

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No. 295 of 2018

Dinesh Mandal, S/o Late Brishpati Mandal @ Bahaspati Mandal
Resident of Mohalla- Railway New Colony, Quarter No. 364 (D), P.S.-
Sahaia Katihar, District- Katihar.

... .. Appellant/Plaintiff

Versus

Chaitali Majumdar W/o Dinesh Mandal, D/o Late Mukund Lal Majumdar At present- ANMPP Programme Sadar Hospital, Katihar.

... .. Respondent/Defendant

Appearance :

For the Appellant/s : Mr. Kiran Sinha
For the Respondent/s : None

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE JITENDRA KUMAR

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE JITENDRA KUMAR)

Date : 25-08-2023

The present appeal has been filed under Section 19(1) of the Family Courts Act, 1984, impugning the judgment dated 18.04.2017 passed by Ld. Additional Principal Judge, Family Court, Katihar, in Matrimonial Case (Divorce) No. 560 of 2012, whereby the petition filed under Section 13(1)(i), praying for decree of divorce, has been dismissed *ex parte*.

2. The case of the Appellant/Plaintiff as per the pleadings is that he was married with the Respondent in the year 1980 as per Hindu Rites and Customs and out of the wedlock, two children were born, one is son, Devashis



Mandal, who is aged about 27 years and the second is daughter Chandrani Mandal, who is aged about 25 years. It is further averred that after solemnization of the marriage, both the parties began to lead happy and prosperous conjugal life. But, in 1997, the Defendant/Respondent left the company of the Appellant/Plaintiff and began to live in a hospital quarter. The Plaintiff/Appellant left no stone unturned to mend the way of the Defendant/Respondent but of no avail. It is further averred that the Defendant/Respondent filed a Complaint Case No. 1249 of 2000, in the Court of Ld. C.J.M., alleging torture and harassment and this complaint is still pending and the marriage bond between the parties has completely broken down. It is further averred that the Plaintiff/Appellant made several attempts to repair the matrimonial bond but the Defendant/Respondent is negating the company of the Appellant. It is further averred that the conduct and circumstances created by the Defendant/Respondent is humiliating and causing mental cruelty because she had roped the Appellant in false criminal case due to which the life of the Plaintiff/Appellant has become miserable and he is feeling humiliated in both private and public life. And hence, the Plaintiff/Appellant is not in a position to live with the



Defendant/Respondent. It is further informed that earlier a Matrimonial Case No. 30 of 2000, was filed by the Plaintiff/Appellant in the Court of Ld. District and Sessions Judge, Katihar, in which the Defendant/Respondent had appeared and filed her written statement. Reconciliation proceedings was also conducted. However, the Defendant/Respondent had completely refused to go with the Appellant to lead a conjugal life. It is further averred that the said matrimonial case/suit could not be contested by the Plaintiff/Appellant and hence, that case was dismissed due to lack of proper pairvi and the suit could not attain finality. It is further averred that his marriage has irretrievably broken down and there is no emotional substratum in the marriage. The matrimonial bond is beyond repair and the marriage is only for the sake of name. It is further averred that the Defendant/Respondent has been living separately from the company of the Plaintiff/Appellant for about 15 years and hence, he is claiming that the Plaintiff/Appellant is entitled to Decree of Divorce dissolving the marriage between the parties.

3. On notice, the Defendant did not appear. Hence, she was proceeded *ex parte*. During the *ex parte* trial, the



following three witnesses were examined on behalf of the Plaintiff/Appellant :

i) **PW-1** - Pardeshi Kamti

ii) **PW-2**- Sabjo Sachi Ghosh

iii) **PW-3** - Dinesh Mandal, who is plaintiff himself

4. The Appellant / Plaintiff has also got the following documents exhibited :

i) **Exhibit No.1** - Order Sheets of the Matrimonial Case No. 30 of 2000.

ii) **Exhibit No. 2** – A copy of the Matrimonial Petition No. 30 of 2000.

5. Pardeshi Kamti, who has been examined as PW-1, is acquainted with both the parties and in her examination- in-chief filed by way of affidavit she has reiterated the statements as made by the Plaintiff/Appellant in his petition. She has also deposed that the Defendant/Respondent is working as a nurse in a Government hospital and she is living separately from the Plaintiff/Appellant for 19 years and the matrimonial life between the parties is completely over. To Court question, she has deposed that she had never talked to Defendant/Respondent, Chaitali Majumdar. She had seen her



only once in the year 1998 at the house of the Plaintiff/Appellant when the altercation was going on.

6. Sabjo Sachi Ghosh, who has been examined as PW-2 is also acquainted with both the parties. In his examination-in-chief filed by way of affidavit, he has reiterated the Statements as made in the petition filed by the Plaintiff/Appellant. To Court question, he deposed that he is neighbour of the Plaintiff/Appellant, Dinesh Mandal. He has also deposed in response to the Court question that he and the Plaintiff/Appellant are in Railway employment since the year 1996. He has also deposed that he does not know why the Defendant/Respondent has been living separately from the Plaintiff/Appellant.

7. PW-3- Dinesh Mandal, is the Plaintiff/Appellant himself. In his examination-in-chief filed by way of affidavit, he has also reiterated the statement as made in his petition. In the said affidavit, he has also deposed that Defendant-wife (who is Respondent herein) has also illicit relationship with one Manoj Kumar Mandal. However, such allegation regarding illicit relationship of the Defendant-wife with the said Manoj Kumar Mandal is not pleaded in the Plaint. To Court, he has deposed that earlier also he had filed



one divorce case, bearing Matrimonial Case No. 30 of 2000 for dissolution of marriage, but that was dismissed for non-prosecution. He has also deposed that in the earlier petition, the same ground for dissolution of marriage was taken. He has also deposed that the complaint case filed by the Defendant/Respondent-Wife under Section 498A of the Indian Penal Code has been dismissed. However, he has not filed any documents in support of such a claim and it is not clear how the complaint has been dismissed.

8. The Exhibit-1, which is the order sheet of previous divorce petition bearing no. 30 of 2000, shows that on 20.05.2002, the divorce petition was dismissed for default for non-attending the matter by the Plaintiff/Appellant as well as Defendant/Respondent.

9. Exhibit-2, is a copy of the Matrimonial Case No. 30 of 2000, filed by the Plaintiff/Appellant for dissolution of marriage in the year 2000 which was dismissed for default. As per the petition, the Plaintiff/Appellant had pleaded adultery of the Defendant/Respondent-Wife with one Manoj Kumar Mandal, who was also impleaded as Defendant No. 2 in the petition. However, such pleading has not been made in the present divorce petition. It is also pertinent to take notice



that in that previous petition, he had not pleaded ground of desertion or cruelty for divorce. Only adultery was pleaded as ground for divorce in the previous matrimonial petition.

10. After considering the evidence on record and submissions on behalf of the Plaintiff/Appellant, Ld. Family Court dismissed the suit *ex parte*, holding that the Appellant / Plaintiff had failed to prove cruelty as allegedly committed by Defendant-wife against the Appellant / Plaintiff. It has also been found by the Ld. Family Court that even ground of desertion has not been proved by the Plaintiff (who is Appellant herein) against the Defendant-wife (who is Respondent herein). In regard to deposition regarding adultery, the examination-in-chief filed by way of evidence, the Ld. Family Court has found that such evidence is beyond pleadings because same has not been pleaded in the Plaint by the Appellant / Plaintiff.

11. Ld. counsel for the Appellant / Plaintiff submits that Ld. Family Court has failed to properly appreciate the pleading and evidence on record and hence the Ld. Family Court has erroneously found that the Appellant / Plaintiff had failed to prove cruelty, desertion and adultery to get decree of divorce against the Respondent-wife.



12. Respondent, despite service of notice did not appear to contest this appeal.

13. In view of the pleadings and submissions made on behalf of the Ld. Counsel for the Appellant, the following points arise for consideration of this Court:

(i) Whether, the Respondent-wife treated the Appellant / Plaintiff with cruelty;

(ii) Whether the Respondent-wife has deserted the Appellant / Plaintiff for more than two years at the time of presentation of the divorce petition;

(iii) Whether the Respondent-wife is living in adultery and she has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse;

(iv) Whether the Appellant / Plaintiff is entitled to get decree of divorce;

14. In view of the pleading that prior to the present divorce petition, the Appellant-Plaintiff had preferred Matrimonial Case No. 30 of 2000 under Section 13 of the Hindu Marriage Act for divorce and the same was dismissed on 20.05.2002 for non-attending the matter by the Appellant and the Respondent, a preliminary question arises whether the



present divorce petition is barred or not. This question requires first consideration. It would be relevant to refer to Rule 3 of Order IX of the Civil Procedure Code, as per which, where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed. As per Rule 4 of Order IX of the Civil Procedure Code where a suit is dismissed under Rule 2 or Rule 3, the Plaintiff has liberty to bring a fresh suit or he may apply for restoration of suit subject to the law of limitation. Rule 3 and 4 of Order IX of the Civil Procedure Code read as follows:-

“3. Where neither party appears, suit to be dismissed.- *Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.*

4. Plaintiff may bring fresh suit or Court may restore suit to file.- *Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in rule 2 or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.”*

15. As such, we find that in case a suit is dismissed for non-attendance of both the parties, the plaintiff



has both options – either to file an application under Rule 4, Order IX of the Civil Procedure Code to get the suit restored by getting the dismissal order set aside or to file a fresh suit.

16. In the case at hand, the Appellant/Plaintiff has preferred to file a fresh suit. Hence, the suit is not barred. It is maintainable.

17. Now let us consider the points which have been already formulated for consideration by this Court.

18. However, before we proceed to discuss the points arising for consideration, it is imperative to see case laws or authoritative Judicial Pronouncements regarding Burden of Proof and Standard of Proof in matrimonial cases.

19. Hon'ble Supreme Court has elaborately discussed the nature of **burden of proof** in matrimonial cases in **Dr. Narayan Ganesh Dastane Vs. Sucheta Narayan Dastane** as reported in **1975 (2) SCC 326** and law laid down herein is still holding the field. In para 23 of the case, **the Hon'ble Apex Court** has observed that, doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it. This principle accords with commonsense as it is so much easier to prove a



positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty.

20. Coming to the **Standard of Proof**, we find that some misconception had arisen on account of the use of the words “Matrimonial Offences” to describe the misconducts of Defendants under the Hindu Marriage Act. That is why before authoritative decision of **Hon'ble Full Bench of the Supreme Court in Dr. Narayan Ganesh Dastane Vs. Sucheta Narayan Dastane** as reported in **1975 (2) SCC 326**, there were conflicting views. As per one view, matrimonial cases are of civil nature and hence standard of proof in such cases would be preponderance of probabilities whereas, as per the another view, proof beyond reasonable doubt should be standard of proof in matrimonial cases in view of the use of word “matrimonial offences” in Hindu Marriage Act. However, in **Dr. Narayan Ganesh Dastane case (supra)**, **Hon'ble Full Bench of the Supreme Court** clearly held that matrimonial cases are civil in nature and preponderance of probabilities will be standard of proof in trial of Matrimonial cases under the Hindu Marriage Act, and not proof beyond reasonable doubt which is applicable in criminal trials. **Hon'ble Supreme Court**, in para 24 of



Dr. Narayan Ganesh Dastane case (supra) observed that the normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Section 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of



probabilities lies. But whether the issue is one of cruelty or of a loan on a pronote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged.

21. Ruling out application of “proof beyond reasonable doubt” in matrimonial cases, **Hon’ble Supreme Court**, in para 25 of **Dr. Narayan Ganesh Dastane case** (supra) has observed that the proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities. If the probabilities are so nicely balanced that a reasonable, not a vacillating, mind cannot find where the preponderance lies, a doubt arises regarding the existence of the fact to be proved and the benefit of such reasonable doubt goes to the accused. It is wrong to import such considerations in trials of a purely civil nature. In para 26 of **Dr. Narayan Ganesh Dastane case** (supra), **Hon’ble Apex Court** has further observed that under the Hindu Marriage Act, nowhere it is required that the



petitioner must prove his case beyond reasonable doubt. Section 23 confers on the court the power to pass a decree if it is “satisfied” on matters mentioned in clauses (a) to (e) of its sub-section of (1). Considering that proceedings under the Act are essentially of a civil nature, the word “satisfied” must mean “satisfied on a preponderance of probabilities” and not “satisfied beyond a reasonable doubt”. Section 23 does not alter the standard of proof in civil cases.

22. Hon’ble Supreme Court, in para 27 of **Dr. Narayan Ganesh Dastane case** (supra) has further observed that the misconception regarding the standard of proof in matrimonial cases arises perhaps from a loose description of the respondent's conduct in such cases as constituting a “matrimonial offence”. Acts of a spouse which are calculated to impair the integrity of a marital union have a social significance. To marry or not to marry and if so whom, may well be a private affair but the freedom to break a matrimonial tie is not. The society has a stake in the institution of marriage and therefore the erring spouse is treated not as a mere defaulter but as an offender. But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before it is



accepted as a ground for the dissolution of a marriage, has no bearing on the standard of proof in matrimonial cases.

23. Hon'ble Apex Court in para 10 of **Shobha Rani Vs. Madhukar Reddi** as reported in **AIR 1988 SC 121** has also observed that considering that proceedings under the Hindu Marriage Act is essentially of a civil nature, the word 'satisfied' must mean 'satisfied on a preponderance of probabilities' and not 'satisfied beyond a reasonable doubt'. Section 23 of the Act does not alter the standard of proof in civil cases.

24. Hon'ble Supreme Court in para 10 of **A. Jayachandra Vs. Aneel Kaur** as reported in **2005(2) SCC 22** has observed that 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.

25. Hon'ble Kerala High Court, after referring to A. Jayachandra case (supra), in para 19 of Mohandas Panicker Vs. Dakshayani as reported in 2013 SCC Online Ker 24493 has observed that the principles laid down in the above decisions reiterate that in civil cases, preponderance of probabilities is the standard to be adopted to prove the case. No doubt, matrimonial cases are civil proceedings and the Court can act upon preponderance of probabilities, especially in adultery cases, since it is difficult to get direct evidence.

26. Now let us consider the points one by one.

Point No.1

27. Before considering whether the Respondent/Wife has treated the Appellant-Plaintiff-husband with cruelty, it would be imperative to see what is the statutory provisions and case laws on the subject.



28. Cruelty has been provided as one of the grounds for divorce under Section 13(1)(i-a) of Hindu Marriage Act. As per the provisions, the marriage can be dissolved by decree of divorce on a petition presented by either of the parties, if the other party has treated the petitioner with cruelty.

29. However, the word 'cruelty' used in Section 13(1)(i-a) of Hindu Marriage Act has not been defined under the Hindu Marriage Act. But the word has been interpreted by **Hon'ble Supreme Court** on several occasions.

30. The **Hon'ble Supreme Court**, in para 4 of **Sobha Rani Vs. Madhukar Reddi** as reported in **AIR 1988 SC 121**, has observed that the word 'cruelty' has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel



treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, 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.

31. The Hon'ble Apex Court in para 5 of **Shobha Rani case** (supra) has further observed that it will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or



their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. The Judges and lawyers, therefore, should not import their own notions of life. They may not go in parallel with them. There may be a generation gap between them and the parties. It would be better if they keep aside their customs and manners. It would be also better if they less depend upon precedents. Each case may be different. They deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful realm of cruelty.

32. The **Hon'ble Supreme Court**, in para 17 of the **Shobha Rani case** (supra) has also observed that the context and the set up in which the word 'cruelty' has been used in the section, it appears that intention is not a necessary element in cruelty. That word has to be understood in the ordinary sense of the term in matrimonial affairs. If the intention to harm, harass or hurt could be inferred by the nature of the conduct or brutal act complained of, cruelty could be easily established. But the absence of intention should not make any difference in the case,



if by ordinary sense in human affairs, that act complained of could otherwise be regarded as cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment.

33. The Hon'ble Apex Court in Gananath Pattnaik Vs. State of Orissa as reported in **2002(2) SCC 619** has observed that the concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs. "Cruelty" for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case.

34. The Hon'ble Supreme Court in para 10 of **A. Jayachandra Vs. Aneel Kaur** as reported in **2005(2) SCC 22** has observed that 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, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of his 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.

35. The Supreme Court in para 12 of **A. Jayachandra case** (supra) has further observed that to constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background, has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the



type as to satisfy the conscience of the court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

36. The Supreme Court in para 13 of **A. Jayachandra case** (supra) has further observed that the court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the court to weigh the gravity. It has to be seen



whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent.

37. In Harbhajan Singh Monga Vs. Amarjeet Kaur as reported in **1985 SCC OnLine MP 83, Hon'ble Madhya Pradesh High Court** has held that even threat to commit suicide to falsely implicate the other spouse and his/her family members in criminal case also amounts to cruelty.

38. In Smt. Uma Wanti v. Arjan Dev as reported in **1995 SCC OnLine P & H 56, Hon'ble Punjab and Haryana High Court** has held that even peculiar behaviour of spouse on account of unsoundness of mind or otherwise also amounts to cruelty. **Hon'ble Court** had held that day to day behaviour of the appellant was such as to disturb the mental peace and harmony of the respondent which definitely amounted to legal



cruelty. She may not be of the unsound mind, but her peculiar ways of behaviour proved by the respondent are sufficient to constitute that legal cruelty. The husband could not live with peace in the company of the appellant. Peace was always disturbed due to her peculiar ways of behaviour, and thus he cannot be disbelieved that her behaviour was cruel to him.

39. In Mrs. Rita Nijhawan Vs. Mr. Bal Krishna Nijhawan as reported in **ILR (1973) I Delhi 944** , **Hon'ble Delhi High Court** has held that denial of sexual intercourse either on account of impotence or otherwise amounts to cruelty to the aggrieved spouse. **Hon'ble Court** also observed that sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favourable influence on a woman's mind and body. The result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifies woman's brain, develops her character and trebles her vitality. It must be recognised that nothing is more fatal to marriage than disappointments in sexual intercourse.



40. Hon'ble Court in Mrs. Rita Nijhawan case

(supra) further observed that the law is well settled that if either of the party to a marriage being of healthy physical capacity refuse to have sexual intercourse, the same would amount to cruelty entitling the other party to a decree. In our opinion it would not make any difference in law whether denial of sexual intercourse is the result of sexual weakness of the respondent disabling him from having a sexual union with the appellant, or it is because of any wilful refusal by the respondent; this is because in either case the result is the same namely frustration and misery to the appellant due to denial of normal sexual life and hence cruelty.

41. The Hon'ble Supreme Court, in para 99 of the **Samar Ghosh Vs. Jaya Ghosh** as reported in **(2007) 4 SCC 511**, has observed, after referring to and discussing several judgments on the point of cruelty, that human mind is extremely complex and human behaviour is equally complicated. Similarly, human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing,



level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

42. The Hon'ble Supreme Court has further observed in **Samar Ghosh case** (supra) that there cannot be any comprehensive definition of the concept of mental cruelty within which all kinds of cases of mental cruelty can be covered. **The Hon'ble Court** in para 100 has further observed that the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

43. It has been further observed by **Hon'ble Supreme Court** in para 101 of the **Samar Ghosh case** (supra) that no uniform standard can ever be laid down for guidance. However, Hon'ble Court thought it appropriate to enumerate



some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty" with caution that such instances are only illustrative and not exhaustive. The instances enumerated by **Hon'ble Apex Court** are as follows :

“ (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, discomode 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.”

44. The Hon’ble Supreme Court, in para 18 of **Ravi Kumar Vs. Jumla Devi** as reported in **2010 SCCR 265**, observed that in matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty. Therefore, cruelty in matrimonial behaviour defies any definition and its category can never be closed. Whether husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any pre-determined rigid formula. Cruelty in matrimonial cases can be of infinite variety. It may be subtle or even brutal and may be by gestures and words.

45. In para 10 of Ramchander Vs. Ananta as reported in **2015(11)SCC 539**, **Hon’ble Supreme Court** has observed that cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which



causes a reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Cruelty can be physical or mental.

46. It has further been observed by **Hon'ble Apex Court in Ramchander case** (Supra) that instances of cruelty are not to be taken in isolation. It is the cumulative effect of the facts and circumstances emerging from the evidence on record which should be taken into consideration to draw a fair inference whether the plaintiff has been subjected to mental cruelty due to conduct of the other spouse.

47. In **Vinita Saxena v. Pankaj Pandit**, as reported in **(2006) 3 SCC 778 Hon'ble Supreme Court** has observed in para 31 that it is settled by a catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on the 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.

48. Hon'ble Supreme Court has further observed in Para-32 of **Vinita Saxena case** (supra) that the word “cruelty” has not been defined and it has been used in relation to human conduct or human behaviour. 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 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.

49. Hon'ble Supreme Court has further observed in Para-36 of the **Vinita Saxena case** (supra) that the legal concept of cruelty which is not defined by the 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 questions of cruelty is that the whole matrimonial relation must be considered, that rule is of a special value when



the cruelty consists not of violent act but of injurious reproaches, complaints, accusations or taunts. It may be mental such as indifference and frigidity towards the wife, denial of a company to her, hatred and abhorrence for the wife, or 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.

50. Hon'ble Supreme Court has further observed in Para-37 of the **Vinita Saxena case** (supra) what constitutes



the required mental cruelty for the 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 home.

51. Hon'ble Supreme Court has further observed in Para-38 of the **Vinita Saxena case** (supra) that 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.

52. Coming to the case at hand, we find that cruelty was not pleaded as ground for divorce in the previous petition, which is Exhibit-2. We further find that only pleading regarding cruelty in the present divorce petition is that the Defendant / Respondent is negating the company of the Appellant / Plaintiff. The conduct and circumstances created



by her is humiliating and causing mental cruelty to him. It has also been pleaded that due to false criminal case filed by the Defendant / Respondent, the life of the Appellant / Plaintiff has become miserable and he is feeling humiliated in both private and public life. Hence, he is not in a position to live with the Defendant / Respondent-wife. P.W. 2, who has been examined on 30.08.2016 has deposed that Defendant / Respondent is working as Nurse in Government Hospital and she is living separately from the Appellant / Plaintiff for 19 years and the matrimonial life between the parties is completely over. P.W. 2, Sabjo Sachi Ghosh has deposed that he does not know why the Defendant / Respondent has been living separately from the Appellant / Plaintiff. The Appellant / Plaintiff, who has been examined as P.W. 3, has not given any specific instance of cruelty either in the pleading or in evidence. However, he has deposed that the Complaint Case filed by the Defendant- Respondent-wife under Section 498A of the Indian Penal Code has been dismissed. However, he has not filed any document in support of such claim and it is not clear how the complaint case had been dismissed. It is also pertinent to note as per the Exhibit-2, which is the Plaint of the previous divorce case filed by the Appellant – Plaintiff, he had



not made any allegation of cruelty against the Defendant / Respondent and it also appears from the address given in the Plea that even at the time of filing the earlier divorce petition, she was living separately. It explains why Appellant / Plaintiff has failed to give any instance of cruelty except making omnibus and bald allegation of cruelty. Withdrawal from the society of a husband not necessarily means cruelty if the spouse withdrawing from the society of the other spouse has valid reason to live separately. Filing false criminal case may amount to cruelty but from the pleading and evidence on record there is no conclusive proof that the criminal case filed by the Defendant-wife has been dismissed and if it has been dismissed, how and for what reason it has been dismissed. In such situation, it is very difficult to form an opinion that the criminal case filed by the Defendant-wife was false.

53. As such, in view of the totality of the pleading and evidence on record, we find that the Appellant/Husband has not proved any alleged misconduct of the Respondent/Wife which could be considered as something more serious than ordinary “wear and tear of married life” or “grave and weighty” which could have caused any danger to his life, limb or health, bodily or mental, giving rise to a



reasonable apprehension to him of such a danger which could make it unsafe for him to continue the matrimonial life with the Respondent/Wife. As such, we find that no legal cruelty has been committed by the Respondent/Wife to him entitling the Appellant-Husband to the decree of divorce.

54. Hence, this point is decided in favour of the Respondent/Wife and against the Appellant/Husband.

Point No.2

55. Now, let us consider point no.2, which relates to desertion. However, before we consider it, it would again be imperative to see what is the statutory provisions and case laws on the subject.

56. Desertion has been provided as a ground for divorce under Section 13(1)(ib) of Hindu Marriage Act. As per the provisions, marriage may be dissolved by decree of divorce on a petition presented by either the husband or the wife if the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. As per the Explanation, the expression “desertion” means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish



of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

57. In Bipinchandra Jaisinghbai Shah v. Prabhavati as reported in **AIR 1957 SC 176**, **Hon'ble Supreme Court** has observed that the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. 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. In the same paragraph **Hon'ble Supreme Court** has further



observed that Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* co-exist. But it is not necessary that they should commence at the same time. The *de facto* separation may have commenced without the necessary animus or it may be that the separation and the *animus deserendi* coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close.

58. Following Bipinchandra Jaisinghbai Shah case (supra), Hon'ble Supreme Court in Lachman Utamchand Kirpalani Vs. Meena as reported in AIR 1964 SC 40 held that in its essence desertion means the intentional



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

59. Hon'ble Apex Court in para 8 of **Savitri Pandey Vs. Prem Chandra Pandey** as reported in **2002(2) SCC 73**, has observed that "desertion", for the purpose of seeking divorce under the Act, means intentional permanent forsaking and abandonment of one spouse by the other without 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.

60. Hon'ble Supreme Court, in para 7 of **Debananda Tamuli Vs. Kakumoni Katakya** as reported in **(2022) 5 SCC 459** has observed that the law consistently laid down by this Court is that desertion means the intentional abandonment of one spouse by the other without the consent of the other and without a reasonable cause. The deserted spouse must prove that there is a factum of separation and there is an intention on the part of deserting spouse to bring the cohabitation to a permanent end. In other words, there



should be *animus deserendi* on the part of the deserting spouse. There must be an absence of consent on the part of the deserted spouse and the conduct of the deserted spouse should not give a reasonable cause to the deserting spouse to leave the matrimonial home. The view taken by this Court has been incorporated in the Explanation added to sub-section (1) of Section 13 by Act 68 of 1976.

61. Coming to the case at hand, we find that in the Plaint, there is no pleading on which date the Respondent has withdrawn from the society of the Appellant / Plaintiff and there is no pleading in the Plaint that for how many years she has deserted the Appellant / Plaintiff at the time of presentation of the Plaint for divorce. Moreover, this ground of desertion was not pleaded even in the previous divorce petition bearing Matrimonial Case No. 30 of 2000. In the evidence of the witnesses examined on behalf of the Appellant / Plaintiff, we find that as per P.W. 1, Pardeshi Kamti, Defendant / Respondent has been living separately for 19 years. But, she has not deposed anything about the reason behind separate living. P.W. 1 has deposed that she does not know why the Defendant / Respondent has been living separately and even Appellant / Plaintiff who has been examined as P.W. 3 was



silent on this issue. He has neither pleaded nor deposed since which date, the Defendant-wife has been living separately and for what reason. He has also not deposed about the reason for separate living.

62. As such, the Appellant/husband has failed to prove that the Respondent/wife has abandoned him without his consent and without reasonable cause with intent to bring cohabitation permanently to an end for more than two years at the time of presentation of the present petition.

63. Hence, this point is also decided against the Appellant/husband and in favour of the Respondent/wife.

Point No.3

64. Let us come to the point no. 3 which relates to ground of adultery. We find that there is not even a whisper in the pleading regarding adulterous life of the Defendant / Respondent, nor alleged adulterer has been impleaded as Defendant before the Family Court. Moreover, this is settled principle of law that any evidence deposed beyond the pleadings cannot be considered for grant of relief.

65. In the light of various judicial pronouncements, it is settled principle of law that the evidence adduced beyond the pleadings is liable to be rejected and



cannot be considered for grant of relief as prayed for by the petitioner.

66. Hon'ble Supreme Court in para 12 of **National Textile Corporation Ltd. Vs. Nareshkumar Badrikumar Jagad & Ors.** as reported in **(2011) 12 SCC 695** after referring to **Trojan & Co. Vs. Nagappa Chettiar** as reported in **AIR 1953 SC 235, State of Maharashtra Vs. Hindustan Construction Co. Ltd.** as reported in **(2010) 4 SCC 518** and **Kalyan Singh Chouhan Vs. C.P. Joshi** as reported in **(2011) 11 SCC 786**, observed that pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It has been further observed that as a settled legal proposition, relief not founded on the pleadings should not be granted. A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ.



67. In Prakash Rattan Lal Vs. Mankey Ram as reported in **ILR (2010)III Delhi 315**, **Hon'ble Delhi High Court** has referred to **Ram Sarup Gupta by LRs Vs. Bishun Narain Inter College** as reported in **(1987) 2 SCC 555** and **Harihar Prasad Singh Vs. Balmiki Prasad Singh**, as reported in **(1975) 1 SCC 212** and observed in para 4 of the judgment that the sole purpose of pleadings is to bind the parties to a stand. When the plaintiff makes certain allegations, the defendant is supposed to disclose his defence to each and every allegation specifically and state true facts to the court and once the facts are stated by both the parties, the court has to frame issues and ask the parties to lead evidence. It is settled law that the parties can lead evidence limited to their pleadings and parties while leading evidence cannot travel beyond pleadings. If the parties are allowed to lead evidence beyond pleadings then the sacrosanctity of pleadings comes to an end and the entire purpose of filing pleadings also stand defeated. The other purpose behind this is that no party can be taken by surprise and new facts cannot be brought through evidence which have not been stated by the defendant in the written statement. The law provides a procedure for amendment of the pleadings and if there are any new facts



which the party wanted to bring on record, the party can amend pleadings, but without amendment of pleadings, a party cannot be allowed to lead evidence beyond pleadings.

68. Hon'ble Supreme Court in para 12 of **Bachhaj Nahar Vs. Nilima Mandal & Anr.** as reported in **(2008) 17 SCC 491** has also observed that the object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. It has been further observed that the Hon'ble Apex Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take. Hon'ble Supreme Court further held in para 10 of the judgment as under:-

“10. The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of



litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are:

(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject-matter of an issue, cannot be decided by the court.

(ii) A court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

(iii) A factual issue cannot be raised or considered for the first time in a second appeal.”

69. Hon’ble Supreme Court in para 6 of **Ram Sarup Gupta case** (supra) has observed that it is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it.

70. Hence, the evidence adduced beyond pleadings, as stated above, is liable to be rejected and cannot be considered as a proof of the alleged grounds of divorce.



71. As such, we find that there is no merit in the present appeal warranting any interference in the impugned judgment. The Family Court has rightly dismissed the matrimonial case of the appellant seeking divorce. The present appeal is dismissed, accordingly, upholding the impugned judgment. Both the parties shall bear their own costs. Let the decree be drawn accordingly.

72. Registrar General is directed to circulate a copy of the judgment amongst all the presiding officers of the Family Courts and send a copy to Director of Bihar Judicial Academy.

(Jitendra Kumar, J)

(P. B. Bajanthri, J)

Chandan/Amrendra

AFR/NAFR	AFR
CAV DATE	08.08.2023
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