC 226, this Court while dealing with a matrimonial matter quoted few excerpts from the Seventy-first Report of the Law Commission of India on the Hindu Marriage Act, 1955 *"Irretrievable Breakdown of Marriage"* dated 7.4.1978. We deem it appropriate to reproduce some excerpts from the said H

report as under:

"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.

* * *

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 spouse and gives rise to crime and even abuse of religion to obtain annulment of marriage.

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

After the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce. The parties alone 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 which they may regulate their relationship in the changed circumstances.

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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 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 breakdown"."

In order to do complete justice in the matrimonial matters, this Court has been less hesitant in exercising its extra-ordinary jurisdiction under Article 142 of the Constitution. To illustrate this fact, reference of some decided matrimonial cases is given hereinbelow.

In *Swati Verma* v. *Rajan Verma & Ors* reported in [2004] 1 SCC 123, this Court came to a definite conclusion that the marriage between the parties has irretrievably broken down and with a view to restore good relationship and to put quietus to all litigations between the parties and not to leave any room for future litigation, so that they may live peacefully hereafter, this Court granted a decree of divorce by mutual consent while exercising its power under Article 142 of the Constitution.

This Court while exercising its unique power vested under Article 142 of the Constitution in a transfer petition in the case of *Madhuri Mehta* v. *Meet Verma* reported in [1997] 11 SCC 81, observed as under:

"During the course of hearing of this transfer petition, parties have jointly made an application under Section 13-B of the Hindu Marriage Act, 1955 before us praying for dissolution of their marriage by mutual consent and in the body of the application a provision has been made for their only child. Though the child has been conferred the right to visit his father as and when he likes, there is no corresponding right with the father to visit his child. That state of affairs would be violating the rights of the child and the father. The husband will, thus, have a right of visitation to see his child but after giving due *intimation* to the mother. The parties have been estranged and have kept apart since January 1996. Earlier to the present status, the parties had their

earlier marriages broken or disrupted. The husband lost his wife in a vehicular accident and the wife had divorced her earlier husband. In this background their differences can well be appreciated when both of them are highly educated doctors. Keeping that in view, we entertain this application and grant them divorce by mutual consent in exercise of our powers under Article 142 of the Constitution, for which there is ample authority reflective from past decisions of this Court. The divorce petition pending in the Family Court at Patna, shall stand disposed of automatically by this order.

The transfer petition and the divorce petitions are disposed of accordingly."

In another transfer petition in the matrimonial matter, in *Anita Sabharwal* v. *Anil Sabharwal* reported in [1997] 11 SCC 490, this Court was of the view that there was no hope for the parties to live together and passed the following order:

"A divorce petition being HMA Case No.863 of 1994 preferred by the respondent-husband was pending in the Court of Shri A.K. Pathak, Additional District Judge, Delhi. The instant transfer petition was moved by the petitioner-wife seeking transfer of the said case to the Family Court, Mumbai. During the pendency of the transfer petition, parties as well as their counsel had on 9.9.1996 put on record a compromise deed wherein they have agreed to get divorce by mutual consent. Strictly speaking, the preconditions of such claim have not been laid inasmuch as a petition to that effect has not been filed under Section 13-B of the Hindu Marriage Act, 1955 (the Act) before the first matrimonial court, and that the statutory period of 6 months has not even commenced. Be that as it may, it stands established beyond doubt on our summoning of the original file - HMA Case No.863 of 1994 - that the parties were married about 14 years ago, have spent the prime of their life in acrimony and litigating and that it is time that their mutuality bears some fruit in putting them apart. Therefore, we take the divorce petition HMA Case No.863 of 1994 on our own file and import thereto the compromise deed put on record by the parties jointly. In terms therewith, a sum of Rs.7 lakhs stands paid to the wife by means of 3 separate bank drafts of Rs.2 lakhs, Rs.2 lakhs and Rs.3 lakhs. Recurring provision has been made therein for their children's education and visitation rights of the father.

We have questioned the parties and they are eager to dissolve the matrimonial tie so that they can rearrange their lives well in time. We, therefore, in the spirit of Section 13-B of the Act, and in view of the fact that all hopes to unite them together have gone, hereby grant to the parties divorce by a decree of dissolution by mutual consent to end their prolonged unhappiness. Ordered accordingly. The transfer petition stands disposed of."

We have heard learned counsel for the parties. This Court adjourned the proceedings from time to time to ensure that the parties may reconcile the differences and live together again, but this has not happened. It is indeed the obligation of the Court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained. But as aptly observed by this Court, in a recent decision in *Naveen Kohli* v. *Neelu Kohli* reported in [2006] 4 SCC 558, that when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist.

In the instant case, we are fully convinced that the marriage between the parties has irretrievably broken down because of incompatibility of temperament. In fact there has been total disappearance of emotional substratum in the marriage. The matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, therefore, the public interest and interest of all concerned lies in the recognition of the fact and to declare defunct *de jure* what is already defunct *de facto* as observed in *Naveen Kohli's case* (supra).

In view of peculiar facts and circumstances of this case, we consider it appropriate to exercise the jurisdiction of this Court under Article 142 of the Constitution.

In order to ensure that the parties may live peacefully in future, it has become imperative that all the cases pending between the parties are directed to be disposed of. According to our considered view, unless all the pending cases are disposed of and we put a quietus to litigation between the parties, it is unlikely that they would live happily and peacefully in future. In our view, this will not only help the parties, but it would be conducive in the interest of the minor son of the parties.

On consideration of the totality of the facts and circumstances of the

A case, we deem it appropriate to pass the order in the following terms:

(a) The parties are directed to strictly adhere to the Terms of Compromise filed before this Court and also the orders and directions passed by this Court;

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(b) We direct that the cases pending between the parties, as enumerated in the preceding paragraphs, are disposed of in view of the settlement between the parties; and

(c) All pending cases arising out of the matrimonial proceedings including the case of restitution of conjugal rights and guardianship case between the parties shall stand disposed of and consigned to the records in the respective courts on being moved by either of the parties by providing a copy of this order, which has settled all those disputes in terms of the settlement.

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These transfer petitions are accordingly disposed of. In the facts and circumstances of the case, we direct the parties to bear their own costs.

S.K.S. Petition disposed of.