

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.188 of 2011

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Smt. Babita Kumari Wife of Sri Ramesh Kumar Daughter of Sri Durga Prasad, resident of Mohallah :- Khajanchi Hat, P.O. & P.S. :-Khajanchi Hat, District :- Purnia, at present residing at Mohallah – Ranighat, Campus of Engineer's Hostel no. 3, P.S. –Sultanganj, District Patna

Defendant in the court below.... Appellant

Versus

Ramesh Kumar Son of Sri Deo Chandra Gupta, resident of Village :- Ram Dihara P.O.-Sone Via Tilothu, P.S.:- Tilothu, District :- Rohtas Saran, at present lecturer in Electrical Engineering, Bihar College of Engineering, Patna -5, P.S. – Pirbahore, District Patna

Plaintiff in the court below.... Respondent

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Appearance :

For the Appellant : Mr. Ajay Kumar Thakur, Advocate

For the Respondent : M/s. L.N.Dass, Mithilesh Kumar Gupta,
Uday Kumr, Virender Kumar, Advocates

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
and
HONOURABLE DR. JUSTICE RAVI RANJAN

CAV JUDGMENT

(Per: HONOURABLE DR. JUSTICE RAVI RANJAN)

Date: 27.04.2016

I have heard parties and perused the records of this appeal.

This appeal is directed against the judgment and decree dated 4.2.2005 passed by the Additional Principal Judge, Family Court, Patna in Matrimonial Case No. 41 of 1998 by which the court below has granted divorce under Section 13 (1) (i-

a) and (1-b) of the Hindu Marriage Act, 1955 (for brevity “the Act”) i.e., on the ground on cruelty and desertion.

The Matrimonial Case No. 41 of 1998 initiated by the husband, i.e., the sole respondent in the present appeal, for dissolution of marriage was viewed from the different perspective by the Family Court Judge who allowed the petition, granted divorce on the ground of cruelty and desertion.

The respondent husband, a Lecturer in the Bihar College of Engineering, Patna, now a National Institute of Technology, in his petition filed before the Family Court, has averred that the marriage between the parties was solemnized in accordance with Hindu rites and customs on 30.4.1987 at Purnea. After the marriage the wife came to her matrimonial house and they started living together. On 16.11.1987 he was appointed on the post of Lecturer in Bihar College of Engineering, Patna and started living in the quarter provided by the College at Ranighat, P.S. Sultanganj, Patna. Three children were born in the wedlock, one daughter, namely, Ruchita and two sons Rohit Vikrant and Anshu in the year 1990, 1993 and 1994 respectively. However, it has been averred in the plaint that right from the beginning the defendant frequently used to leave the quarter of the plaintiff and go to at her parents house at Purnea without his consent and used

to come back at her desire and will. She remained under the influence of her parents and brothers and, even while staying with the husband in his quarter, she did not care for him at all. On 21.7.1996 the wife left the matrimonial house and went to her 'Naihar' without the consent of the husband and did not return even after several requests. The husband went to Purnea to bring her back on 28.7.1996 but she did not return. Husband has alleged that he was subjected to misbehaviour at Purnea and even was abused by the appellant, her parents and brother. As a result, he came back on 30.7.1996 without her. Further allegation is that she along with her parents and brother always used to threaten the husband and pressurise him to transfer his properties in her name. Such demand was made on 28.7.1996 at Purnea. Thereafter, the husband returned back to Patna and started living alone in his quarter suffering troubles, hardship and mental agony. The aforesaid situation continued for pretty long time and, as a result, the education of the children also suffered as they had remained absent from their school for about six months. Fed up with the attitude of the wife, the husband filed a case for restitution of conjugal life. However, she returned back and stayed in the husband's quarter. As a result, the husband left the case filed for restitution of conjugal right unattended. It appears from the



assertions made in the petition filed by the husband and discussed above that, as per his claim, there had been a marital discord and total non compability as the wife had severed all the ties. It is further alleged that the couple did not have any physical marital conduct since February 1996. Although she came back on 31.3.1997, after about a lapse of eight months to the quarter of the plaintiff and started residing there but she had refused to discharge her marital obligation. It has further been alleged that whenever the parents of plaintiff used to come to Patna the wife had always ill treated and misbehaved with them and, for demorlising the husband, called him and his parents 'beggars' and not up to her status. Further allegation in the petition of husband is that such abnormal and harsh behaviour and the action of the wife had made a dent in the social status of the plaintiff and had alienated him from society. She also used to misbehave with the sister of the plaintiff. She did not even use to care her own children and use to rise late in the morning and as such the husband himself had to prepare the children for school. She was all along poisoning the mind of the children also. She used to regularly refuse to cook food as a result of which the husband had often managed food from some other source including hotel. She never used to timely give medicine to the children whenever they fell ill. Due

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to her ill behaviour, the mother of the husband who had come for her treatment at the time of Durgapuja in the year 1997 had to go back. When the parents again came at the time of Deepawali, she forced them to cook separately and threatened to poison them. This forced his parents to leave the quarter in the night of Deepawali itself. All efforts to please him went in vain. She often used to threaten the petitioner to kill him by using a sickle. She used to ill treat his friends also. The aforesaid behaviour and conduct of the wife, as per the allegation by the husband, had subjected him to mental cruelty.

The husband petitioner had filed an application for amendment in his petition also on 23.7.1998 which was allowed inserting a passage under paragraph 35(a) stating that on 4.4.1998 the wife had clandestinely left his quarter and took all her belongings. He had informed the Sultanganj Police Station regarding the aforesaid and, since thereafter, the wife was staying at Purnea with her parents. Amendments were sought again by the husband petitioner by inserting paragraph 35(b), 35(c) and 35(d) stating that after filing of the matrimonial case a complaint case has been filed by the wife against husband, his parents and two sisters under Section 498A, 323, 406 and 120B of the Indian Penal Code and Section 3/4 of the Dowry Prohibition Act, 1961 in which



cognizance has been taken against them. It has been asserted that such action was taken after 15 years of marriage and after three children having been born in the wedlock. Allegation of demand of dowry of one lac rupees was made by the wife. As per demand, the husband gave her one lac rupees to ensure the withdrawal of criminal case and also to ensure that no such step would be taken by her in future. The amount was paid by Demand Draft. She came back again in the month of September, 2000 from Purnea and again started living with the children in the quarter but did not keep any contact with the petitioner and again demanded Rs. 50,000/- which was paid by him. However, she again went to Purnea on 31.10.2001 and, after much request, as the money demanded was already paid, she filed a compromise petition in the Court after that bail was granted to the husband. Even though she assured that she would not pursue the criminal case but again demanded Rs. ten lacs and threatened that she would not withdraw the case if the aforesaid amount was not paid. In above view of matter the criminal case was continuing. All efforts of the friends and well-wishers for approachment failed due to the ill-behaviour and rigid attitude of the wife. On 30.10.2001, before going to Purnea, the wife had again ill-treated her father-in-law and even assaulted them. She had completely



disrupted peace of the family. Time and again she use to demand money from him and also continued with abusing him and all other members of family making their life hell. On 16.5.2002 she invited certain anti-social elements also to pressurise the husband to transfer properties in her name. On a particular day all the family members had to close themselves in one room to save their lives as she continue to abuse and threaten them from outside in the presence of such outsiders. It is alleged that, on 15th of March 2002 she tried to strangle the petitioner but somehow he could save his life. Ultimately, the husband petitioner left his own quarter on May 2002 along with his parents and started residing in a rented accommodation whereas the wife remained in occupation of 8 rooms quarter provided to the husband by the Engineering College. He had written to the Sr. Superintendent of Police, Patna and Officer, Incharge of Sultanganj Police Station also regarding the events. In the meantime, she had again lodged a false criminal case being Complaint Case No. 417(C)/2002.

On the aforesaid factual matrix the husband filed petition for grant of decree of divorce.

Wife has also filed her objection stating that at the time of marriage her father had given several items by way of gift as demanded by the husband and his parents but they again

demanded Rs. 80,000/- due to which they had to transfer their 4 kathas of valuable land of Purnea in the name of father of the petitioner by executing a registered sale deed. Though it was shown that the transfer was for valuable consideration but that was only showy as not a single penny was given. Even then, her husband, his parents and specially his sister who were living in Patna started mentally and physically torturing her for fulfilling illegal demand. The wife used to share her predicament with the neighbours and his brother also who was a student of Patna Medical College at that point of time and, due to torture inflicted upon her, she had often gone to her father's house at Purnea where she used to live for months. The sister of her husband used to instigate her husband to torture her to such a level so that she could be compelled to commit suicide. Thereafter, as per her assertions, her father-in-law pressurised her father to take back the land of Purnea purchased by him as stated above after paying valuable consideration and, as such, her father had to pay Rs. 80,000/- and, thereafter, land was returned by executing a registered sale deed. It is stated that the aforesaid act was also a novel way of extracting dowry. She has also made allegation that due to behaviour and conduct of her husband she had to live at her parents' place mostly and her children were also staying at Purnea





not at Patna. She has also stated that she has lodged criminal case in Purnea only for the reason that she was thrown out by her husband and beating mercilessly. Thereafter, a joint petition for compromise was filed on payment of Rs. one lac for the benefit of children. However, after compromise, the aforesaid one lac rupees was taken back and the husband again started beating her and, therefore, again a complaint case was filed. Whenever her husband erred she filed a case but whenever he loved her, she tried to maintain the matrimonial tie.

The Family Court framed following issues for consideration :

“(1) क्या यह वाद जैसा कि प्रस्तुत किया गया है, विचार करने के योग्य है?

(2) क्या वादी को वर्तमान वाद लाने के लिए वैद्य एवं विधिमान्य वाद हेतुक हुआ ?

(3) क्या प्रतिवादिनी वादी के साथ क्रूरतापूर्ण व्यवहार करती है ?

(4) क्या प्रतिवादिनी ने वादी को फरवरी, 1996 से अभित्याजित कर रखा है?

(5) क्या वादी मांगे गये अनुतोषों के पाने का हकदार है?

(6) क्या वादी कोई अन्य अनुतोष पाने का हकदार है?”

The Additional Principal Judge, Family Court, after appreciating the oral and documentary evidence led by the parties,



has held that the husband has been subjected to cruelty and in view of the fact that as the wife did not permit or allow or facilitate cohabitation between the parties, it has to be understood that she withdrew from the matrimonial obligation from February, 1996 which would amount to desertion. Thus, the decree of divorce has been granted on both the counts.

Assailing the legal sustainability of the judgment, learned counsel appearing for the appellant submitted that the judgment and decree is erroneous on count of non-appreciation of evidence of the D.Ws. in proper perspective. Error has been committed by the court below by discarding her allegation made against the husband regarding cruelty inflicted upon her and not granting any relief under Section 23(A) of the Act on the ground that she, by filing an application on 13.8.2004, had pardoned the cruelties and torture made by the family members as she wanted to reside with her husband. Further error pointed on behalf of appellant is that the court below has totally ignored the evidence led by the children who have stated that their father was torturing their mother and their mother was taking care of them in regular and proper manner. It has been urged that, from bare perusal of the paragraph 28 of the judgment, it would appear that the court below was suffering from bias in view of certain

applications having been filed by the wife making allegation against him during the pendency of the matrimonial case. Though it is stated that the wife has apologized but still, for such behaviour, it has been surprisingly held that she was guilty of cruel behaviour against the husband.

Per contra learned counsel appearing for the respondent has submitted that in the written statement itself and thereafter, in a petition filed in guardianship case also the wife has clearly stated that she does not want to leave with husband and her children is not safe in his hand. That apart the husband and his father while being examined as P.Ws. 1 and 4 have given event wise graphic account of the cruel behaviour of the wife and they have withstood the test of cross examination. Other witnesses have also supported the same. Thus, it can safely be inferred that since the children were living with mother they have only given tutored version. That apart, the wife did not have courage to get her examined as a witness and stand the test of cross-examination. She was the best person to deny the allegation of cruelty made by the husband and in case husband had treated her with cruelty in such case also her examination was of prime importance. However, she failed to produce her for examination.

Before proceeding to appreciate rival submissions



raised at the Bar, this court is tempted to quote a passage from a decision of the Apex Court rendered in **Malathi Ravi, M.D. Verus B.V. Ravi, M.D. [(2014) 7 SCC 640]** which is an observation regarding institution of marriage itself. The passage is extracted as under:-

“Marriage as a social institution is an affirmance of civilized social order where two individuals, capable of entering into wedlock, have pledged themselves to the institutional norms and values and promised to each other a cemented bond to sustain and maintain the marital obligation. It stands as an embodiment for continuance of the human race. Despite the pledge and promises, on certain occasions, individual incompatibilities, attitudinal differences based upon egocentric perception of situations, maladjustment phenomenon or propensity for non-adjustment or refusal for adjustment gets eminently projected that compels both the spouses to take intolerable positions abandoning individual responsibility, proclivity of asserting superiority complex, betrayal of trust which is the cornerstone of life, and sometimes a pervert sense of revenge, a dreadful diet, or sheer sense of envy bring the cracks in the relationship when either both the spouses or one of the spouses crave for dissolution of marriage – freedom from the institutional and individual bond.”

The case in hand was initiated by the husband for dissolution of marriage on the ground of cruelty and desertion.



The Apex Court in catena of decisions has dealt with issue of mental cruelty. Some of those decisions have been referred and dealt with by the Apex Court in **Malathi Ravi, M.D. (supra)**. For better appreciation relevant passage dealing with the several earlier decisions of the Apex Court on the ground of the cruelty are extracted as under:

“29. Before we proceed to deal with the issue of mental cruelty, it is appropriate to state how the said concept has been viewed by this Court. In *Vinit Saxena v. Pankaj Pandit*[(2006) 3 SCC 778], while dealing with the issue of mental cruelty, the Court held as follows: (SCC pp. 796-97, paras 31 & 35)

“31. It is settled by a catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.

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35. Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be

determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered.”

30. In *Samar Ghosh v. Jaya Ghosh* [(2007) 4 SCC 511], this Court has given certain illustrative examples wherefrom inference of mental cruelty can be drawn. The Court itself has observed that they are illustrative and not exhaustive. We think it appropriate to reproduce some of the illustrations: (SCC pp. 546-47, para 101)

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

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

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

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

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(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will

not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

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(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.”

31. In the said case the Court has also observed thus: (Samar Ghosh case [Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511] SCC pp. 545-46, paras 99-100)

“99. The human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed



parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances....”

32. In Vishwanath Agrawal, v. Sarla Vishwanath Agrawal [(2012) 7 SCC 288 : (2012) 4 SCC (Civ) 224: (2012) 3 SCC (cri) 347], while dealing with mental cruelty, it has been opined thus: (SCC p. 298, para 22)–

“22. The expression ‘cruelty’ has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status.”

33. In the said case, analysing the subsequent events and the conduct of the wife, who was responsible for publication in a newspaper certain humiliating aspects about the husband, the Court held as follows: (Vishwanath Agrawal case, Vishwanath Agrawal, v. Sarla Vishwanath Agrawal [(2012) 7 SCC 288 : (2012) 4 SCC (Civ) 224: (2012) 3 SCC (cri) 347], SCC p. 307, para 54)

“54.In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. The conduct and circumstances make it graphically clear that the respondent wife had really humiliated him and caused mental cruelty. Her conduct clearly expositis that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womaniser and a drunkard. She had made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious.”

34. In U. Sree v. U. Srinivas[(2013) 2 SCC 114 : (2013) 1 SCC (Civ) 1002: (2013) 1 SCC (Cri) 858], the



Court, taking note of the deposition of the husband that the wife had consistently ill treated him inasmuch as she had shown her immense dislike towards his “sadhna” in music and had exhibited total indifference to him, observed as follows: (SCC p. 127, para 23)

“23. ...It has graphically been demonstrated that she had not shown the slightest concern for the public image of her husband on many an occasion by putting him in a situation of embarrassment leading to humiliation. She has made wild allegations about the conspiracy in the family of her husband to get him remarried for the greed of dowry and there is no iota of evidence on record to substantiate the same. This, in fact, is an aspersion not only on the character of the husband but also a maladroit effort to malign the reputation of the family.”

35. In *K. Srinivas Rao v. D.A. Deepa* [(2013) 5 SCC 226: (2013) 2 SCC (Civ) 775: (2013) 2 SCC (Cri) 963], while dealing with the instances of mental cruelty, the court opined that to the illustrations given in the case of *Samar Ghosh* (*Samr Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511) certain other illustrations could be added. We think it seemly to reproduce the observations: (*K.Srinivas Rao Case*) [(2013) 5 SCC 226: (2013) 2 SCC (Civ) 775: (2013) 2 SCC (Cri) 963] SCC p. 234, para 16)

“16. ...Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse.”

The Apex Court in **Malathi Raiv, M.D. (supra)**, apart from dealing with the issue of cruelty, has also delved upon

the concept of desertion and has quoted earlier decisions of the Apex Court in this regard. Relevant passages are extracted as under for better appreciation of the matter :

“19. Dealing with the concept of desertion, this Court in Savitri Pandey v. Prem Chandra Pandey [(2002) 2 SCC 73] has ruled thus:- (SCC pp. 80-81, para 8)

“8. Desertion”, for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other’s consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations i.e. not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to a host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbai Shah v. Prabhavati [AIR 1957 SC 176] held that if a spouse abandons the other in a state of temporary passion, for example, anger [pic]or disgust without intending permanently to cease cohabitation, it will not amount to desertion.”

20. In the said case Savitri Pandey case [(2002) 2 SCC 73], reference was also made to Lachman Utamchand Kirpalani’s case [Lachman Utamchand Kirpalani v. Meena, AIR 1964 SC 40] wherein it has been held that desertion in its essence means the intentional permanent forsaking and abandonment of one spouse by the other



without that other's consent, and without reasonable cause. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion as proved the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation."

Coming to the case in hand, from perusal of the materials on record, it would appear that the husband has given a graphic account of his mental and to some extent, physical suffering at the hands of the wife. The allegations levelled in the petition has been dealt with above and, thus, are not required to be reproduced again. In support of the allegation the petitioner has examined altogether four witnesses. P.W. 1 is the father of the respondent husband who has given event-wise account of his as well as his son's suffering at the hands of his daughter-in-law which includes even physical assault. He appears to have withstood the test of cross-examination. The P.Ws. 2 and 3 are friends of the respondent husband and have also supported the

case. The husband has examined himself as P.W. 4 and has corroborated the allegations made in the plaint by citing several events and occurrences. He has been cross examined in detail but has withstood the test.

The wife has examined about five witnesses. The most important witnesses examined on behalf of the wife are her sons. Ritik Rohan, who has been examined as D.W. 1 and was aged about ten years at the time of his examination, has stated regarding mental and physical torture of his mother by father and also the grandparents, who allegedly used to abuse and sometime even assault her. He has stated that the brothers and sister were being looked after by mother in the Government quarter. However, he has also stated that whenever he fell ill his father used to take care of him even by remaining at bed side whole night. He has accepted in the cross examination that he is living in the quarter since 2002 and his father resides somewhere else and further that there was never a quarrel between the grandparents and his mother whereas, in his chief he has stated that they used to torture her so there is obviously deviation in his statement. He has also stated that grand-parents have not visited the quarter for about one year which supports the claim of the husband made in that regard. Similarly Rohit Vikrant, another son of the parties, was examined





as D.W. 4 at the age of 12 years. He also appears to have defended her mother and have made allegations against father of ill treating his mother at the instigation of grand parents. However, while being cross examined he has accepted that father is paying school fees etc.. He has also stated that his presence in the school is bad because he has remained outside station almost entire year which again supports such allegation made by the husband. It has to be kept in mind that the husband has alleged that his children were being poisoned by mother and D.W.1 has stated that they were staying in the quarter provided by the college to his father but the father was not living there. Similarly other D.Ws. have supported the case of the wife. However, in my considered view, the non-examination of wife gives a major dent to her case as she was the best person to state regarding allegations made by the husband or the allegation made by her in her objection.

Learned counsel for the appellant has stated that several time petitions were filed but those were not accepted and she was even not given time for moving in civil revision against the orders rejecting the time petition. However, on perusal of record it appears that the court was trying for expeditious disposal of the case whereas the appellant - wife was all along seeking adjournments. On 4.1.2005 the Principal Judge has recorded in



his order that the wife has filed a time petition seeking fifteen days adjournment for producing witness as she has gone to her parent's house where she has fallen ill. However, the same was rejected on the ground that there was no medical certificate along with the time petition indicating her illness and, whereas the court had already decided for day to day hearing for disposal of this matter, the wife was not showing interest. Thus, on the next date fixed on 4.1.2005, she was directed to appear in person to be examined as witness. However, again on 5.1.2005 it appears that a time petition was filed stating that she was suffering from cold and, therefore, she was unable to appear before the court but that was also without any medical prescription or certificate. The court had opined she was purposely filing time petitions by way of dilatory tactics. However, again the matter was adjourned. On 11.1.2005 a petition was filed for reexamination of her witness nos. 1, 2 and 4 as the court could not record it properly but the application was rejected. Another petition was filed stating that her father was suffering from Hepatitis B and was being treated at Delhi and her doctors had advised her also to take rest. However, she was present before this court but did not present herself to be examined as witness. Again matter was deferred for the next date, i.e., on 12.1.2005 granting her opportunity to



examine herself failing which final hearing would commence even without that. On 12.1.2005 she filed a petition that she desired to move before the High Court against rejection of her aforesaid time petition. However, when the case was called out DW 5 was examined on her behalf and the matter was again posted for further examination on 13.1.2005. Again the wife did not present herself for her examination and it further appears from the order dated 13.1.2005 that Satyesh Kumar, who was examined as DW 5, did not put her signature on the deposition, therefore, his evidence was expunged. Thereafter, the court below again granted her time to appear on 17.1.2005 for recording her evidence but again she could not avail the opportunity. Not only she did not examine her as witness but neither she nor her Advocate was present when the case was called out. Then the court proceeded to fix 18.1.2005 as date of final hearing. On 18.1.2005, an application was filed on behalf of the Babita Kumari for adjournment which was neither signed by her nor by her Advocate. In the application it was stated that she was taking rest, therefore, in view of her illness she should be given more time. Time petition was rejected. Matter was heard in part and eventually hearing was concluded on 14.2.2005.

From the perusal of the order-sheet, it appears that sufficient time was granted to the appellant for her examination

but she could not avail the opportunity. All the time she was filing time petitions. It appears to this court also that dilatory tactics was adopted by her and, as such, she herself could be blamed for not being examined as witness.

However, it has been vehemently argued on behalf of the appellant that the Presiding Officer has proceeded in a biased manner as he was angry with wife for making certain allegations against him by filing petition etc which has been dealt in detail in paragraph no. 28 and has opined that, in view of such conduct of the wife, he has been forced to accept the allegation of cruelty made by the husband upon wife to be true.

From perusal of paragraph 28, it appears that conduct of the wife of course was not up to mark at all. However, at the same time, it appears that the court below has also been carried away by her such conduct and has recorded his observation as stated above which was not at all required to be done.

However, the seminal question that has to be addressed is whether under these circumstances the decree for divorce granted by the Family Court should be interfered with? The answer has to be in negative, as apart from the observation of the Family Court recorded in paragraph 28, there are sufficient materials on record and upon the appreciation of rival contention



this Court would also come to the same conclusion that husband has been able to prove his case of cruelty and desertion.

Though it is a fact that during the two previous years of filing of the case, the wife had gone to her parent's house and had come back to the official quarter of husband again and, thereafter, the husband had left his official quarter. However, it is not important as to whether they were living under one roof or not rather the issue would be whether one of the spouse has withdrawn from the matrimonial obligation or not. Desertion, as has been held in **Savitri Pandey v. Prem Chandra Pandey [(2002)2 SCC 73]** by the Apex Court, is not the withdrawal from a place but from state of things which would mean withdrawing from the matrimonial obligations, i.e., not permitting or allowing and facilitating the cohabitation between the parties. The allegation of the petitioner that the wife did not permit or facilitate the cohabitation since February 1996 could not be countered by the wife. The best way of countering that would have been to come up as a witness and give an event wise reply but she failed to get her examination. Thus, desertion stands proved.

Similarly on the point of the cruelty the Apex Court in **Vinita Saxena V. Pankaj Pandit [(2006) 3 SCC 778]** has held





that mental cruelty can cause more serious injury than the physical harm and can create in the mind of the injured such apprehension as contemplated in relevant provision under section 13 of the Hindu Marriage Act. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner so as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case. Mental cruelty is a state of mind. In fact the act that creates in mind of one spouse the feeling of deep anguish, disappointment and frustration caused by the conduct of other for a long time may lead to mental cruelty.

That apart the Apex Court in **Samar Ghosh v. Jaya Ghosh [(2007) 4 SCC 511]**, has observed, on consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering that would not make possible for the parties to live with each other, could come within the broad parameters of mental cruelty.

In the case in hand the husband has made allegation regarding mental and, to some extent, physical torture. He has led



evidence as stated above and has been able to prove it. The wife has also made allegation of cruelty against the husband but has failed to examine her as witness to support her pleading. Thus, on account of mental cruelty also there is no requirement of interfering with the judgment and the decree of the Family Court. On that count also, in view of the observations of the Apex Court in **Samar Ghosh (supra)**, it has to be held that on consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as stated by both of them is of such magnitude that it would not be possible for the parties to live with each other, thus, it would also come within the broad parameters of mental cruelty.

As a result this appeal fails and, accordingly, is dismissed.

However, there would be no order as to costs.

(Dr. Ravi Ranjan, J)

I agree.
(Ramesh Kumar Datta, J):

(Ramesh Kumar Datta, J)

Spd/- A.F.R.

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