THE HIGH COURT OF TRIPURA
AGARTALA

MAT APP. NO.15 OF 2009

Shri Biswanath Basper,
S/O Late Brajanath Basper,
Resident of Kajirgaon,
P.S. Kailashahar,
District-North Tripura.

..... *Appellant*

- Vs –

Smti. Jhumarani Ghosh(Basper),
W/O Shri Biswanath Basper,
D/O Shri Himangshu Ghosh,
Resident of Baligaon,
P.S. Kamalpur,
District-Dhalai.

..... *Respondent*

BEFORE
HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA
HON'BLE MR. JUSTICE S.C. DAS

For the appellant : Mr. B. Banerji, Advocate

For the respondent : Mr. P. Roy Barman, Advocate

Date of hearing & delivery of Judgment & order : **07.01.2015**

Whether fit for reporting :

Yes	No
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JUDGMENT & ORDER (ORAL)

(Deepak Gupta, CJ.)

This appeal by the petitioner-husband is directed against the judgment dated 24.11.2009 passed by the Judge, Family Court, Kailashahar, North Tripura in Case No.T.S.(Divorce)86/2008 whereby he dismissed the petition filed

by the appellant-husband under Section 13 of the Hindu Marriage Act seeking divorce on the grounds of cruelty and desertion.

2. The undisputed facts are that the petitioner-husband was married to the respondent-wife on 09.05.2002. They are both Hindus and governed by the provisions of the Hindu Marriage Act.

3. The petitioner in his affidavit filed by way of evidence stated that the wife used to hate his mother since the petitioner and his mother belonged to an untouchable community. However, other than stating that the wife hated the mother, no other overt or covert act of cruelty has been alleged. The second allegation of cruelty is that the wife used to avoid conjugal life with the petitioner. Again no detailed facts have been given. It is averred that the wife asked the husband to separate from his father's house and leave the mother alone and reside separately. This by itself could not amount to an act of cruelty because a wife may rightly or wrongly ask her husband to set up a separate residence for the couple. There is no allegation that thereafter the wife left the husband or that because the husband did not leave his parents' house the wife acted with cruelty against him.

4. It is the admitted case of the parties that the husband filed a petition for restitution of conjugal rights and this petition was compromised and thereafter the wife rejoined the company of the husband. If the wife had acted with cruelty we fail to understand why the husband would have filed a petition for

restitution of conjugal rights and not for divorce. It is obviously the husband wanted to live with the wife and this clearly indicates that there were no acts of cruelty as alleged in the earlier part of the affidavit.

5. Be that as it may, the fact remains that the wife rejoined the company of the husband. Therefore, in terms of Section 23 of the Hindu Marriage Act read with Rule 7 of the Gauhati High Court Hindu Marriage Rules, 1988, it is apparent that the acts of cruelty, if any, which may have taken prior to the filing of the petition for restitution of conjugal rights were condoned by the husband after the wife and the husband started living together. Thereafter, no act of cruelty has been alleged in the petition or in the affidavit. As such, no ground of cruelty is made out.

6. As far as the ground of desertion is concerned, it would be pertinent to mention that the petition for grant of divorce was filed on 26.11.2008 and the allegation in the petition and in the evidence is that the wife left the house of the husband on 19.07.2007. In terms of Section 13, the desertion should be for a continuous period of two years prior to the filing of the petition for divorce and even as per the allegations, the desertion was only for one and half years and therefore at the time of filing of the divorce petition, the cause of action for filing a divorce petition on the ground of desertion had not even arisen.

7. It is contended by learned counsel for the petitioner that the marriage has irretrievably been broken down and therefore there is no point in continuing with the dead marriage. In this behalf, reference has been made to the judgment of the apex Court in ***K. Srinivas Rao v. D.A. Deepa, (*****2013 AIR SCW 1396)**, wherein the apex Court held as follows:-

> *"25. It is also to be noted that the appellant-husband and the respondent-wife are staying apart from 27/4/1999. Thus, they are living separately for more than ten years. This separation has created an unbridgeable distance between the two. As held in Samar Ghosh, if we refuse to sever the tie, it may lead to mental cruelty.*
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> *26. We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. 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."*

8. There are many other judgments of the apex Court which have taken a different view. It is settled law that irretrievable breakdown of marriage is not by itself a ground for divorce. The Courts cannot legislate and it is only for the legislature to decide what are to be the grounds of divorce. At the same time, if other grounds are made out or the ground of cruelty or desertion is partly proved, then if the marriage is dead, then the Court may take a view granting divorce. We may make it clear that sometimes even when a ground for divorce is made out the Court can refuse to grant divorce because of other circumstances, such as, the welfare of the children. But where the marriage is dead that will be a factor which will have to be taken into consideration to come to the conclusion that divorce may be granted. By itself, the fact that the marriage has irretrievably been broken down can never be a ground for grant of divorce. In the present case, both the grounds of cruelty and desertion did not exist on the date of filing of the divorce petition. Therefore, we find no merit in the appeal which is accordingly dismissed.

JUDGE **CHIEF JUSTICE**