



C.M.A.No.1017 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on:	Judgment delivered on:
10.08.2022	09.12.2022

CORAM :

THE HONOURABLE MS.JUSTICE V.M.VELUMANI
and
THE HONOURABLE MR.JUSTICE S.SOUNTHAR

C.M.A.No.1017 of 2011

Aravindan

.. Appellant

Vs.

Usha

.. Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 19(1) of the Family Courts Act, 1984, against the judgment and decree dated 28.01.2011 made in F.C.O.P.No.224 of 2005 on the file of the Family Court, Salem.

For Appellant : Mrs.V.Srimathi
for Mr.V.Raghavachari

For Respondent : Mr.T.M.Hariharan



J U D G M E N T

(Judgment of the Court was delivered by V.M.VELUMANI, J.)

The appellant is husband and respondent is wife. The appellant filed F.C.O.P.No.224 of 2005 under Section 13(1)(i-a)(i-b) of the Hindu Marriage Act, on the file of the Family Court, Salem, for dissolution of the marriage conducted between the appellant and respondent on 05.03.2003. The learned Judge, dismissed the said F.C.O.P. Challenging the said order of dismissal, the appellant/husband has come out with the present appeal.

Case of the appellant:

2. According to the appellant, the appellant and respondent got married on 05.03.2003 at P.C.C.Thirumana Mandapam, Steel Plant Road, Salem. The parents of the appellant met the entire marriage expenses of Rs.2,00,000/-. The appellant's family presented a 'Thali' along with 'Kodi' (Chain) weighing about 11 ½ sovereigns. After marriage, the appellant and respondent started residing at the house of the appellant. For two months, the marital relationship was smooth. After two months, the respondent started behaving indifferently, impertinently, arrogantly stating that her father is very influential person in their place and expected everybody to act according to her wish. The respondent started



creating problem. The respondent even during the first two months of marriage also, did not take care of household things. The appellant's mother even though very old, was doing all the household things.

2(a). Whenever the respondent received phone call from her home, she started ill-treating the appellant and his parents. The respondent was treating the appellant's mother as servant maid. The respondent also used to ill-treat the relatives of the appellant as she comes from a fairly rich family. Whenever the respondent picks up quarrel with appellant, she used to remove her Thali Kodi and throw it.

2(b). The respondent became pregnant within two months of marriage. The appellant and his parents patiently waited considering the welfare of the family and child in the womb, even the father of the respondent started threatening the appellant and his parents. The respondent's father started demanding and threatening the appellant to transfer the house standing in his name in the name of the respondent. Unable to withstand the ill-treatment and torture by the respondent and his father, appellant's mother twice attempted suicide. The appellant, due to mental agony caused by the ill-treatment of the respondent and the threats by her father, met with an accident. The appellant was taking



treatment for one week as in-patient for the injuries sustained by him in the accident and continued the treatment for two months. When the appellant was in the Hospital for taking treatment, the respondent's parents came to Salem and took the respondent to their home without informing the appellant.

2(c). In the month of August 2003, Valaikappu function was conducted at Salem Steel Plant and respondent's parents took the respondent to their home against the wish of the appellant. The respondent did not communicate with the appellant and did not respond when the appellant tried to contact her. The respondent did not inform the appellant about the birth of the child in December 2003. When the appellant came to know about the birth of the child, he went to the Hospital. The respondent and her parents treated him in an inimical manner.

2(d). The respondent from August 2003 voluntarily deserted the appellant without any reasonable cause or any excuse.

2(e). The respondent behaved arrogantly and cruelly and even though the appellant was willing to lead a normal family life, the respondent was not amenable to the same. The attitude and behaviour of



the respondent and threat made by the respondent's father, made his life very miserable.

2(f). On the above averments, the appellant has filed F.C.O.P.No.224 of 2005 seeking dissolution of marriage conducted between the appellant and respondent on 05.03.2003.

Case of the respondent:

3.The respondent filed counter statement denying all the allegations made against her by the appellant and stated that all the averments are false. It is not correct that appellant's family met the entire marriage expenses as alleged by the appellant. The respondent's father agreed to give a sum of Rs.5,000/- for purchasing cot, beuro as given to her sister. When the respondent's father was not well and admitted in the Hospital at Coimbatore, the appellant and his mother did not allow the respondent to go and see her father in the Hospital.

3(a). The appellant's mother scolded the respondent stating that the respondent is beggar's daughter and by mistake, they got her married to the appellant and ill-treated the respondent stating that she will get the appellant married to her grand daughter Poorani after getting rid off the



respondent.

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3(b). During the month of Aadi, when the respondent went to her parents house, the appellant refused to come stating that he will not come to beggar's house. When the respondent's father met the appellant for fixing a good day for conducting Valaikappu function, the appellant picked up quarrel with him and shouted at him. The appellant's brother-in-law, who was present at that time advised the appellant not to behave like that. The Valaikappu function as per the wish of the appellant was conducted at the Steel Plant Marriage Hall, Salem.

3(c). The respondent and her parents informed the appellant about the birth of female child on 18.12.2003. The appellant alone came and saw the child in the Hospital. Subsequently, the appellant and his parents did not come and see the child. After three months of birth of child, the respondent's father contacted the appellant's father to leave the respondent and child in the matrimonial home. At that time, he informed that he will take the respondent and child after seven months. Even after nine months, the appellant did not inform about taking the respondent and the child. The respondent's parents took the respondent and child to the matrimonial home. The appellant's mother did not allow the



respondent and child into the matrimonial home. The appellant's sisters asked the father of the respondent to give in writing that they will not have any contact with the respondent in future and then only they will allow the respondent into the matrimonial home.

3(d). The respondent made number of attempts to join the appellant in the matrimonial home. On one occasion, when the respondent went to matrimonial home, the appellant's mother did not allow the respondent to enter the house. The respondent waited till 6.00 P.M. and then went to her home. When the respondent's relatives went to appellant's home for pacifying the appellant, the appellant threatened them and went out. The appellant's father told the respondent that he will convince his wife and appellant for bringing the respondent to matrimonial home in one month. Even after two months, the appellant did not take the respondent to matrimonial home. The respondent went to matrimonial home with child and stayed there for a week. The appellant's mother informed her daughters about the stay of the respondent. They came and shouted at respondent, who could not bear their torture. The appellant's father seeing this, took the respondent to her elder sister's house at Rasipuram. He advised the respondent to give complaint to the Police against the appellant and his mother. The respondent did not agree



for the same and did not accept the sum of Rs.5,000/- offered by the appellant's father.

3(e). After the respondent came to know about the appellant filing of the petition for dissolution of marriage, the respondent, her parents and relatives went to the matrimonial home to settle the matter. The appellant gave a complaint to the Steel Plant Police Station against the respondent's father. The Steel Plant Police referred the matter to the Kondalampatti Women Police Station. The respondent's father begged the appellant to live with respondent. The appellant did not agree for the same. After enquiry, the All Women Police, advised the appellant to live with the respondent. The appellant informed the Police that he will take the respondent to matrimonial home in 15 days and live with her, but did not do so.

3(f). The respondent was living with appellant as dutiful wife and in future also, she will continue as dutiful wife. The respondent is always ready and willing to live with the appellant along with child.

3(g). The respondent has filed petition before the Judicial Magistrate Court No.II, Attur, claiming maintenance as appellant failed to maintain the respondent and child and prayed for dismissal of the petition



for divorce.

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4.Before the learned Judge, the appellant examined himself as P.W.1 and examined one J.Kannan, friend of appellant as P.W.2 and 11 documents were marked as Exs.P1 to P11. The respondent examined herself as R.W.1 and marked four documents as Exs.R1 to R4.

5.The learned Judge considering the pleadings, oral and documentary evidence, dismissed the petition holding that the appellant failed to prove the cruelty and desertion by the respondent.

6.Against the said order of dismissal dated 28.01.2011 made in F.C.O.P.No.224 of 2005, the appellant has come out with the present appeal.

7.The learned counsel appearing for the appellant made the following submissions:

(i)The learned Judge failed to properly appreciate the scope of Sections 13 (i-a) & (i-b) of the Hindu Marriage Act, 1955.

(ii)The learned Judge ought to have seen that the respondent has deserted the appellant during the statutory period as per the Act. The respondent has deserted the appellant without any reason or excuse.

<https://www.mhc.tn.gov.in/judis> (iii)The learned Judge ought to have seen that the marriage



between the appellant and respondent had been irretrievably broken out.

(iv)The appellant and respondent are living separately from August 2003 and there is no cohabitation for long time.

(v)The Hon'ble Apex Court and this Court have held that long period of desertion and non-cohabitation amounting to the marriage being dead between the parties and marriage is only a fiction.

(vi)The respondent is a literate person and even after six years of separation, she did not file any petition for restitution of conjugal rights.

(vii)The respondent has no intention to join the appellant in the matrimonial home, but is only interested in the property of the appellant.

(viii)The respondent filed petition for maintenance making various allegations. The respondent had made scandalous and vexatious allegations against the appellant.

(ix)The respondent admitted in cross examination that she falsely stated in the petition for maintenance filed by her against the appellant that appellant threatened and persuaded her to abort if the child in womb was a female child.

(x)The learned Judge erred in accepting the statement of respondent that the appellant did not allow the respondent to enter into the matrimonial home. The learned Judge failed to see that said allegation is not supported by any oral or documentary evidence.



(xi)The learned Judge failed to properly appreciate the evidence of P.W.2, who had categorically deposed that respondent did not come and see the appellant when the appellant was taking treatment as in-patient in the Hospital for the injuries sustained by him in the accident.

(xii)The failure on the part of the respondent for visiting the appellant in the Hospital and taking care of the appellant amounts to cruelty.

(xiii)The learned counsel appearing for the appellant referred to the averments made in F.C.O.P.No.224 of 2005, oral and documentary evidence and contended that appellant had proved that the respondent treated the appellant and his mother cruelly and had deserted the appellant from August 2003 without any reason and prayed for allowing the appeal.

In support of her contentions, the learned counsel appearing for the appellant relied on the following judgments:

(1) 2007 (2) SCC 263 (Rishikesh Sharma vs. Saroj Sharma);

“5. During this last hearing both the husband and wife were present in Court. Husband was ready and willing to pay lumpsum by way of permanent alimony to the wife. The wife was not willing to accept the lumpsum but however expressed her willingness to live with her husband. We are of the opinion that her desire to live



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with her husband at this stage and at this distance of time is not genuine. Therefore, we are not accepting this suggestion made by the wife and reject the same.”

(2) (2008) 7 SCC 734 (Satish Sitole vs. Ganga (Smt);

“8. Since, initially on behalf of the respondent-wife it was made to appear that she was ready and willing to go back to the appellant, subject to certain terms and conditions, we explored the possibility of an amicable solution, but such an attempt ended in failure on account of the rigid stance taken on behalf of the respondent. On behalf of the wife it was submitted that certain orders had been passed by the Courts below for payment of alimony by the appellant to the respondent but that the same had not been complied with. At this stage it may also be mentioned that a male child (Chetan) had been born out of the wedlock on 28.2.1993 and we had hoped that the child would act as a catalyst to an amicable settlement, but even the existence of the child could not bring about a reconciliation between the parties.

9. Since despite the attempts at reconciliation the Gordian Knot could not be untied and clearly the marriage has broken down irretrievably, it was submitted on behalf of both the parties that it would perhaps be to the best interest of the parties to have the marriage tie dissolved with adequate provision by way of permanent alimony for the respondent.



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13.Having dispassionately considered the materials before us and the fact that out of 16 years of marriage the appellant and the respondent had been living separately for 14 years, we are also convinced that any further attempt at reconciliation will be futile and it would be in the interest of both the parties to sever the matrimonial ties since the marriage has broken down irretrievably.”

(3) (2006) 4 SCC 558 (Naveen Kohli vs. Neelu Kohli);

“83. Even at this stage, the respondent does not want divorce by mutual consent. From the analysis and evaluation of the entire evidence, it is clear that the respondent has resolved to live in agony only to make life a miserable hell for the appellant as well. This type of adamant and callous attitude, in the context of the facts of this case, leaves no manner of doubt in our mind that the respondent is bent upon treating the appellant with mental cruelty. It is abundantly clear that the marriage between the parties had broken down irretrievably and there is no chance of their coming together, or living together again.”

(4) C.M.A.No.604 of 2017, dated 03.04.2014 (K.Kuppuraj vs.

M.Rajasulochana);



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“18. From the aforesaid discussion, it is clear that the wife had not attempted or taken any steps to join her husband by filing a petition before the family Court for restitution of conjugal rights. If at all she is interested to live with her husband, she could have filed a petition for conjugal rights to establish her stand. Even assuming that her husband was having illicit relationship with one Subha, it is not a hurdle for her to live with her husband as she clearly deposed that she is willing to live with her husband despite knowing that he had illicit relationship with another woman. In cross-examination, the wife has stated that her husband character is good except the fact that he was living with one Subha. She has specifically stated that her husband was having very good character. Since the case squarely falls within the four corners mentioned supra (in para 13), we are of the view that it is a fit case for granting divorce on the ground of "desertion". ”

(5) C.M.A.(MD)Nos.238 & 239 of 2012, dated 06.04.2017

(Salome vs. Dr.Prince);

“19.The learned counsel for the appellant contended that divorce can be granted on the ground of irretrievable break down of marriage as per judgments of the Hon'ble Apex Court. This contention is untenable. The Hon'ble Apex Court has granted divorce on that ground



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exercising its extraordinary power under Article 142 of the Constitution of India. The said power is not available to this Court or to the Trial Court. In the subsequent judgments, the Hon'ble Apex Court held that the earlier judgment, granting divorce on the ground of irretrievable broken down cannot be taken as precedent. It is pertinent to note that the respondent obtained a decree of restitution of conjugal rights. There is nothing on record to show that after obtaining decree, he took steps to make the appellant to live with him as his wife. He has not filed any E.P. as per Order 21 Rule 32 Civil Procedure Code. Where a person, who suffered a decree of restitution of conjugal rights has wilfully failed to obey the decree, the person, who obtained decree can enforce the same by attachment of his or her property. In the circumstances, the fact that the appellant and the respondent are living separately for more than 10 years and the attitude of the respondent even after obtaining a decree of restitution of conjugal rights has not taken steps to enforce the same, but insisting on retaining matrimonial bond would amount to causing mental cruelty and to torment and traumatized the appellant. This has been held so by the Delhi High Court in the judgment reported in **2016 (O) Supreme (Del.) 3869** and the Hon'ble Apex Court in the judgment reported in **2006 (4) SCC 558** [cited supra].

20.The ratio laid down in the said judgments are squarely applicable to the facts of the present case. The insistence of the respondent to continue the matrimonial



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tie even though he is fully aware that there is no possibility of re-union and living together as husband and wife, amounts to causing mental cruelty to the appellant.”

(xiv) The learned counsel appearing for the appellant also relied on the following judgments in support of her contentions:

- (1) **1998 (II) CTC 385 (Amaravathy vs. R.A.Pakkirinathan);**
- (2) **Civil Appeal Nos.4984 – 4985 of 2021, dated 13.09.2021 (Sivasankaran vs. Santhimeenal);**
- (3) **C.M.A. No.3249 of 2017, dated 05.07.2022 (C.Sivakumar vs. A.Srividhya);**

8.The learned counsel appearing for the respondent reiterated the averments in the counter statement and made the following submissions:

(i)The appellant's mother started ill-treating the respondent stating that the respondent comes from a poor family and that they made a mistake by getting the respondent married to the appellant.

(ii)The respondent was forced to leave the matrimonial home due to ill-treatment and torture by the appellant's mother and sisters.

(iii)It is usual custom during month of Aadi, the wife will be taken to parents house and the husband will be invited to visit in-law's house. In



the present case, when the respondent's parents invited both the appellant and respondent to their house for the month of Aadi, the appellant refused to go to his father-in-law's house.

(iv)When the respondent was seven months pregnant, the father of the respondent approached the appellant and his parents to fix a date for conducting Valaikappu function. At that time, the appellant shouted at the father of the respondent that his wife was taken away for Aadi month without his permission and he was insulted. The brother-in-law of appellant viz., Kanagarathinam advised the appellant that what he was doing is wrong.

(v)After three months of child birth, the respondent's father requested the appellant that respondent and child to be taken back to matrimonial home. The parents of the appellant wanted the respondent to wait for seven months. Even after nine months of child's birth, the respondent was not called for to matrimonial home.

(vi)The parents of the respondent and senior aunt took the respondent and child to matrimonial home. But they were prevented. Again the respondent went to matrimonial home along with child. But, she was denied entry. She waited till 6.00 P.M. and returned to her parents house.

<https://www.mhc.tn.gov.in/judis> (vii)Even when elders of the respondent's family visited the



matrimonial home for conciliation, they were not allowed to talk.

(viii) Two months thereafter they went to matrimonial home with the child and stayed there for seven days. They were ill-treated and tortured stating that proper SeerVarisai was not done and appellant will be married to a girl who brings 50 sovereigns of gold.

(ix) Seeing the ill-treatment meted out by the respondent, the father of the appellant took the respondent to her sister's house and gave some money. The respondent refused to receive the money and told her father-in-law that she is interested only in living with appellant.

(x) On hearing that appellant is going to issue notice for divorce, the respondent, her parents and elders visited the appellant's house.

(xi) The appellant gave a Police complaint against them and did not allow the respondent and child to enter the matrimonial home.

(xii) The respondent gave a petition to the Kondalampatti All Women Police Station for joining the appellant in matrimonial home with child.

(xiii) The appellant promised that he will take the respondent and child after 15 days, but failed to do so.

(xiv) Whenever the respondent tried to join the appellant in the matrimonial home, she was denied entry.

(xv) Once when the respondent was denied entry, the father of the



appellant allowed the respondent to occupy a small portion of the house.

But again, she was thrown out after two days.

(xvi)After seven days, she had to remove the lock and enter the matrimonial home as she had no source of maintenance.

(xvii)The respondent has stated all these facts in M.C.No.27 of 2005 on the file of the Judicial Magistrate Court No.II, Attur, filed by her for interim maintenance.

(xviii)The appellant gave complaint against the respondent alleging that she had forcefully entered the house and also filed a private complaint against the respondent and others before the Judicial Magistrate Court No.I, Salem alleging trespass.

(xix)The learned Judicial Magistrate No.II, Attur in M.C.No.27 of 2005 directed the appellant to pay a sum of Rs.2,500/- per month each to the respondent and child, but the appellant has not paid any maintenance and as on July 2022, a sum of Rs.10,00,000/- is due and payable by the appellant.

(xx)The respondent did not take any coercive action for recovery of the said amount as she wants to live with the appellant.

(xxi)As far as the contention of the appellant with regard to Thali Kodi is concerned, she is wearing Thali in the yellow thread and kept the chain (kodi) at home for safety purpose.



(xxii)The respondent is always interested in joining the appellant in matrimonial home. She has stated so in her counter statement and she also made several attempts to join the appellant in the matrimonial home. But, the appellant and his mother prevented them from entering into the matrimonial home.

(xxiii)The appellant has given complaint against the respondent, her parents and relatives whenever they attempted to join the appellant.

(xxiv)The appellant failed to prove the alleged act of cruelty and desertion.

(xxv)The learned Judge has categorically considered all the materials placed before him and dismissed F.C.O.P.No.224 of 2005. There is no reason to interfere with the said order and prayed for dismissal of the appeal.

In support of his contentions, the learned counsel appearing for the respondent relied on the following judgments:

(1) (2010) 13 SCC 298 (Neelam Kumar vs. Dayarani);

“9. The High Court then took up the other allegation that the respondent did not come to attend and take care of the appellant when he was undergoing medical treatment in a hospital for the injuries caused in an accident. The High Court found that this allegation



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was not part of the appellant's pleadings and the matter was introduced in course of evidence. The court observed that not being stated in the pleadings, the allegation could not be taken into consideration. Even otherwise, apart from the oral statement made before the trial court, there was no material to support the allegation. The appellant did not examine any doctor or produce the medical records in connection with his treatment. In any event, one single instance, in isolation, was hardly sufficient for the dissolution of marriage on the ground that the respondent treated the appellant with cruelty.

13. The counsel for the appellant then submitted that the appellant's marriage with the respondent had completely broken down with no hope of revival and compelling them to live together would be very hard and unjust. He made a plea for dissolution of marriage on the ground of its irretrievable breakdown. In support of the submission, learned Counsel relied on the judgment of this Court in *Satish Sitole v. Smt. Ganga* (2008) 7 SCC 734 wherein it was held in the last paragraph as follows:

“14...that since the marriage between the parties is dead for all practical purposes and there is no chance of it being retrieved, the continuance of such marriage would itself amount to cruelty, and, accordingly, in exercise of our powers under Article 142 of the Constitution we direct that the marriage of the appellant and the respondent shall stand dissolved....”

14. We are not impressed by this submission at all. There is nothing to indicate that the respondent has contributed in anyway to the alleged breakdown of the marriage. If a party to a marriage, by his own conduct



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brings the relationship to a point of irretrievable breakdown, he/she cannot be allowed to seek divorce on the ground of breakdown of the marriage. That would simply mean giving someone the benefits of his/her own misdeeds.

15. Moreover, in a later decision of this Court in *Vishnu Dutt Sharma v. Manju Sharma* (2009) 6 SCC 379 it has been held that irretrievable breakdown of marriage is not a ground for divorce as it is not contemplated under Section 13 and granting divorce on this ground alone would amount to adding a clause therein by a judicial verdict which would amount to legislation by Court. In the concluding paragraph of this judgment, the Court observed:

“12.If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts.” ”

(2) 2010 (3) MWN (Civil) 129 (Rajalakshmi vs. Vairamuthu);

“22. The trial Court has granted divorce on the ground of desertion. For proving desertion, Under Section 13(1)(ib) of Hindu Marriage Act, the Respondent herein 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 Respondent herein. The



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desertion requires four important elements viz., (i) factum of separation (ii) necessary intention to put an end to matrimonial consortium and cohabitation permanently, (iii) want of reasonable cause and (iv) want of consent or against the wish of the other spouse. In AIR 1964 SC 40 (**Lachhman Uttam Chand Kirpalani v. Meena**) the Supreme Court has held that mere leaving the matrimonial home is not sufficient. *Animus deserendi* at the time of leaving the matrimonial home has to be proved.

23. "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 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. The



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party seeking divorce on the ground of desertion is required to show that he or she was not taking the advantage of his or her own wrong. (vide **SAVITRI PANDEY VS. PREM CHANDRA PANDEY ((2002) 2 SCC 73)**.

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33. When the 1st Appellant is taking efforts to rejoin her husband, in her anxiety, she might have given the complaint before the police. Mere filing of criminal complaint against husband by itself would not amount to cruelty. It is to be seen that the complaint came to be filed only subsequent to the strained relationship between the parties after the Respondent has left the house.”

(3) (2018) 17 SCC 383 (Manju Kumari singh alias Manju singh vs. Avinash Kumar Singh);

“3.In our considered opinion, even under the law, the divorce cannot be granted on the ground that marriage has been broken down irretrievably. In view of that, the order passed by the High Court of Jharkhand cannot be said to be sustainable in the eye of the law.

4.Hence, we set aside the order passed by the High Court and remand the matter to the High Court for fresh hearing. The appeal is allowed in the aforesaid terms.”

(4) (2020) 17 SCC 822 (Kaushalya vs. Mukesh Jain);

“12.4 In the event that there is any failure on the part of the respondent to comply with the order for deposit of arrears and month to month installments, it



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will be open to the appellant to apply before the Family Court to get the defence of the respondent struck off.”

(5) (2011) 5 SCC 234 (Hitesh Bhatnagar vs. Deepa Bhatnagar);

“17)As a last resort, the appellant submits that the marriage had irretrievably broken down and prays that the Court should dissolve the marriage by exercising its jurisdiction under Article 142 of the Constitution of India. In support of his request, he invites our attention to the observation made by this Court in Anil Kumar V. Maya Jain, (2009) 10 SCC 415, wherein though the consent was withdrawn by the wife, this Court found the marriage to have been irretrievably broken down and granted a decree of divorce by invoking its power under Article 142. We are not inclined to entertain this submission of the appellant since the facts in that case are not akin to those that are before us. In that case, the wife was agreeable to receive payments and property in terms of settlement from her husband, but was neither agreeable for divorce, nor to live with the husband as his wife. It was under these extraordinary circumstances that this Court was compelled to dissolve the marriage as having irretrievably broken down. Hence, this submission of the appellant fails.

21)This Court in the case of *V. Bhagat v. Mrs. D. Bhagat*, (1994) 1 SCC 337 held that irretrievable breakdown of a marriage cannot be the sole ground for the dissolution of a marriage, a view that has withstood the test of time. In the case of *Savitri Pandey v. Prem*



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Chandra Pandey, (2002) 2 SCC 73, this Court took the view:

“17. The marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses.....”

24. In the present case, time and again, the respondent has stated that she wants this marriage to continue, especially in order to secure the future of their minor daughter, though her husband wants it to end. She has stated that from the beginning, she never wanted the marriage to be dissolved. Even now, she states that she is willing to live with her husband putting away all the bitterness that has existed between the parties. In light of these facts and circumstances, it would be travesty of justice to dissolve this marriage as having broken down. Though there is bitterness amongst the parties and they have not even lived as husband and wife for the past about 11 years, we hope that they will give this union



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another chance, if not for themselves, for the future of their daughter. We conclude by quoting the great poet George Eliot

“What greater thing is there for two human souls than to feel that they are joined for life - to strengthen each other in all labour, to rest on each other in all sorrow, to minister to each other in all pain, to be one with each other in silent, unspeakable memories at the moment of the last parting.”

(6) 2017 (12) Scale 345 (Sukhendu Das vs. Rita Mukherjee);

“4. After referring to the pleadings in the case, the trial court found that the Appellant failed to prove cruelty on the part of the Respondent. The evidence adduced by the Appellant was scrutinized by the trial court to come to a conclusion that the Appellant did not make out a case for divorce. The High Court, taking note of the fact that the Appellant and the Respondent are judicial officers, made an attempt for conciliation between the parties. However, in spite of the effort of the High Court, both the Appellant and the Respondent did not appear personally before the High Court. Despite taking note of the fact that the Appellant and the Respondent were living separately since the year 2000, the High Court dismissed the Appeal by holding that irretrievable breakdown of marriage cannot be a ground



for divorce. The High Court held that the Appellant failed to prove mental cruelty on the part of the Respondent.”

WEB COPY (xxvi) The learned counsel appearing for the respondent also relied on the judgment reported in **1998 (II) CTC 385 (Amaravathy vs. R.A.Pakkirinathan)**.

9.Heard the learned counsel appearing for the appellant as well as the learned counsel appearing for the respondent and perused the entire materials on record.

10.Based on the pleadings and arguments of the learned counsel appearing for the appellant and respondents, the following points have arisen for consideration in this appeal:

(I)Whether the impugned order dated 28.01.2011 passed in F.C.O.P.No.224 of 2005 is liable to be set aside?

(II)Whether the appellant is entitled to a decree of dissolution of marriage conducted on 05.03.2003 between the appellant and respondent?

Points for consideration (I) and (II):

11.From the materials on record and the submissions made by the learned counsel appearing for the appellant and respondent, the following



facts emerge:

- (a) The appellant and respondent got married on 05.03.2003.
- (b) They lived in the house of appellant along with his parents.
- (c) Misunderstanding arose between the parties within two months from the date of marriage.
- (d) The parties have made serious allegations against each other.
- (e) The appellant also made allegations against father and relatives of the respondent and gave complaints to the Police against father of the respondent.
- (f) The respondent made allegations against the mother and sisters of the appellant.
- (g) The respondent filed M.C.No.27 of 2005 on the file of the Judicial Magistrate Court No.II, Attur, claiming maintenance from the appellant for herself and minor daughter.
- (h) In the petition filed for maintenance, the respondent made certain allegations against the appellant and his mother, which she admitted in cross-examination as D.W.1 in F.C.O.P.No.224 of 2005 that said allegations are not correct.
- (i) The appellant and respondent are living separately from August 2003 and till date, there is no reunion and no cohabitation.
- (j) The respondent has not filed any petition for restitution of



conjugal rights, but stated in the counter statement that she is always willing to live with the appellant.

(k) The appellant did not examine his mother or sister to prove the cruelty by the respondent. Similarly, the respondent did not examine her father, brother or any of her relatives to prove that only appellant and his family members treated her cruelly and all their efforts for reunion failed.

11(i).From the above points, it is seen that appellant and respondent got married on 05.03.2003 and their cordial relationship lasted only for two months. After that their relationship became failed and both the appellant and respondent made serious allegations against each other. These allegations are not relating to stray incident or happened due to normal wear and tear of family life. These allegations continued for number of years. As per the order of this Court, appellant and respondent appeared before us, but no settlement could be arrived at.

11(ii).Several allegations made by the appellant and respondent against each other and against their family members also make it clear that both of them are not comfortable with each other. The appellant had given complaints against father of the respondent, her relatives and also against the respondent. The respondent had also given a petition to the



Police. Considering the above attitude of the appellant and respondent, it will not be in the interest of both the parties to order resuming matrimonial life.

11(iii).Another factor to be taken note of is that appellant and respondent are living separately from August 2003 for more than 19 years. According to appellant, the respondent voluntarily left the matrimonial home without any reasonable cause. Whereas, it is the case of the respondent that she was forced to leave the matrimonial home due to the ill-treatment and torture of the appellant, his mother and sisters. According to respondent, she always wants to join the appellant and live with him along with child and the appellant did not allow her to enter the matrimonial home. But the respondent had not filed any petition for restitution of conjugal rights. It is not in dispute that parties are residing separately from August 2003 and there is no cohabitation for 19 years. The learned counsel appearing for the respondent also did not dispute this fact. Long period of separation and failure to have cohabitation for a long period makes the marriage a dead one and marriage is only on paper as per law and practically marriage does not exist and it is not possible to revive, especially when any one of the parties is not willing to resume the family life. This issue was considered and decided by the Hon'ble Apex



Court in the judgment reported **2007 4 SCC 511, [Samar Ghosh Vs. Jaya Ghosh]**. The relevant paragraph 101 is extracted hereunder:

“101.No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behavior 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



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long time may lead to mental cruelty.

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

(vi) Sustained unjustifiable conduct and behavior 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



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because of the acts and behavior 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 sterilization 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.”

Clause 14 of the above referred paragraph 101 of the above



judgment is squarely applicable to the facts of the present case.

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11(iv).As far as cruelty is concerned, it may be 'physical' or 'mental'. The term 'cruelty' is elaborately considered by the Hon'ble Apex Court in the judgment reported in **2006 3 SCC 378, [Vinita Saxena Vs. Pankaj Pandit]**. The relevant paragraphs are extracted hereunder:

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

32.The word 'cruelty' has not been defined and it has been used in relation to human conduct or human behavior. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely



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affecting the other. The cruelty may be mental or physical, intentional or unintentional. There may be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

33.The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions, their culture and human values to which they attach importance. Judged by standard of modern civilization in the background of the cultural heritage and traditions of our society, a young and well educated woman like the appellant herein is not expected to endure the harassment in domestic life whether mental, physical, intentional or unintentional. Her sentiments have to be respected, her ambition and aspiration taken into account in making adjustment and her basic needs provided, though grievances arising from temperamental disharmony. This view was taken by the Kerala High Court in the case reported in *Ranjani V. Subramanian*.

34.In 1993 (2) Hin L.R. 637, the Court had gone to the further extent of observing as follows:



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'Sometime even a gesture, the angry look, a sugar coated joke, an ironic overlook may be more cruel than actual beating'.

35. Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered.

36. The legal concept of cruelty which is not defined by statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all question of cruelty is that the whole matrimonial relations must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complains accusations or taunts. It may be mental such as indifference and frigidity towards wife, denial of a company to her, hatred and abhorrence for wife or



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physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellant's side, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure.

37. As to what constitute the required mental cruelty for purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial



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home.

38.If the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer.

.. ..

40.This Court in **Dastane v. Dastane**, observed as under:-

“The Court has to deal not with an ideal husband and an ideal wife, (assuming any such exist) but with the particular man and women before it. The ideal couple or a mere ideal one will probably have no occasion to go to a matrimonial court or, even if they may not be able to draw their differences, their ideal attitudes may help them overlook or gloss over mutual fault and failures.”

11(v).Another judgment of the Hon'ble Apex Court reported in **2006 4 SCC 558, [Naveen Kohli Vs. Neelu Kohli]** is also relevant to decide the present issue. The learned counsel appearing for the appellant



relied on paragraph No.83 of this judgment which is extracted supra. The paragraph Nos.86 and 87 are also relevant to decide the issue in the present case and are extracted hereunder:

“...86.In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.

87. The High Court ought to have visualized that preservation of such a marriage is totally unworkable which has ceased to be effective and would be greater source of misery for the parties.”

11(vi).In the judgment reported in **2007 (2) SCC 263 (Rishikesh Sharma vs. Saroj Sharma)**, the Hon'ble Apex Court has held that when the wife expressed her willingness to live with her husband and did not



accept the lumpsum alimony offered by the husband, the Hon'ble Apex Court rejected wife's willingness to live with husband as not genuine. In the present case also, before us the respondent did not accept the amount offered by the appellant and expressed her desire to live with appellant. We are of the opinion that in the facts and circumstances of case, the willingness expressed by respondent is not genuine and is not acceptable.

11(vii).It is seen that out of 19 years of marriage, except for first five months of marriage, the appellant and respondent are living separately for 18 years 7 months. Any effort at reconciliation is of no use and it would be in the interest of both the appellant and respondent to sever the matrimonial ties.

11(viii).In **(2006) 4 SCC 558 (Naveen Kohli vs. Neelu Kohli)**, at paragraph 83 of the above judgment, the Hon'ble Apex Court analysing the entire evidence held that respondent/wife has resolved to live in agony only to make a life miserable and hell for the appellant/husband as well. Considering the pleadings and entire evidence, we have no hesitation to hold that ratio in the above judgment is squarely applicable to the facts of this case.



11(ix).In the judgment of this Court dated **06.04.2017 made in**

C.M.A.(MD)Nos.238 and 239 of 2012, (Salome vs. Dr.Prince), this

Court held that after living separately for 10 years and attitude of the respondent/husband without taking steps to execute the decree of restitution of conjugal rights, but insisting on retaining matrimonial bond would amount to cruelty to the appellant/wife. This Court referred to the judgment of the Delhi High Court on this issue.

11(x).Learned counsel appearing for the respondent contended that irretrievable break down of marriage is not a ground for granting a decree of divorce, relied on the judgments referred to above and the relevant portions are extracted above. But it is seen that in the judgments relied on by the learned counsel appearing for the appellant and respondent that long separation and non-cohabitation for long time not only amounts to irretrievable break down of marriage, but also amount to causing cruelty to the wife or husband as a case may be when the husband or wife insists on the marriage being continued, when the marriage has become dead and when there is no possibility of reconciliation.

11(xi).In view of the ratio in the above judgments, contention of the learned counsel for the appellant that marriage between the appellant and respondent became dead due to long separation and non-cohabitation for



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long period and appellant is entitled to dissolution of marriage has considerable force and is acceptable. In view of the above, Points for consideration (I) and (II) are answered in favour of the appellant.

12.In view of the judgments of the Hon'ble Apex Court and this Court referred to above, the judgments relied on by the learned counsel appearing for the respondent do not advance the case of the respondent.

13.For the above reasons, this Civil Miscellaneous Appeal is allowed. The order of the learned Judge dated 28.01.2011 made in F.C.O.P.No.224 of 2005 is set aside. Accordingly, F.C.O.P.No.224 of 2005 filed by the appellant on the file of the Family Court, Salem, is allowed. No costs.

(V.M.V., J) (S.S., J)
09.12.2022

kj / krk

Index : Yes / No
Internet : Yes / No

To

1.The Judge,
Family Court,

<https://www.mhc.tn.gov.in/judis>



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Salem.

2.The Section Officer,
VR Section,
High Court,
Madras.



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V.M.VELUMANI, J.
and
S.SOUNTHAR, J.

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Pre-delivery Judgment in
C.M.A.No.1017 of 2011

09.12.2022