

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.645 of 2009

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TANMAY JAISWAL, son of Sri Suresh Kumar Jaiswal, resident of Mohalla – 20/3 S.B.I. Officer's Colony, Ambedkar Path, Rukunpura, P.S. Danapur Town, District – Patna, Pin - 800014

... .. Appellant/s

Versus

SAPNA JAISWAL, daughter of Sri Jag Narayan Chaudhary, resident of Mohalla – 154/C, Ashok Nagar, Road No. 4, Ranchi

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr.Niraj Kumar Sinha, Adv
For the Respondent/s : Mr.Ram Naresh Sharma

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH)

Date : 28-09-2020

Heard learned counsel for the appellant and learned counsel for the respondent.

The present Miscellaneous Appeal is directed against the judgement and decree dated 9.5.2007 and 19.5.2007, respectively, passed by the learned Additional Principal Judge, Family Court, Patna in Matrimonial Case No. 160 of 1996, dismissing the appellant husband's matrimonial case for a decree of divorce on the ground of cruelty and desertion.

The present Miscellaneous Appeal has a chequered history. Initially, for challenging the judgement and decree under appeal, First Appeal No. 157 of 2007 was filed but



subsequently, a Division Bench of this Court directed for converting the First appeal into Miscellaneous Appeal vide order dated 11.11.2009. Notices were issued to the sole respondent wife on 11.1.2010. Thereafter, vide order dated 4.7.2011, direction was given to make payment of maintenance amount of Rs.2000/- to the respondent wife and Rs.1700/- for the child as per the order of the learned Court below in Matrimonial Case No. 160 of 1996 along with arrears since March, 2007 which comes to Rs.1,77,600/-.

In view of the fact that the appellant and respondent are residing separately since last 21 years and were on litigating terms and also in view of the fact that efforts for mediation failed, this Court vide order dated 20.9.2016 directed to consider the prayer of the appellant husband for dissolution of marriage subject to payment of permanent alimony. Since then, the matter was adjourned for enabling the learned counsels to inform the Court with regard to the terms on which they may consider mutual separation. Thereafter, vide order dated 30.03.2017, the parties were directed to file affidavit in terms of order dated 20.09.2016, pursuant to which on 3.08.2017, the appellant filed supplementary affidavit but the respondent was neither present nor any affidavit on her behalf was filed, and as such the



respondent was also asked to file affidavit. The order dated 21.9.2017 reflects that the appellant husband was ready with a draft of Rupees Eighteen Lacs and for payment of one time settlement amount but since the respondent wife did not appear, hence, the issue could not be resolved. The order dated 21.11.2017 reflects that it was submitted on behalf of the respondent wife that she is ready for resolving the issue on payment of one time settlement amount of Rupees Eighteen Lacs when the Division Bench of this Court directed for filing a joint petition. The order dated 21.11.2017 reads as follows:

“Learned counsel for the respondent submits that the respondent-wife is ready for one time settlement on payment of Rs.18,00,000/- (Eighteen Lakhs).

Let a joint petition be filed by the parties in this regard.

As prayed for, let this matter be posted on 5th December, 2017 in Chambers at 2.15 P.M. On that occasion, let the husband and wife remain personally present before this Court.”

Thereafter, neither the affidavit was filed nor the respondent wife appeared before the Court but the order dated 15.12.2017 reflects that both the appellant husband and



respondent wife were present in Court and the respondent wife denied that any submission was made in Court that she is ready for divorce rather she is ready to resume the conjugal life. Order dated 15.12.2017 reads as follows:

“Husband and wife are present before us.

It appears from the order dated 21.11.2017 that the counsel for the respondent had submitted before us that respondent-wife is ready for one time settlement.

However, today she denied and has submitted that she is not ready for divorce rather she would be willing to live with her husband.

In such a situation, we are left with no option but to hear this matter on merit.

Put up for hearing on 08th of January, 2018.”

This appeal travelled to different Courts since last eleven years but the matter could not been disposed of due to some or the other reason, and in particular, as gets reflected, due to the inconsistent stand of the respondent, fresh notices were again issued to the respondent, in view of the fact that subsequent to the hearing dated 15.12.2017, none appeared on



behalf of the respondent, on most of the occasions. Subsequent thereto, the respondent entered fresh appearance, as gets reflected vide order dated 05.08.2019.

The last affidavit was filed by the appellant husband on 30.9.2019, making a specific statement that the appellant husband is ready for one time settlement with the respondent wife but the respondent was not ready for the same, hence the appeal was heard on merits.

The factual matrix of the case is that the marriage between the appellant and the respondent was admittedly performed on 29th April, 1994. The appellant husband claimed that the respondent wife tortured the appellant and behaved indecently and finally deserted him on 24.4.1995. The Matrimonial Case . 160 of 1996 was filed on 16.8.1996 by the appellant husband on the ground that immediately after the marriage, the respondent wife began wearing indecent clothings exposing her body, which was not liked by the family members of the appellant or the appellant. When the appellant tried to persuade her for not wearing such clothes then she abused him. It is also alleged that the mother-in-law of the appellant husband, within few days of the marriage called him as 'Badtamiz', on phone, and as such, the marriage could not be



consummated. On 7th May, 1994, two unknown boys in inebriated condition, entered into the room of the respondent wife when she bolted the door from inside and remained there for 15-20 minutes with them and thereafter they left the place and after their departure when the appellant husband protested then the respondent wife replied that those boys were her friends and the boys had promised to her to come again.

On 21.5.1994, the father of the respondent wife came, remained closed in a room with her and thereafter he left with a briefcase suspected to be containing valuables. The father of the appellant, realizing that the compatibility is reducing day by day, allowed the appellant husband to go for honeymoon trip to Darjeeling, Kalingpong and Gangtok for a fortnight but the attitude of the respondent wife did not change. Respondent wife behaved in a very ruthless manner with the appellant husband in the hotel at Darjeeling and threw plates and slippers on him but the appellant husband tolerated that. The respondent misbehaved with the appellant at Kalingpong on 3.6.1994 and at Gangtok also. The appellant husband visited her maternal aunt(Mausi) but there also the respondent did not wear decent clothes and on protest, the appellant husband was abused by the respondent. Thereafter, on return from honeymoon, the



respondent wife went to her parents' house at Ranchi and returned to Patna on 28.6.1994. In the meantime, the appellant came to know that some muscle men were hired by the father of the respondent. It is also alleged that the respondent wife threw hot tea on the appellant. Subsequently, the appellant was transferred from Patna to Balasore. For some time at Balasore she behaved properly but thereafter she started behaving in a cruel manner. The appellant's mother had also gone to Balasore, when the respondent wife stopped talking to the appellant for sometime. In April, 1995 the appellant husband came to know that the respondent wife is not keeping well then he came to Patna and took her to a gynaecologist. The respondent wife was examined by the doctor and was administered to saline drip at the clinic of Dr. Nutan Anand, when the father of the respondent, namely, Jag Narain Choudhary and his friend Sita Ram Chapariya and other bad elements had come to the nursing home and they slapped the appellant husband and the respondent wife was taken by her father. The respondent wife conveyed the appellant husband that she will not stay with him and she will not come back to his house again. In the evening of 24.4.1995, the respondent wife was examined by Dr. Pramila Modi when it was found that she was carrying pregnancy. The



respondent wife gave birth to a male child on 19.10.1995 but the appellant husband was not informed, whereafter the appellant came to know that the respondent's family is planning to implicate him in criminal cases upon which, the brother of the appellant Sanjay Jaiswal filed informatory petition on 4.8.1995 in the Court of the learned CJM, Patna and ultimately, Matrimonial Case was filed on 16.8.1996 for dissolution of marriage on the ground of cruelty.

The respondent appeared and filed written statement, admitting the marriage on 29.4.1994 and she claimed to have cordial relationship with the appellant husband. She claimed to have gone to Darjeeling, Kalingpong and Gangtok on 31.5.1994 for honeymoon and in return journey, the respondent wife went to the house of maternal aunt (Mausi) of the appellant husband and thereafter to Patna. In July-August, 1994 when the appellant husband was transferred to Balasore, she went there in February, 1995. When she was staying at her parents' house, the respondent wife gave birth to a child on 19.10.1995. However, the appellant was knowing that the respondent was carrying pregnancy without any complications, yet she was taken to the doctor for medical check up at a nursing home where attempt taken to get her pregnancy aborted. When the father of the



respondent was given information, he along with his friend Sita Ram Chapariya came and took her to the house of Sita Ram Chapariya when in the evening of 24.4.1995 the respondent wife was examined by Dr. Pramila Modi at her clinic where she suggested that the respondent was carrying pregnancy and she is normal The respondent wife is still ready to resume conjugal life and has no plan to re-marry.

On the basis of the pleadings of the parties, following nine issues were framed, which read as follows:

“(i) Is the suit as framed maintainable ?

(ii) Has the petitioner got valid cause of action for the suit ?

(iii) Has the opp. Party been using after the marriage vulgar and scanty cloth, assaulted to the petitioner through throwing a cup of tea and other utensils etc. ?

(iv) Has the opp. Party-wife been illicit relation with her boy friends ?

(v) Has the opp. Party been suffering from some mental disorder ?

(vi) Has the petitioner filed this case on a false allegation brought by him against the opp. Party ?

(vii) Is the opp. Party a lady of very



sound and good character and of good behaviour ?

(viii) Had the difference started between the opp. Party and the sister of the petitioner Sujata for refusal of Chunri by the opp. Party ?

(ix) Has the petitioner filed this case at the behest of sister and mother ?

(x) Have the mother and sister kept the clothes and ornaments of the O.P. when she had left his house ?

(xi) To what other relief or reliefs which the petitioner is entitled for ?

Both sides adduced evidence. The learned Court below came to a conclusive finding that the appellant failed to prove that the respondent wife used to dress up herself to expose her body or that, she inflicted cruelty, threw slippers, abused the appellant husband and his family members, rather the learned Court below came to definite finding that it was the appellant husband who inflicted torture upon the respondent wife. So far as the allegation of two unknown boys having visited the respondent at the matrimonial house, within a four days of marriage, is concerned, the identity of those boys has not been disclosed. P.W. 4 Vijay Kumar Verma, the maternal uncle (Mausa) of the appellant husband, in whose house, in return



journey of honeymoon, the respondent wife and the appellant husband stayed, has not stated anything about the misbehaviour or abuse. The maternal aunt (Mausi) of the appellant, though has not been examined, but was present, but P.W. 4 did not state that his wife has conveyed about the cruel behaviour of the respondent wife at her residence.

So far as the question of desertion is concerned, the learned Court below came to a finding that the appellant claimed to have been deserted by the respondent wife on 24.4.1995 but the evidence on record suggests that she was compelled to leave the matrimonial house and no attempt was made to reconcile the issue as the mother of the appellant husband, during examination, has stated that she never took any effort to bring her daughter-in-law (respondent wife) to the matrimonial house. As a result, the learned Court below dismissed the matrimonial case. Hence, the present appeal.

Learned counsel for the appellant submits that the judgement under appeal is not in consonance with the evidence available on record. The levelling of allegations against the appellant of attempting to get the pregnancy of the respondent aborted, misbehaviour of the respondent with the appellant and his family members and his relatives, as well as respondent's



relationship with the appellant clearly prove that the appellant husband was subjected to mental cruelty. The appellant and the respondent are admittedly residing separately since 20 years, hence, marriage has broken down and no purpose would be served in allowing such relationship to continue. It is further submitted that the appellant is making payment of maintenance amount as directed by the Court. Moreover, the appellant is ready to make payment of one time settlement amount of Rupees Twenty Lacs to the respondent wife. On earlier point of time also, the appellant brought a draft of Rupees Eighteen Lacs but due to the adamant attitude of the respondent wife, the issue could not be settled.

Learned counsel for the appellant has relied upon the judgements in the case of Sudhanshu Mauli Tripathi Vs. Meena Kumari and Anr., reported in 2010(2) PLJR 251, K. Srinivas Rao Vs. D.A. Deepa reported in (2013) 5 SCC 226, Bhawna Sharma Vs. Sanjeev Sharma reported in (2019)137 ALR 825, and the case of NV Vs. AV of Delhi HC in MAT APP (FC)12/2018, S. Varadhrajan Vs. S. Latha, reported in AIR 2019 Madras 192 and the case of Samar Ghosh Vs. Jaya Ghosh, reported in (2007) 4 SCC 511.

Learned counsel for the respondent wife submits that



the judgement and decree under appeal does not require any interference. The allegation of cruelty, like, dressing up in an indecent and objectionable manner, abusing and throwing of slippers and tea on the appellant husband has not been proved, rather the materials on record suggest that it was the appellant who tried to get the pregnancy of the respondent wife terminated. The respondent wife never deserted the appellant husband and the respondent is still ready to resume the conjugal life. It is further submitted that the mother of the appellant has suggested that no effort was taken to bring the respondent wife from her parents house. Hence, there is no material on record to suggest that the respondent has deserted the appellant and the judgements relied upon by the learned counsel for the appellant husband are all the cases of irretrievable breakdown of marriage, which is not a ground mentioned under Section 13 of the Act on which the marriage can be dissolved.

Having heard learned counsels for the parties, the only issue in the present appeal is whether the appellant husband has proved the cruelty and desertion.

Here it would be apt to appreciate the scope and intent of cruelty within the ambit of Hindu Marriage Act, 1955. Cruelty is not defined under the Act but it is one of the grounds



under Section 13(1)(ia) of the Act, on the basis of which divorce can be granted. Cruelty is the human conduct or behaviour in respect to matrimonial duties and obligations and such conduct adversely affects the other. Cruelty can be of two kinds – physical or mental. It is easy to prove physical cruelty with direct evidence, but it is really difficult to prove the mental cruelty with direct evidence, as, mental cruelty impacts the mind of one side of the married couple by the other side, which is of such a nature that a reasonable conclusion can be reached by the affected side that it is not possible or it is not safe to reside in the company of the other side who has inflicted cruelty.

Cruelty under Section 13(1)(ia) of the Act has been analyzed in the case of Praveen Mehta Vs. Inderjit Mehta reported in (2002) 5 SCC 706. Paragraph 21 of the judgment reads as follows:

“21. 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 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. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty



is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other.”

‘Mental cruelty’ has been elaborated by the Hon’ble Supreme Court in the case of V. Bhagat Vs. D. Bhagat, reported in (1994) 1 SCC 337. Paragraph 16 of the judgement reads as follows:

“16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible



for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.”

Similarly, in the case of Savitri Pandey Vs. Prem Chandra Pandey (2002) 2 SCC 73, the Hon’ble Supreme Court held that cruelty can be treated as mental cruelty, when the husband or the wife who has claimed dissolution of marriage on



the ground of mental cruelty, has apprehension in his or her mind that it is harmful and injurious to live in the company of the other side. However, it is well settled that the cruelty largely depends on the living condition of the parties to which they are accustomed to or their economic or social conditions and their culture and human values to which they attach importance. Hence, each case has to be decided on its own merits. The daily wear and tear cannot be treated as mental cruelty.

The word 'cruelty' has been analyzed by the Supreme Court in the case of A. Jayachandra Vs. Aneel Kaur, reported in (2005) 2 SCC 22. Paragraph 10 reads as follows:

“10. The expression 'cruelty' has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse same is



established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.”

In the present case, the only allegation of physical cruelty is of throwing slippers and hot tea but no oral evidence



to that effect has been produced. The thrust of pleading of the appellant in the plaint is the misbehaviour of the respondent, dressing in a vulgar manner and having relationship with other boys, but none of these alleged misconduct of the respondent wife has been proved.

In the case of Samar Ghosh Vs. Jaya Ghosh, reported in (2007) 4 SCC 511, the Hon'ble Supreme Court has catalogued certain instances of mental cruelty. Paragraph 101 reads as follows:

“101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of “mental cruelty”. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(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.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language,



petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(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.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(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.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(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.

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(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.”

The case of the appellant does not come within any of the above instances rather the conduct of the appellant husband appears unreasonable that within few days of the marriage two boys came and remained in the room of the respondent wife for 15-20 minutes but he did not inform the



police nor did he inform anyone. The mother of the appellant was in the house but she has admitted in her evidence that the father of the respondent was not informed about the said incidence.

Certain informatory petitions have been exhibited as Ext. 4, 4/a and 4/b but they have been filed in 1996 which suggest that they have been filed to make a ground for proving cruelty.

So far as desertion is concerned, the desertion is also not defined under the Act. For constituting the concept of desertion, two essential conditions must precede, i.e., the factum of separation and the intention to bring the cohabitation permanently to an end. Either spouse who is claiming to be deserted must bring the absence of consent and absence of reasonable cause for deserting the other side. The Supreme Court in the case of Savitri Pandey Vs. Prem Chandra Pandey, reported in AIR 2002 SC 591, has analyzed what will amount to desertion for being a ground for dissolution of marriage in paragraph 8 of the judgement, which reads as follows:

“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 or disgust without intending permanently to cease cohabitation, it will not amount to desertion. It further held: (AIR pp. 183-84, para 10)

“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* coexist. 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 the 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.”

It is also well settled principle that desertion cannot be equated with the separate living by the party to the marriage.



However, desertion can be constructive one which can be inferred from the attending circumstances. Admittedly, the appellant claims that the respondent wife deserted him on 24.4.1995 when her father took her back from the clinic of Dr. Pramila Modi and took her along with him and at that point of time the appellant claims that the respondent wife conveyed him that she is forsaking and abandoning him. The date of marriage being performed on 29.4.1994 is not in dispute and the appellant admits the date of desertion as 24.4.1995.

Section 13(1)(b) of the Act defines the principles for getting the marriage dissolved between the husband and wife, through the decree of divorce if the other side has deserted the petitioner for a continuous period for not less than two years immediately preceding to the presentation of the petition. In the present case, the date of desertion is admitted on 24.4.1995 whereas the Matrimonial Case No. 160 of 1996 was filed on 16.8.1996. Hence, on this score also, the appellant was not entitled to get the marriage dissolved on the ground of desertion.

Learned counsel for the appellant husband has basically focused his argument on the ground that the appellant and the respondent are residing separately since last 21 years, hence, the marriage has broken down and no useful purpose will



be served to allow them to litigate.

Section 13 of the Act does not stipulate irretrievable breakdown of marriage as the ground for dissolution of marriage. However, in many cases the Hon'ble Supreme Court in exercise of jurisdiction under Article 142 of the Constitution of India has dissolved the marriage on the ground of irretrievable breakdown of the same. The 71st Report of Law Commission of India briefly dealt with the concept of irretrievable breakdown of marriage which was submitted to the Government on 7th April, 1978. In this report, it was recommended that in last few decades, it is found that in the courts the matrimonial suits are being filed less on the principle based on fault of the party theory but more on the doctrine of breakdown of marriage. Hence, the number of matrimonial proceedings based on matrimonial offence theory or fault of party theory has been outnumbered by the irretrievable breakdown of marriage theory. Hence, recommended for incorporation of irretrievable breakdown of marriage as a ground under Section 13 of the Act for dissolution of marriage. However, it has not been incorporated till date.

In several cases, the Hon'ble Supreme Court has exercised power under Article 142 of the Constitution of India. However,



such power, in view of this Court, cannot be exercised by the High Court or the Principal Judge, Family Court as has been held in the case of Anil Kumar Jain Vs. Maya Jain, reported in (2009) 10 SCC 415. Paragraph nos. 28 and 29 of the judgment read as follows:

“28. It may, however, be indicated that in some of the High Courts, which do not possess the powers vested in the Supreme Court under Article 142 of the Constitution, this question had arisen and it was held in most of the cases that despite the fact that the marriage had broken down irretrievably, the same was not a ground for granting a decree of divorce either under Section 13 or Section 13-B of the Hindu Marriage Act, 1955.

29. In the ultimate analysis the aforesaid discussion throws up two propositions. The first proposition is that although irretrievable break-down of marriage is not one of the grounds indicated whether under Sections 13 or 13- B of the Hindu Marriage Act, 1955, for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13-B of the aforesaid Act. This doctrine of



irretrievable break-down of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Neither the civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on grounds not provided for in Section 13 and 13-B of the Hindu Marriage Act, 1955.”

The plea of the appellant husband that the respondent wife was in illicit relationship with two boys has been taken half heartedly to take the plea of adultery but neither the name of the boys have been disclosed nor the conduct of the appellant husband that he allowed the boys to enter into the room of his wife in his own house appears to be unreasonable. A pleading without any evidence to prove the same has no meaning. Moreover, Rule 16 of the Patna High Court Hindu Marriage Rules stipulates that the adulterer is a necessary party when the dissolution of marriage or judicial separation is sought on the ground of adultery. However, on certain grounds the Court may allow the petitioner not to make an adulterer as party if he is dead or if he could not know his name instead of due diligence. Rule 16 of the Rules reads as follows:



“16. Co-respondent in husband’s petition.- In any petition presented by a husband for divorce on the ground that the wife is living in adultery or judicial separation on the ground that the wife has, since the solemnization of the marriage, been guilty of adultery, the petitioner shall make the alleged adulterer, if alive, a co respondent in the said petition, unless he is excused from so doing by an order of the Court which may be made on any or more of the following grounds which shall be supported by an affidavit in respect of the relevant facts.-

(i) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed;

(ii) that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts for its discovery;

(iii) that the alleged adulterer is dead;

(iv) for any other sufficient reason that the Court may deem fit to consider.”

Similar provision has been made under Rule 214(16) of the Civil Court Rules, which reads as follows:

“16. Co-respondent in husband’s petition.- In any petition presented by a husband for divorce on the ground that the wife is living in adultery or judicial separation on the ground that the wife has, since the solemnization of the



marriage, been guilty of adultery, the petitioner shall make the alleged adulterer, if alive, a co respondent in the said petition, unless he is excused from so doing by an order of the Court which may be made on any or more of the following grounds which shall be supported by an affidavit in respect of the relevant facts.-

(i) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed;

(ii) that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts for its discovery;

(iii) that the alleged adulterer is dead;

(iv) for any other sufficient reason that the Court may deem fit to consider.”

In the present case, when the son of the appellant and respondent has also become adult, we are of the view that no useful purpose will be served at this stage to allow the marriage to be dissolved. Both the appellant husband and the respondent wife have still occasion to ponder over the whole issue and take a positive steps though it appears that different benches of the High Court made several attempts to get the issue settled but to no avail.

In the circumstances, we do not find any merit in the



appeal, which is, accordingly, dismissed.

However, the appellant husband is expected to make payment of the maintenance amount as awarded by the learned Court below till date. The respondent wife is at liberty to take recourse to the appropriate remedy available in law.

(Dinesh Kumar Singh, J)

(Arvind Srivastava, J)

Anil/-Ashwini/-

AFR/NAFR	
CAV DATE	
Uploading Date	
Transmission Date	

