

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.12.2017

Date of Reserving the Judgment	Date of Pronouncing the Judgment
28.08.2017	13.12.2017

CORAM:

**THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA**

**C.M.A.No.3131 of 2013
and
M.P.Nos.1 of 2013 & 1 of 2014**

V.Usha Devi

... Appellant / Respondent

G.Dayalanathan

... Respondent / Complainant

Civil miscellaneous appeal is filed under Section 19 of the Family Courts Act, 1984, against the judgment and decree, dated 21.03.2013, made in O.P.No.2792 of 2010, on the file of the II Additional Family Court, Chennai and to set aside the same.

For Appellant : Mr.Tranquebar Dorai Vasu
for Mr.S.Muthukumar

For Respondent : Mr.T.R.Rajagopalan, Senior Counsel
for Mr.T.Gowthaman

J U D G M E N T**A.D.JAGADISH CHANDIRA, J.,**

The present civil miscellaneous appeal has been filed by the appellant / wife, under Section 19 of the Family Courts Act, 1984, challenging the Judgment and Decree, dated 21.03.2013, made in O.P.No.2792 of 2010, on the file of the II Additional Family Court, Chennai, dissolving the marriage solemnized between her and the respondent / husband, on 01.03.1995, at Panchdev Temple, Sector 22, Gandhinagar, Gujarat, on the grounds of desertion and cruelty.

2. The case of the respondent / husband in brief is that he is a Tamilan and the respondent is a Telugu speaking woman. When they were in Gujarat, they fell in love with each other and got married on 01.03.1995, at Panchdev Temple, Sector 22, Gandhinagar, Gujarat, as per the Hindu Rites and Customs, in the absence of their parents and also without any formal invitation to anybody. After marriage, till October 1995, they were in Gujarat and thereafter, they came to Chennai. Inasmuch as the respondent / husband got job in a concern known as "Pentamedia Graphics Limited" at Chennai, they had shifted their residence to the official quarters of the respondent/husband situated at Kelambakkam. Their relationship was very cordial. Out of the wedlock, on 17.02.1999, the appellant / wife delivered a

male child, namely, Abranath Srivatsav Dayal. During the year 2001, the appellant / wife had started a business at Chennai and during October, 2003, the respondent / husband had resigned his job in Pentamedia Graphics Limited and vacated the official quarters allotted to him and both the appellant / wife and the respondent / husband decided to reside in the house of the appellant / wife's parents situated at Adambakkam, Chennai.

3. According to the mutual consent between the respondent / husband, they decided that the child be taken care by the parents of the appellant / wife, the respondent / husband and the appellant / wife started living in the first floor of the appellant / wife's parents house for which the respondent / husband had paid some amount to her parents. Thereafter, unfortunately, the appellant / wife had started to change her attitude towards the respondent / husband and thereby, there was no cordial and comfortable relationship between them. The appellant / wife had neglected the respondent / husband completely and not shown interest on him. They used to take food from the appellant / wife's parents during morning and night hours and the appellant / wife had also not shown interest in speaking with the respondent / husband. Hence, the respondent / husband had detached from the appellant / wife and been living separately in the first floor and the appellant / wife had continued to live with her parents and

that she even started to sleep with her parents in the downstairs and that she did not care for the respondent / husband and ignored the marital obligations of a husband and there was no mental or physical relationship between them. Due to the frustration, the respondent / husband had approached the appellant / wife's parents to advise their daughter to bring back into the marital life in a right track and in spite of their advise, the appellant / wife did not change her attitude towards him and during that period the appellant / wife even stopped communication with him. When such being so, to do something about the existing situation, the respondent / husband during July, 2007 looked out for a separate house for the family in the same area, for which, although the appellant / wife had come once or twice, subsequently, she had not shown any interest to live with him and she remained with her parents along with the child. The situation continued leaving the respondent / husband deprived and though the respondent / husband went to the residence of his in-laws and spoke to the appellant / wife in the presence of elders and made it categorically clear that the situation could not continue and even the effort taken by the respondent/husband did not have any effect and the appellant / wife flatly refused to leave her parents.

4. Further, according to the respondent / husband, the appellant / wife was very much influenced by her parents and thereby, she had failed to

discharge her responsibility towards him, which caused him much mental agony. Hence, after the consensus arrived at between them they decided to leave to Velachery and reside there with the parents of the respondent / husband, during July 2008, he had shifted his residence to his parents house at Velacherry, Chennai. Even in his parents house also, she was living with the respondent / husband only for few days and she went back to her parents' house along with the child and also take back her belongings without even informing the parents of the respondent / husband saying that she was not comfortable with them. The respondent / husband had suggested and made an attempt to convince her to move to a vacant house owned by his parents at Alandur and accordingly, he had shifted to Alandur, but, the appellant / wife had categorically refused to live with him. At that time, out of frustration, the respondent / husband had even reminded the appellant / wife that it had been more than five years since they had shared any marital relationship and that they have been living away from each other mentally and physically over the entire period. But, it did not evoke any response from the appellant / wife and she continued to live with her parents without any regard for the physical and psychological impact and the respondent / husband suffered due to the absence of his wife and child. However, with the hope that the proximity to the wife and son would change the attitude, the respondent / husband shifted to his mother's flat at

Alandur and had been visiting his son once or twice in a week and taking him out during the weekends and holidays and she had continued to live with her parents. In such circumstances, on 01.02.2010, the respondent / husband had issued a notice to the appellant / wife asking her to rejoin with him. But, the appellant / wife had not sent any reply. Therefore, the respondent / husband feeling mentally and physically upset because of the appellant / wife's desertion and that the indifference and deprived of conjugal relationship had caused cruelty, filed an original petition for dissolution of the marriage on the grounds of cruelty and desertion.

5. The appellant / wife filed a counter affidavit contending that the respondent / husband had not taken care to spend for the family, which forced her to work and earn separately. The respondent / husband had not provided any monetary help to her and therefore, she had established her own source of income and thereby, she had been managing the family. She has been working as a Guest Lecturer in Hindustan College of Engineering, Kelambakkam and also running an Institute known as "Inspirer's Technologies" at Kelambakkam. The respondent / husband, after resigning his job from Pentamedia Graphics Limited, had started his own business and for some period, he had helped in the appellant / wife's business and since both of them were in the same business and sometimes the customers of

both of them were one and the same and that the first and foremost reason for separation in the matrimonial life was that the respondent / husband did not like the appellant / wife prospering in her field and thereby, started treating her like a rival and that slowly developed into a resentment culminating into a disaster marital breakup. Due to the hectic schedule in the profession, they could not concentrate in bringing up their child. Therefore, they had decided to shift their residence to Adambakkam, where the parents of the appellant / wife are residing and put up their establishment in the first floor of the house. Subsequently, the child was looked after by her parents and that the child was aged 11 years studying 6th Standard.

6. According to the appellant / wife, she had taken all care and affection towards the respondent / husband and that they were living happily and it is false to state that there was no physical contact between them. No such incident as stated in paragraph Nos.7 and 8 in the divorce petition had been taken place. She was ready and willing to live with him and never allowed the respondent / husband to be alone and that there was a child for them and that she having understood the family value in the society had never treated the respondent / husband as stated in the petition. Inasmuch as she had realized the fact that the respondent /

husband had gone away from her. She had spoken with him as well as his parents. It is false to state that the appellant / wife was influenced by her parents. The appellant / wife had stated that the respondent / husband used to take the child out and on the pretext of befriending the child started mesmerizing his mind to change his mind by imputing a threat that another child will come in his place and that the child will not enjoy the same comfort. Though her parents had spoken to him, the respondent / husband created unnecessary panic and that the whole issue of separation is only by the act of the respondent / husband whereas she had done all her duties and performed her responsibilities and that respondent / husband had gone away from the matrimonial bond and intended to break it for no reason or fault of her. The respondent / husband, on his own volition, vacated the premises and moved to his parents' house at Velacherry. The appellant / wife had also attended the funeral of her father-in-law and she was staying with the respondent / husband along with his family members. Initially, his parents were not kind enough towards her because the appellant and the respondent got married without their permission and that they also belonged to different communities and that she did not want to take any chance living with her parents. When the respondent / husband was not working, her parents alone had supported him. He had high sense of ego in his mind, which did not allow him to live peacefully and he is the only root

cause for all the problems. The respondent / husband had exaggerated the facts and had narrated as if it happened for so many years and the actual physical separation occurred only when the respondent / husband moved away and until then everything was normal. Inasmuch as there was no proper and specific reason stated by her for not given any reply to the notice sent by the respondent / husband.

7. Further, according to the appellant / wife, it is false to state that she was not interested in living with the respondent / husband and therefore, she has not moved to the residence looked out by him at Adambakkam. In fact, the appellant / wife came to know that the respondent / husband had shifted his residence from Velacherry to Alandur later through her son and that the respondent / husband planned everything of his own and never disclosed to the appellant / wife and she was taken up for sudden tasks for which she was not ready momentarily due to the commitment of work and the child's education and that the entire blame was put on her as if having come to the matrimonial house she did not last long relationship with him. The respondent / husband used to react immediately in a negative sense even for a small suggestion or discussion given by the appellant / wife. Even though their marriage was on their own being a love marriage, the respondent / husband had not considered the

appellant / wife for her views and decisions and that even for a small difference of opinion, he used to walk out of the house and threatened her that he would desert her. The appellant / wife had denied the separation for 6-1/2 years and stated that the respondent / husband had not provided any financial support for all the preceding five years and that she was dependant on her parents till date and stated that she ever wanted to live with the respondent / husband and it is the respondent / husband, who was not ready to take her back and that in spite of all the oddities, she wished for happy married life and wanted to lead a good life before all the relatives and friends of both of them and prayed for dismissal of the original petition.

8. Before the Court below, the respondent / husband was examined as P.W.1 and Exs.P1 to P3 were marked on his side and on the side of the appellant / wife, she was examined as R.W.1 and no document was marked on her side. Written arguments were also filed by both sides.

9. The Trial Court, after taking into consideration the oral and documentary evidence adduced and the arguments advanced on either side, by Judgment, dated 21.03.2013, found the grounds of desertion and cruelty raised by the respondent / husband as proved to dissolve the marriage and

accordingly, allowed the original petition and dissolved the marriage solemnized between the appellant / wife and the respondent / husband. Aggrieved over the same, the appellant / wife has preferred the present civil miscellaneous appeal.

10. Mr. Tranquebar Dorai Vasu, learned counsel appearing for the appellant / wife submitted that the Judgment and Decree of the Court below are against the facts and evidence on record and that the Court below erred in granting divorce on the grounds of desertion and cruelty. The learned counsel further contended that the respondent / husband had not proved the allegations by acceptable oral and documentary evidence and that he had not proved the grounds of desertion and cruelty as contended by him in the original petition and except the evidence of P.W.1, by way of proof affidavit reiterating the averments in the petition no other evidence was adduced to substantiate the allegations of desertion and cruelty; that in the absence of sufficient pleadings by the respondent / husband to prove the alleged desertion and cruelty and in the absence of oral and documentary evidence, the Family Court wrongly came to the conclusion that the acts of the appellant / wife in not following the respondent / husband to the house set up by him amounts to desertion and cruelty and thereby, the Family Court had committed an error in granting the decree of divorce.

11. The learned counsel for the appellant / wife further contended that the Family Court, without taking into consideration the pleadings and the oral and documentary evidence in full, had picked up the evidence in part and arrived at a wrong conclusion as if the appellant / wife was at fault and the appellant / wife alone was the cause for the desertion and cruelty. Further the Family Court had failed to see the attitude and behavior of the respondent / husband and it was the respondent / husband, who had deserted his wife and child and kept away from the matrimonial relationship, whereas he had projected as if the appellant / wife was at fault.

12. Further, the learned counsel for the appellant / wife contended that the Family Court failed to take into consideration the conduct of the respondent / husband in shifting his residence from one place to another and that it was his individual decision and that it is the admitted evidence of the respondent / husband that he had been shifting the residence without consulting his wife and when that being so, the Family Court erred in holding that the appellant / wife had deserted him.

13. The learned counsel for the appellant / wife further contended that on going through the entire evidence that were placed by the respondent / husband, it was the unilateral decision of the respondent /

husband in changing the residence without consent of the appellant / wife and it was the respondent / husband who had been shifting his residence and it is clear that he wanted to live along with his parents and that the appellant / wife was not the cause for desertion and cruelty and that the respondent / husband cannot take advantage of his own fault to hold that the appellant / wife deserted him. The learned counsel for the appellant / wife contended that the allegations in the original petition of the respondent / husband if taken into consideration in entirety do not make out any ingredients of desertion and cruelty as required under law and thereby, the Judgment of the Court below was erroneous under law. The learned counsel further contended that a decree of divorce cannot be granted on the basis of the mere allegations made in the pleadings when they are not supported by any documentary and oral evidence and that too especially when the respondent / husband has not made out his case by adducing oral and documentary evidence, the Court below ought not to have granted divorce on the grounds of desertion and cruelty. Further, the learned counsel for the appellant / wife submitted that in taking into consideration the evidence in this case in entirety, it was the husband who moved away and started to live separately and that he was the one who was changing residence without consulting the wife and that the facts being mixed it was impossible to extricate that who deserted whom and contended that in such

circumstances, the Family Court ought not to have granted divorce in favour of the respondent / husband. The learned counsel further contended that while culling out the evidence, it is seen that the respondent / husband in his deposition before the Court had categorically stated that:

“அந்த வீட்டிற்கு செல்லும்போது என்னுடைய உடமைகளை மட்டும் எடுத்துச் சென்றேன், மறுவாரம் எதிர்மனுதாரர் வரும்போது சமையலுக்கு உரிய சாமான்களை மட்டும் கொண்டு வந்தார், இதர பொருட்களை கொண்டு வரவில்லை, நான் வாடகை வீட்டிற்கு சென்றது என்னுடைய சொந்த முடிவு என்றும்? என் மனைவியுடன் கலந்து ஆலோசிக்காமல் எடுத்த முடிவு என்றால் சரிதான். நான் பலமுறை எதிர்மனுதாரரை கேட்டும் அவர் பதில் தெரிவிக்காமல் இருந்ததினால் தனிக் குடித்தனம் போனால் அவர் வந்துவிடுவார் என்ற நோக்கத்தில் வீடு பார்த்து குடியேறினேன். 2008-ல் அந்த வாடகை வீட்டை காலி செய்துவிட்டு வேளச்சேரியில் இருக்கும் என் பெற்றோர் வீட்டிற்கு சென்றுவிட்டேன், அதன் பிறகு ஆலந்தூரில் என் பெற்றோருக்கு சொந்தமான மஹேஸ்வரி வீட்டிற்கு குடியேறினேன். என் பெற்றோர் வீட்டில் பெற்றோருடன் ஓரே மாதங்கள்தான் தங்கியிருந்தேன். ஆலந்தூரில் என் பெற்றோருக்கு சொந்தமான வீட்டில் 2010 வரையில் குடியிருந்தேன். 2009-ல் எதிர்மனுதாரரை என்னுடன் சேர்ந்து வாழும்படி அழைத்து அறிவிப்பு எழுதியுள்ளேன். அந்த அறிவிப்பை நீதிமன்றத்தில் தாக்கல் செய்யவில்லை. நான் இது போன்று சேர்ந்து வாழ வரும்படி அறிவிப்பு கொடுக்கவில்லை என்றால் சரியல்ல. 2010-க்கு பிறகு என் அப்பா இறந்தபிறகு என் பெற்றோர் வீட்டிற்கு வேளச்சேரிக்கு வந்துவிட்டேன், இப்போது அங்குதான் இருக்கிறேன்.”

Thereby, making it clear that it is the respondent / husband who started desertion and that having done so, he cannot take advantage of his own wrong and that the appellant/ wife was ready to live with him. In support of

his contentions, the learned counsel for the appellant/ wife placed reliance upon the decision of this Court in ***K.Kannusamy vs. T.Sumathi***, reported in ***CDJ 2017 MHC 936***, and submitted that the essence of desertion is forsaking and abandonment of one spouse by another without any reasonable cause and without the consent and against the wish of the other spouse and contended that in this case it is the respondent / husband who had abandoned the family and he is the person who kept on changing the residence and that taking the facts on entirety it is the husband who had deserted and that the wife cannot be held responsible for no fault of her. The relevant portion of the said decision reads as under:

"The essence of desertion is forsaking and abandonment of one spouse by other without reasonable cause and without consent or against wish of other spouse. It may at times be impossible to draw line between the two that is desertion and cruelty, because very often facts are mixed so that it is impossible to extricate one from other. It is a firmly established rule that the ground for the relief in a matrimonial cause should be strictly proved. The standard of proof in case of all proceedings under Act that Court must be satisfied on preponderance of probability and The Court requires evidence of spouse who charges other spouse with matrimonial offence should be corroborated."

14. The learned counsel for the appellant / wife also placed reliance upon yet another decision of this Court in **Rajiv Mangal vs. Ritu Mangal**, reported in **CDJ 2017 MHC 4989**, wherein it has been held that in a case when the respondent / husband does not make out necessary ingredients stipulated for making out a case for divorce on the ground of desertion, the Family Court ought not to have granted divorce.

15. The learned counsel for the appellant / wife also contended that absolutely no case has been made out by the husband on the ground of cruelty and thereby, the Family Court erred in granting divorce on the ground of cruelty.

16. *Per contra*, Mr.T.R.Rajagopalan, learned Senior Counsel appearing for the respondent / husband submitted that both the grounds of desertion and cruelty have been categorically proved by the respondent / husband by adducing plausible oral and documentary evidence and that sincere steps were taken by the respondent / husband to live in matrimony and the appellant / wife was not inclined to live with him as a dutiful wife at her parent's house forcing him to shift the residence to a nearby place and that she having come and lived with him for some time left the matrimonial home set up by him without a valid reason and that despite the legal notice

sent by him to the wife to return to the matrimonial home, she refused to join him to render conjugal obligations forcing him to file a case for divorce on the grounds of desertion and cruelty and the Family Court, after taking into consideration the oral and documentary evidence adduced and also the arguments advanced on either side, had granted divorce and that the Judgment of the Family Court is a well considered one and it does not require any interference from this Court and prayed for dismissal of the civil miscellaneous appeal by confirming the order of the Family Court.

17. The learned counsel for the respondent / husband further contended that the respondent / husband had set out the details in the original petition as well as in his evidence before the Court below that taking into consideration the welfare of the child the respondent / husband and appellant / wife decided to move to the parents' house of the appellant / wife and while they were living in the first floor of her parents' house, she slowly stopped to live with him as a dutiful wife by rendering him conjugal obligations and after sometime, she started to live with her parents in the ground floor itself and that there was no marital relationship between the respondent / husband and the appellant / wife and thereafter, in spite of the best efforts taken through several conversations of the respondent / husband, the appellant / wife did not take any steps to make her marriage

workable with the respondent / husband and that at some point of time, even the conversations between the respondent / husband and the appellant / wife stopped, except for absolute requirements. After that phase, during 2011, after giving sufficient warning, the respondent / husband had shifted to a new residence from the house of the appellant's parents so as to compel the appellant to come and live with him. However, in spite of that the appellant / wife did not want to join with the respondent / husband and thereby, her refusal to join with the respondent / husband amounts to desertion by the appellant / wife.

18. The learned Senior Counsel for the respondent / husband further contended that the attempts made by the respondent / husband to make the appellant / wife to come and live with him had failed at the instance of her parents. The respondent / husband and the appellant / wife later moved to Velacherry to live together along with their son in the residence of the respondent / husband's parents. However, the appellant / wife left the matrimonial home set up at Velacherry with her son, within a few days of shifting, without even informing the respondent / husband and his parents and went back to her parents residence. Thereupon, the respondent / husband even suggested that they could move to a vacant house owned by the respondent / husband's mother at Alandur. The appellant had refused

to show any inclination to join him and made it clear that she was not interested to live with him. The learned Senior Counsel for the respondent / husband further contended that having left with no other alternative, hoping that the appellant / wife will join with him, the respondent / husband had shifted his residence and sent a legal notice calling upon her to join with him, however, the appellant / wife had not bothered to send any reply to the notice and had not taken any steps to re-join with the respondent / husband and thereby, he desperately having lost all his attempts and having deprived of conjugal relationship had filed the petition for divorce. The learned Senior Counsel for the respondent / husband further contended that the respondent / husband had cogently proved his case in consonance with the contents of the original petition by adducing evidence by proof and that nothing had been extracted from the respondent / husband during his cross-examination to deny the fact of desertion and submitted that the Family Court had rightly granted divorce on the grounds of desertion and cruelty.

WEB COPY

19. Heard both sides and perused the evidence and materials placed on record.

20. Now, what is to be seen is that whether the respondent / husband has proved the case of desertion and cruelty as required under law and whether the Family Court is right in granting divorce on the grounds of desertion and cruelty.

21. The relief of divorce had been sought for in this case on the grounds of desertion and cruelty and before proceeding further, it would be appropriate to refer to the relevant provision under which, divorce can be sought for viz;

Section 13(1) (i-a) and (i-b) of the Hindu Marriage Act, 1955

Divorce – Any marriage solemnized, whether before or after the commencement of this Act, may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

[(i).....

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petitioner; or]

22. At the outset, while going through the records of the Family Court, we are able to see that the Family Court has not framed any issues with regard to the grounds urged in the petition for divorce and both parties have not raised any objection regarding the same. Now, we have to see whether the pleadings and evidence on record let in by the respondent / husband are sufficient to grant the decree of divorce on the grounds prayed for viz., desertion and cruelty.

23. The Honourable Apex Court and our High Court in plethora of Judgments has held that for establishing the claim of "desertion", so far as the deserting spouse is concerned, two essential conditions must be there viz., (i) the factum of separation; and (ii) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly, two elements are essential so far as the deserted spouse is concerned: (i) the absence of consent; and (ii) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. Thus, under Section 13(1)(i-b) of the Hindu Marriage Act, the petitioner who seeks for divorce has to prove (i) that there was desertion for a continuous period of two years immediately preceding the presentation of the petition; (ii) the desertion was without reasonable cause and without the consent or against the wish of the petitioner. Further, heavy burden is cast upon the

petitioner who seeks relief of divorce on the ground of desertion to prove four essential conditions viz., (i) factum of separation; (ii) *animus deserendi*; (iii) absence of any or her consent; and (iv) absence of his or her conduct giving reasonable cause to desert the spouse to leave the matrimonial home. It is necessary for the petitioner to establish that during all the period that there has been a desertion, petitioner must affirm that he/she was ready and willing to resume the married life. Offence of desertion must be proved beyond any reasonable doubt and as a rule of prudence evidence of the petitioner is to be corroborated. In the light of the above well settled principles, it is to be seen whether respondent / husband has discharged his burden of proof establishing that appellant / wife had no reasonable cause to leave the matrimonial home.

24. Further, to prove the ground of cruelty, firstly it has been shown that the acts, words and emotions on events alleged to amount the cruelty allged against the petitioner must be proved beyond the reasonable doubt and it must be in accordance with law of evidence; secondly, it must be established that there is an apprehension that it would be harmful or injurious for the petitioner to live with the other party and, thirdly, the requirement of law is that the Court must be satisfied that the apprehension is reasonable.

25. As we have dealt with the facts of the case projected by respondent / husband and the appellant / wife in their petition and counter, we feel it is not necessary for us to reiterate the facts found in the pleadings in full once again and we deem it would be sufficient to analyze the relevant portions of the evidence let in by the parties to arrive at a just decision. The husband had let in evidence by way of proof affidavit reiterating the facts stated in the petition. The marriage between the appellant / wife and the respondent / husband was a love marriage and that after the marriage, they have shifted their residence to Gandhinagar, Gujarat, where they continued till September 2003. Thereafter, they came to Chennai and settled at Kelambakkam and had become busy in their respective careers. It is the case of the appellant / wife that the respondent / husband did not care to spend any money on the family necessitating her to work and earn. After the birth of their child, the appellant/ wife and the respondent / husband mutually decided to shift their residence to the parents' house of the appellant / wife at Adambakkam, Chennai, so that the child would be taken care of by the parents of the appellant/ wife and the decision was mutually taken keeping in mind the welfare of their son, since the appellant / wife and the respondent / husband were busy with their respective works throughout the day. Thereafter, during the stay at the house of the parents' of the appellant / wife, she had spent more time with her parents and spent

lessor time with the respondent / husband thereby, making the respondent / husband to shift to a house at Adambakkam and it is the admitted case of the respondent / husband that while he was alone at Adambakkam he had not sent any letter asking the appellant / wife to come and live with him and thereafter, he had changed from house to house with an expectation that the appellant / wife would follow him to the matrimonial house set up by him. Further, during 2009, the respondent / husband had issued a legal notice to the appellant / wife to join him in matrimony, but thereafter, he had not proceeded to file any petition for restitution of conjugal rights and the notice is also not marked before the Family Court.

26. However, the appellant / wife, after the receipt of the legal notice, had met the respondent / husband and pacified him and the respondent / husband had promised her father that he would not take legal action and that is the reason for not replying and it is the case of the appellant / wife that even thereafter the respondent / husband used to come and go and stay in her house. Further the appellant / wife after the demise of the father of the respondent / husband had agreed to live with him but the respondent / husband had refused to accept her. Though the appellant / wife had categorically stated that she was willing to join him, the respondent / husband had refused to accept her and filed the petition for

divorce. In the evidence before the Family Court, the admission of the respondent / husband in the cross-examination is that the decision to go to a separate house was his own decision and that he had not consulted his wife before moving out. Further, it had been admitted by the respondent /husband that even after the death of his father, he was in talking terms with the appellant / wife. Thereby, the parties have been in touch with each other and the child being their point of contact. In respect of cruelty, the respondent / husband had stated that denial and deprivation of conjugal relationship amounted to cruelty. Apart from the above, no other evidence has been let in by the respondent / husband to make out a case that the appellant / wife had treated him with cruelty thereby, making it difficult for him to live with his wife. The appellant / wife had clearly established that it was her husband, who had deserted her wilfully and deliberately and without any reasonable cause and that she after the demise of the father of the respondent / husband had offered to join him, however the respondent / husband had filed the petition for divorce. Moreover, the appellant / wife had stated in her evidence that even after the respondent / husband moved to his new residence, which was close to her parents house, she used to frequently go over there and stay with her son and would do all the things needed for her husband. This has not been contradicted by the respondent / husband. While this being so, the Trial Court had allowed the petition for

divorce without giving a proper finding with regard to desertion and cruelty.

27. The Honourable Supreme Court in ***Savitri Pandey vs. Prem Chandra Pandey***, reported in **(2002) 2 SCC 73**, has held as follows:

"6. Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(ia) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other. In the instant

case both the trial court as well as the High Court have found on facts that the wife had failed to prove the allegations of cruelty attributed to the respondent. Concurrent findings of fact arrived at by the courts cannot be disturbed by this Court in exercise of powers under Article 136 of the Constitution of India. Otherwise also the averments made in the petition and the evidence led in support thereof clearly shows that the allegations, even if held to have been proved, would only show the sensitivity of the appellant with respect to the conduct of the respondent which cannot be termed more than ordinary wear and tear of the family life.

7. No decree of divorce could be granted on the ground of desertion in the absence of pleading and proof. Learned counsel for the appellant submitted that even in the absence of specific issue, the parties had led evidence and there was sufficient material for the Family Court to return a verdict of desertion having been proved. In the light of the submissions made by the learned counsel, we have opted to examine this aspect of the matter despite the fact that there was no specific issue framed or insisted to be framed.

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 host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbhai Shah v. Prabhavati [AIR 1957 SC 176] held that if a spouse abandons the other in a state of temporary passions, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion. It further held:

"For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely (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. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. 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. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation

and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decide to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings

for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court."

9. *Following the decision in Bipinchandra's case (supra) this Court again reiterated the legal position in Lachman Utamchand Kirpalani v. Meena alias Mota [AIR 1964 SC 40] by holding that in its essence desertion 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 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 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.

10. *To prove desertion in matrimonial matter it is not always necessary that one of the spouse should have left the company of the other as desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage. Desertion may also be constructive which can be inferred from the attending circumstances. It has always to be kept in mind that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case.*

.....

12. *No evidence was led by the appellant to show that she was forced to leave the company of the respondent or that she was thrown away from the matrimonial home or that she was forced to live separately and that the respondent had intended animus deserendi. There is nothing on record to hold that the respondent had ever declared to bring the marriage to an end or refuses to have cohabitation with the appellant. As a matter of fact the appellant is proved to have abandoned the matrimonial home and declined to cohabit with the respondent thus forbearing to perform the matrimonial obligation.*

13. *In any proceedings under the Act whether defended or not the court would decline to grant relief to the petitioner if it is found that the petitioner was taking advantage of his or her own wrong or disability for the purposes of the reliefs contemplated under Section 23(1) of the Act. No party can be permitted to carve out the ground for destroying the family which is the basic unit of the society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties."*

28. In ***Ravi Kumar vs. Julmidevi***, reported in **(2010) 4 SCC 476**, the Apex Court has held that:

"It may be noted only after the amendment of the said Act by the amending Act 68 of 1976, desertion per se became a ground for divorce. On the question of desertion, the High Court held that in order to prove a case of desertion, the party alleging desertion must not only prove that the other spouse was living separately but also must prove that there is an animus deserendi on the part of the wife and the husband must prove that he has not conducted himself in a way which furnishes reasonable cause for the wife to stay away from the matrimonial home."

29. In ***Gurbux Singh vs. Harminder Kaur***, reported in **(2010) 14 SCC 301**, the Apex Court has held that:

"Cruelty has not been defined under the Act. It is quite possible that a particular conduct may amount to cruelty in one case but the same conduct necessarily may not amount to cruelty due to change of various factors, in different set of circumstances. Therefore, it is essential for the appellant, who claims relief, to prove that a particular/part of conduct or behaviour resulted in cruelty to him. No prior assumptions can be made in such matters. Meaning thereby that it cannot be assumed that a particular conduct will, under all circumstances, amount to cruelty, vis-à-vis the other party. The aggrieved party has to make a specific case that the conduct of which exception is taken amounts to cruelty."

30. In ***Samar Ghosh vs. Jaya Ghosh*** reported in **(2007) 4 SCC 511** the Hon'ble Apex Court enumerated illustrative instances of human behaviour finding it relevant to deal with cases of mental cruelty. However, the Apex Court held that the instances are only illustrative and exhaustive.

31. Subsequently, in ***Ramchander vs. Ananta***, reported in **(2015) 11 SCC 539**, the Honourable Apex Court has held that:

"The expression 'cruelty' has not been defined in the Hindu Marriage Act. Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes a reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Cruelty can be physical or mental. In the present case there is no allegation of physical cruelty alleged by the plaintiff. What is alleged is mental cruelty and it is necessarily a matter of inference to be drawn from the facts and circumstances of the case. It is settled law that the instances of cruelty are not to be taken in isolation but to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the plaintiff has been subjected to mental cruelty due to conduct of the other spouse. In the decision in Samar Ghosh case (supra), this Court set out illustrative cases where inference of 'mental cruelty' can be drawn and they are only illustrative and not exhaustive."

32. In ***Suman Singh vs. Sanjay Singh***, reported in **(2017) 4 SCC 85**, the Apex Court has held that:

"12. The word "cruelty" used in Section 13(1)(ia) of the Act is not defined under the Act. However, this expression was the subject matter of interpretation in several cases of this Court. What amounts to "mental cruelty" was succinctly explained by this Court (three

Judge Bench) in Samar Ghosh vs. Jaya Ghosh [(2007) 4 SCC 511]. Their Lordships speaking through Justice Dalveer Bhandari observed that no uniform standard can ever be laid down for guidance, yet it is appropriate to enumerate some instances of human behavior which may be considered relevant in dealing with the cases of "mental cruelty". Their Lordships then broadly enumerated 16 category of cases which are considered relevant while examining the question as to whether the facts alleged and proved constitute "mental cruelty" so as to attract the provisions of Section 13 (1) (ia) of the Act for granting decree of divorce.

13. Keeping in view the law laid down in Samar Ghosh's case [(2007) 4 SCC 511], when we examine the grounds taken by the respondent in his petition for proving the mental cruelty for grant of divorce against the appellant, we find that none of the grounds satisfies either individually or collectively the test laid down in Samar Ghosh's case (supra) so as to entitle the respondent to claim a decree of divorce.

33. Now, taking into reference the above decisions of the Apex Court and the facts and the evidence adduced by both the parties in the case on hand, we find that the respondent / husband has failed to prove *animus deserendi* on the part of the appellant / wife as nowhere he has pleaded or proved that he took sincere or actual efforts to bring the appellant / wife to

the matrimonial home and further there is nothing on record to hold that the appellant / wife had ever declared to bring the marriage to an end or refused to have cohabitation with the respondent / husband and as a matter of fact, the respondent / husband, after issuance of legal notice for restitution of conjugal rights, without filing petition for restitution of conjugal rights had filed petition for divorce on the grounds of desertion and cruelty. In the present case there is no allegation of physical cruelty. What is to be seen is whether mental cruelty is proved. It is necessarily a matter of reference to be drawn from the facts and circumstances and evidence let in in this case. It is settled law that instances of cruelty are not to be taken in isolation but to take the cumulative effect of facts and circumstances emerging from the evidence on record and thereafter the Court has to draw a fair inference whether the petitioner has been subjected to mental cruelty due to the conduct of the other spouse. We find, no evidence had been let in by the respondent / husband to prove cruelty and we find that none of the allegations satisfy the test laid down in **Samar Gosh's** case so as to entitle the respondent / husband for grant of divorce on the ground of cruelty. Here in this case clash of ego between career oriented spouses had been blown beyond proportion and had ended up in court without taking into consideration the fabric of family life and the future of the child.

34. In (1997) 11 SCC 701 Balwinder Kaur Versus Hardeep Singh

the Apex Court has held that a petition for divorce is not like any other commercial suit. A divorce not only affects the parties, their children, if any, and their families but the society also feels its reverberations. Stress should always be on preserving the institution of marriage. That is the requirement of law. Hence, we find that the Family Court has erroneously granted divorce on the grounds of desertion and cruelty without proper appreciation of facts and evidence on record and thereby, the findings of the Family Court are liable to be set aside.

35. In the result, the civil miscellaneous appeal is allowed and the Judgment and Decree, dated 21.03.2013, made in O.P.No.2792 of 2010, on the file of the II Additional Family Court, Chennai, granting divorce on the grounds of desertion and mental cruelty are set aside. No costs. Consequently, connected miscellaneous petitions are closed.

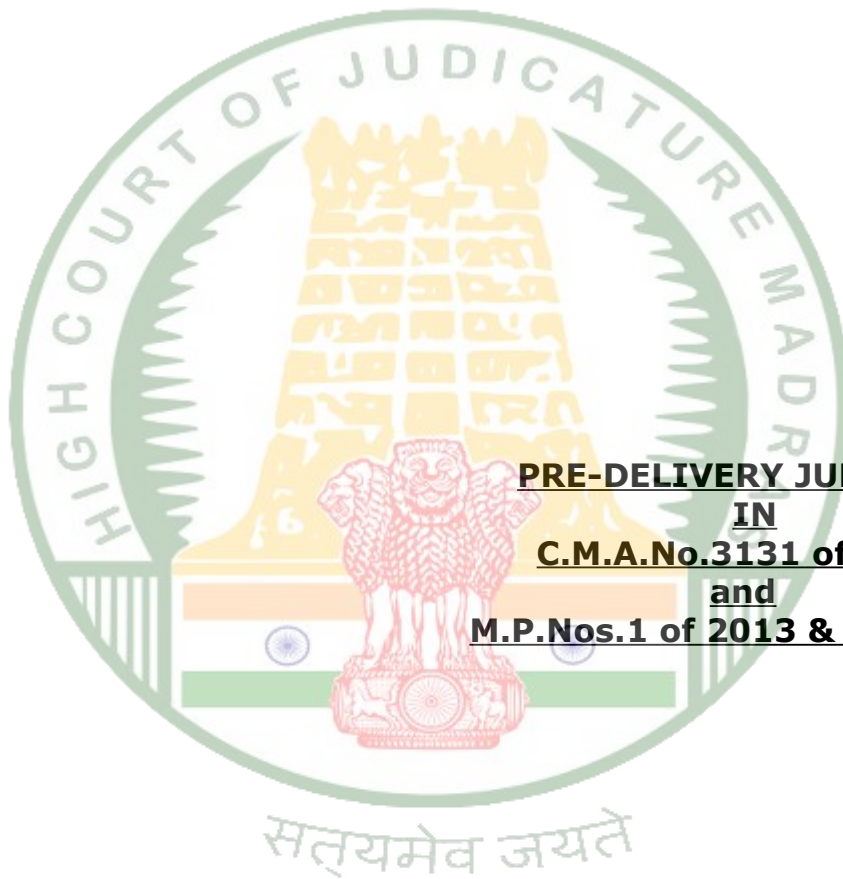
[R.P.S.,J.] [A.D.J.C.,J.]
13.12.2017

Internet : Yes
Index : Yes
krk / mm/gr.

To:
The II Additional Principal Judge,
II Additional Family Court, Chennai.

R.SUBBIAH, J.
and
A.D.JAGADISH CHANDIRA, J.

krk / mm/gr.



PRE-DELIVERY JUDGMENT
IN
C.M.A.No.3131 of 2013
and
M.P.Nos.1 of 2013 & 1 of 2014

WEB COPY

13.12.2017