Manidipa Bhowmik Vs Mihir Datta

Court: Gauhati High Court (Agartala Bench)

Date of Decision: March 23, 2012

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 18 Rule 18, Order 18 Rule 3, Order 18 Rule 3A, Order 41 Rule 33
Criminal Procedure Code, 1973 (CrPC) â€" Section 125, 125(1)
Evidence Act, 1872 â€" Section 67, 68
Family Courts Act, 1984 â€" Section 10, 10(1)
Hindu Marriage Act, 1955 â€" Section 13, 13(1)(ia), 13(1)(ib), 13A
Penal Code, 1860 (IPC) â€" Section 498A

Citation: (2013) 1 DMC 66 : (2012) 3 GLT 201

Hon'ble Judges: Subhasis Talapatra, J; B.D. Agarwal, J

Bench: Division Bench

Advocate: A.K. Bhowmik and Mr. R. Datta, for the Appellant; S. Deb and Mr. S. Datta, for the Respondent

Final Decision: Dismissed

Judgement

S. Talapatra, J.
This appeal by the wife is filed against the judgment and order dated 27.07.2007 passed by the learned Judge, Family

Court, Udaipur, South Tripura, in the Title Suit (Divorce) 07/2005. The marriage between the parties took place on 06.08.2000 as culmination of

a love affair which developed during their study at Agartala. The husband, the respondent herein the serving as an Assistant Teacher in a school

located at Amarpur at the time of marriage which was solemnised as per Hindu Rites and Customs at Udaipur in the residence of the wife, the

appellant herein. The parties started living together as husband and wife in a joint family of the respondent consisting his widow mother and

unmarried younger sister. After some days from the marriage it was noticed that the appellant was reluctant to reside in the ancestral house of the

respondent at Amarpur and without any information she used to leave the matrimonial home at this or that pretext. The appellant could not tolerate

the mother and younger unmarried sister of the respondent and for a reprieve therefrom the respondent had to send his unmarried younger sister to

the house of his brother-in-law at Agartala. Even thereafter, the appellant could not adjust with the old widow mother of the respondent and she

used to pick up quarrel with the mother of the respondent without any reasonable cause and on several occasions the appellant left the house of the

respondent without any intimation and continued to stay in her parental house at Udaipur for a long spell. On most of the occasions, the respondent

along with his elder brother-in-law, namely Sri Kajal Majumder had to assuage the appellant by prolonged persuasion for coming back to the

house of the respondent. It has been further alleged in the petition filed u/s 13(1) (ia) and (ib) of the Hindu Marriage Act, 1955, hereinafter referred

as the "petition" in short, that on 05.08.2002 when the respondent was on duty in his school, the appellant deserted the respondent without any

intimation either to him or to his mother. On coming back from the school when the respondent came to know that the appellant had left the house,

he immediately rushed to the parental house of the appellant and requested her to return but the appellant flatly denied. The respondent also took

help of the uncles of the appellant, namely Sri Sukhen Bhowmik and Sri Sailen Bhowmik to impress the appellant for returning to the matrimonial

home but, all such endeavours as taken by the said uncles as well were frustrated by the appellant and from 05.08.2002 till filing of the petition, the

appellant did never enquire about the respondent or his old widow mother. She was showing vehemence whenever any proposal for conciliation

was made and thereby she frustrated all such initiatives. On 10.01.2003 the appellant delivered a male child but she did not make any contact with

the respondent. Thus the respondent was deprived of even seeing his newly born child. Whenever the respondent tried to contact the appellant

over phone, the appellant was not allowed to attend the phone calls or she was not attending the calls. It is alleged in the petition that even the

father and younger brother of the appellant insulted him on many occasions. Ultimately, the appellant instituted one proceeding u/s 125 of the Code

of Criminal Procedure for maintenance, for herself and for the newly born son.

2. The prayer of the appellant was rejected with a finding that since the appellant deserted the respondent without any reasonable cause, she had

been disentitled from the maintenance, however, the learned Chief Judicial Magistrate, South Tripura, Udaipur, by the order dated 30.03.2005

made provisions for maintenance of Rs. 1,000/- per month for the newly born son. When the said proceeding u/s 125 of Cr.P.C. was pending, the

petitioner was appointed as a Lecturer in the District Institute of Education and Training (DIET), Kunjaban on and from 30.06.2004 and since then

the respondent was living at Agartala alone in a rented house. During her examination in the said maintenance proceeding, the appellant deposed

that she was no longer interested to live with the respondent even if the mother and unmarried younger sister of the respondent were not allowed to

live with them in a rented house. The appellant had been living in her father"s house at Udaipur, avoiding and depriving the respondent of the

conjugal life. Ultimately, the petition on the ground of cruelty and desertion was instituted by the respondent.

3. Having received the notice from the Court of the learned Judge, Family Court at Udaipur in the said suit for dissolution of marriage being Title

Suit (Divorce) 07/2005, the respondent, the appellant herein, appeared and filed the written statement by denying all the allegations as levelled

against her and stated that she was induced by the respondent and got their marriage registered in the office of the Registrar, Hindu Marriage Act,

Agartala, though there was no marriage as per Hindu rites and customs. The appellant further alleged that the said marriage was kept secret but,

after long time when the respondent came back on completion of his studies, he refused to marry the appellant. At the instance of the elder sister of

the appellant, namely Smti Sudipa Bhowmik, the respondent agreed to marry the appellant on condition that a dowry of Rs. 5 lacs be paid. She

further alleged in the written statement that on 22.05.1999, the respondent by a letter revealed that he would be ready for dissolution of marriage if

a sum of Rs. 7 lacs were paid to him. She alleged in the written statement further that at the instigation of the old mother, sister and brother-in-law,

the respondent started torturing the appellant both physically and mentally. The appellant however, did not initially inform about such torture to his

father but when she found the torture unbearable, she had to inform her father on 16.02.2001. The father of the appellant under such

circumstances shifted her to Udaipur with consent of the respondent but when the respondent came to Udaipur on 29.02.2001 for taking back the

appellant, the father of the appellant raised the matter of torture. At the point of time, the respondent misbehaved with her father and left the house

posing a threat of adverse consequence. The appellant also contended that one meeting was convened in the house of one Ashotush Sarkar, who

happened to be a close acquaintance of the appellant''s family on 03.06.2001. In that meeting, the respondent apologised to the father of the

appellant. The appellant further stated in her written statement that she was again subjected to torture on 12.09.2001 when the respondent''s

mother and sister attempted to kill her by lassoing a saree around her neck. It was also alleged that the respondent and his relatives tried to cause

abortion of her foetus. In such situation she was compelled to leave the house of the respondent on 05.08.2002 and since then she has been living

in her father''s house at Udaipur. The appellant further stated that she gave birth of a male child on 10.01.2003 at Agartala but alleged that even

after sending information, the respondent did not turn up. However, she admitted that none the less she approached this Court against the order of

the Chief Judicial Magistrate denying her maintenance, the same was not interfered with and the order of the learned, South Tripura, Udaipur was

maintained with modification that the male child shall get Rs. 1,500/- per month.

4. The respondent, as the petitioner in the said matrimonial proceeding, examined three witnesses and the appellant examined six witnesses but she,

for undisclosed reason, did not examine herself.

5. Before the evidence was laid, the learned Judge, Family Court framed four issues, which are as follows:

(i) Whether the respondent is the legally married wife of the petitioner ?

(ii) Whether the respondent Smt. Manidipa Bhowmik was subjected to torture both mentally and physically by the petitioner Sri Mihir Datta and

his relatives and was compelled to leave the house of the petitioner? Or whether the respondent Smt. Manidipa Bhowmik has willingly deserted the

petitioner without any reasonable grounds and living separately in the house of her father avoiding to discharge her marital obligation to the

petitioner ?

(iii) Whether the petitioner is entitled to get a decree of divorce as prayed for ? And

(iv) Whether the respondent is entitled to any other relief/reliefs ? If so to what extent ?

6. On appreciation of the evidence so led by the parties, learned Judge, Family Court, decided the Issue Nos. I, II and III in favour of the

respondent herein and Issue No. IV was also consequently decided against the appellant herein.

7. While deciding Issue No. II, the learned Judge, Family Court quite categorically returned the finding that:

When both the petitioner and the respondent was finally heard regarding the divorce or possibility of reunion, it is submitted by the respondent

Smt. Manidipa Bhowmik that she is in no way interested to live together with the petitioner and having considered the position of the case, I am of

the view that the marital bondage between the petitioner and the respondent has totally broken down, though I found no evidence of torture both

mental and physical from the side of the petitioner for which the respondent was compelled to leave the house of her sweet matrimonial home. It is

rather the respondent who has withdrawn herself from the society of the petitioner and accordingly the Issue No. II is decided against the

respondent but in favour of the petitioner."" The learned Judge, Family Court, South Tripura, Udaipur also enhanced the maintenance for the minor

son, namely Master Mriganka Datta to Rs. 2,000/- per month instead of Rs. 1,500/- and provided the maintenance for the appellant @ Rs.

1000/- per month, as a result the total maintenance stood at Rs. 3,000/- per month.

8. Mr. A.K. Bhowmik, learned senior counsel appearing for the appellant enunciated at the outset the fundamental grounds in the appeal for which

the impugned judgment and order has been urged to be interfered by this Court. These are as follows:

(i) There is no evidence available on record to return the finding of cruelty and desertion;

(ii) The ground that the marriage has been irretrievably broken down cannot be availed u/s 13 of the Hindu Marriage Age for passing a decree of

divorce dissolving the marriage.

(iii) Without cross-examination, the deposition as recorded by the learned Judge, Family Court, cannot be admitted in the evidence and cannot be

read/appreciated for returning any finding;

(iv) By recording the deposition of the witnesses as adduced by the appellant as the respondent in the proceeding first and thereafter recording the

deposition of witnesses as adduced by the respondent herein, the learned Court below has violated the basic procedural safeguards of the Family

Court proceeding has to be conducted as per the provisions of the CPC in view of Section 10 of the Family Courts Act, 1984; and finally,

(v) the statement as recorded by the learned Judge, Family Court to the effect that the appellant herein that she was no longer interested to live

with the respondent has been perversely recorded in as much as no such statement had ever been made by the appellant herein.

Mr. Bhowmik, learned senior counsel for the appellant, referring to the depositions of witnesses as adduced by the appellant, submitted that there

is no material which can be stated to constitute cruelty or desertion.

9. For appreciating the challenge, a close scrutiny of the evidence as recorded by the Family Court is required to be made.

P.W.1, namely Sri Uttam Ghosh stated before the Court that he advised the respondent herein

to go to the house of the respondent and at that time getting the telephone from the respondent I also visited the house of the father of the

respondent and at that time I tried to mitigate the dispute and the respondent told me that she was compelled to come and at that time no allegation

was made against the petitioner. I cannot say about the exact cause of dispute but I still hope that their relationship be restored.

P.W.1 also stated that one day the appellant coming to his shop, admitted that she slapped the elder sister of the respondent.

10. P.W.2, namely Sri Khokan Majumder stated before the Court :

Thereafter some dispute between the husband and wife started on the issue of frequent leaving of the respondent from the house of the petitioner

and one day I personally visited the house of the respondent at Udaipur and talked to the respondent, her elder sister and parents and shifted the

respondent to the house of the petitioner at Amarpur but thereafter also she left the house of the petitioner without the permission or consent of the

petitioner. After some days the respondent filed a case for maintenance and at that time I wanted to talk to the respondent but was refused by the

mother and father of the respondent and thereafter contacted to the elder sister of the respondent over telephone but no positive response for

amicable settlement so far my knowledge goes. I found no such fault on the part of the family members of the petitioner which might have

compelled the respondent to leave the house.

11. The respondent herein, as P.W.3 deposed before the Court that after their marriage they started living together at Amarpur. At that time, he

found that :

She was very arrogant and uncontrollable and used to leave our house as her own whims. I repeatedly tried to convince her to live properly but

she did not pay heed to me and for the last 5 years we have been living separately. Before filing this case, I tried to settle the dispute from my own

and through our relatives and Finally by sending 2 Advocates and when she refused to come back to my house, I was compelled to file the present

petition for getting a decree of divorce. There is least possibility of reunion since she still tries to continue to live in the house of her father and

mother and tries to make me Ghar Jamai. But I cannot leave my parents and relatives who are dependent on me.

12. At this backdrop, this Court would reread the statements as made by the witnesses adduced by the appellant.

One Satyajit Choudury, deposed before this Court as DW1 and stated that:

after about one year dispute has arisen due to alleged torture made upon the respondent by the petitioner and in the month of May, 2001 one

meeting was convened in the house of one Ashutosh located at Fulkumari and in that meeting I was present. On the basis of an assurance given by

the petitioner Mihir Dutta, the dispute was amicably settled and the respondent Manidipa Bhowmik went back to the petitioner, but after some

days it was again reported that the torture did not stop and the respondent was compelled to come back to her father''s house located at the bank

of Jagannath Dighi, Udaipur.

13. DW2, namely Sri Krishnananda Bhowmik, the father of the appellant, stated before the Court that:

after the marriage my daughter started living with him at Amarpur in a joint mess along with his mother and elder sisters. But my daughter was

subjected to cruelty both mentally and physically by the mother and two sisters of the petitioner Mihir Dutta and this torture might have been

committed by the mother and sisters of the petitioner since they did not accept the marriage mentally and at the instigation of them, the petitioner

himself also tortured my daughter. One day I got telephonic information given by one Samir Bhowmik of Amarpur that my daughter was brutally

tortured by all of them including the petitioner and my daughter was driven out nakedly and she was rescued by the neighbhourers and that

information I got from one Samir Bhowmik. Inspite of this I want that my daughter should go back to the house of her husband and to start a new

conjugal life with her husband.

14. The appellant''s sister, namely Smti Sudipa Bhowmik (Nath) examined by the appellant as D.W.3, who stated that:

after the marriage my sister was subjected to torture both mentally and physically and she was compelled to come back home with four months''

carrying but after her return, the petitioner did not care to visit our house or did not take any initiative to take back her. We are agreeable to send

back our sister in the event of change of the petitioner in his thinking and conduct.

15. Another witness, namely Smti Mira Sana was examined by the appellant as DW4, who stated that :

After about one year from the date of marriage the dispute between the husband and wife had arisen and due to torture the respondent Manidipa

Bhowmik came back home and one day myself along with the mother of the respondent shifted the respondent to Amarpur and we halted there in

the house of the petitioner at that time. But the petitioner Mihir Dutta uttered many words and slang languages and also he demanded one lakh

from the mother of the respondent for the purpose of purchasing one bike. In that night the respondent Manidipa Bhowmik was reportedly

tortured by him and in the morning of the following day we came back leaving behind the respondent therewith her husband.

16. One Sailen Ch. Bhowmik was examined as DW5, who stated in the Court that:

After some days I was reported that the respondent Manidipa Bhowmik was tortured by the mother and sisters of the petitioner and also by the

petitioner and on the matter of dispute on the basis of my initiation one meeting was convened in the house of our relative namely Ashubabu at

Fulkumari and as per assurance given by the petitioner, the matter was amicably settled but the respondent was again subjected to torture by the

petitioner even after assurance given by him. On the basis of information of today''s hearing, I again talked to the petitioner over phone for

amicable settlement and in spite of time given for sitting on Sunday, the petitioner did not turn up and so I appeared before this Court to depose my

deposition.

17. Sri Samir Bhowmik, as referred by DW2, deposed in the Court as DW6. He stated that :

There is allegation and counter allegation between the parties and one day I was told by the petitioner Sri Mihir Dutta that his wife suddenly left the

house and with the intervention of my initiative and other people, the dispute was settled and the respondent Smt. Manidipa Bhowmik returned

home again and there was also counter allegation by Smti Manidipa Bhowmik against the husband but I cannot say exactly the actual cause of such

dispute. One day there was heavy quarrel between the respondent and the mother of the petitioner and other family members and at that time the

petitioner was not present, but I was called by the respondent Smt. Manidipa Bhowmik and visited to that house I rescued the respondent Smt.

Manidipa Bhowmik and shifted to my house and thereafter I sent information to the father of the respondent and she was shifted to Udaipur with

hope that after some days she would come back to the house of the husband. At that time I was not told by respondent Smt. Manidipa Bhowmik

by whom she was tortured or for which the quarrel has started. I will be happy if the couple restarts living together.

18. It is apparent from a conjoint reading of those depositions that both the parties had been entangled in attrition whenever they lived together and

it has been corroborated that there had been initiative by the respondent herein initially for restitution of the marriage but the appellant herein did

not cooperate and she had woven some stories which lost here and there for lack of corroboration. DW2, who is the father of the appellant, did

not state anything of unlawful demand from the respondent herein, what he stated that one Samir Bhowmik informed him that his daughter, the

appellant herein was driven out from the house nakedly and she was rescued by the neighbourers and he got that information from that Samir

Bhowmik. Said Samir Bhowmik came before the Court but did not support that episode. He only stated that there was a quarrel between the

mother and sister of the respondent herein and the appellant. Even the episode of demanding Rs. 5 lacs at the time of marriage and Rs. 7 lacs for

the purpose of giving divorce by the respondent herein has not been supported by the DW3 though in the written statement it has been

categorically asserted that such demand was placed to her.

DW1, Sri Satyajit Chowdhury and DW5, Sri Sailen Ch. Bhowmik did not disclose their source of knowledge that the appellant was tortured.

They have not stated in their depositions that in the meeting the appellant was present and she made the allegation of torture. It is quite common,

when a family dialogue is arranged for settlement of dispute whatsoever, either of the parties becomes accommodative and makes assurance to

avoid recurrence of such incidents in future. That can not be interpreted as admission of "torture". The deposition of DW4 hardly posits any

credibility inasmuch as it cannot be accepted that when the appellant was tortured in their presence in the matrimonial home, the mother of the

appellant along with DW4 had returned without taking any flutter.

19. Mr. A.K. Bhowmik, learned senior counsel for the appellant, however, is correct to some extent as there is no evidence of physical cruelty

against the respondent available in the deposition of PWs 1, 2 and 3 but the presence of mental cruelty cannot be overlooked by this Court.

20. It is admitted position that since 05.08.2002 the parties are living separately and all initiatives for reconciliation have been proved to be futile.

Even the appellant herein stated before the Court of the learned Chief Judicial Magistrate, South Tripura, Udaipur that she does not want to live

with the respondent herein. On the face of such submission, the learned Chief Judicial Magistrate, South Tripura, Udaipur, taking recourse to sub-

section (4) of Section 125 of the Code of Criminal Procedure, 1973 had denied her the maintenance u/s 125 (1) of Cr.P.C. on the ground that the

appellant had deserted the matrimonial home without reasonable cause. Even though the said finding was challenged before this Court but this

Court did not interfere with the said finding and in the course of time that reached its finality.

21. Mr. S. Deb, learned senior counsel appearing for the respondent, joining the issues, submitted that irretrievable break down of the marriage

leads to cruelty. Cruelty even though not defined in Hindu Marriage Act, but serious exercise had been undertaken to provide a workable

definition of the word ''cruelty''. The learned senior counsel, referring to Dr. N.G. Dastane Vs. Mrs. S. Dastane, , would contend that the Apex

Court has formulated the principles as follows :

(a) What we must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles in English law, but

whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be

harmful or injurious to him to live with the respondent;

(b) In such an atmosphere, truth is a common casualty and therefore we consider it safer not to accept the bare word of the appellant either as to

what the respondent said or did or as to the genesis of some of the more serious incidents. The evidence of the respondent too would be open to

the same criticism but the explanation of her words and deeds, particularly of what she put in cold print, must come from her oral word and that

has to be examined with care.

22. Later on, with reference to the evidence as has been recorded by the learned Judge, Family Court, South Tripura, Udaipur, the learned senior

counsel relied N.G. Dastane (supra) & Anr. decision in Shobha Rani Vs. Madhukar Reddi, as reported in (1998) 1 SCC 105, wherein in para 18

the Apex Court held :

It is requirement of the offence of ''cruelty'' defined u/s 498A of the Indian Penal Code. Section 13(1) (i-a) of the Hindu Marriage Act provides

that the parties gave after solemnization of the marriage treated the petitioner with cruelty. What do these words mean ? What should be the nature

of cruelty ? Should it be only intentional, willful or deliberate? Is it necessary to prove the intention in matrimonial offence? We think not. We have

earlier said that cruelty may be of any kind and any variety. It may be different in different cases. It is in relation to the conduct of parties to a

marriage. This conduct which is complained of as cruelty by one spouse may not be so for the other spouse. There may be instances of cruelty by

the unintentional but inexcusable conduct of any party. The cruel treatment may also result by the cultural conflict of the spouse. In such cases, even

if the act of cruelty is established, the intention to commit suicide cannot be established. The aggrieved party may not get relief. We do not think

that was the intention with which the Parliament enacted Section 13 (1)(i-a) of the Hindu Marriage Act. The context and the set up in which the

word "cruelty" has been used in the section, seems to us, 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 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, the 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 willful ill-treatment. The same is also the line of reasoning adopted by the House of Lords in Gollins v. Gollins (at p. 976)

where Lord Evershed said :

I am unable to accept the premise that "cruelty" in matrimonial proceedings requires or involves of necessity the element of malignity, though I do

not of course doubt that if malignity be in fact established it would be highly relevant to a charge of cruelty. In my opinion, however, the question

whether one party to a marriage has been guilty of cruelty to the other or has treated the other with cruelty does not, according to the ordinary

sense of the language used by Parliament, involve the presence of malignity (or its equivalent) and if this view be right it follows, as I venture to

think, that the presence of intention to injure on the part of the spouse charged or (which is, as I think, the same thing) proof that the conduct of the

party charged was "aimed at" the other spouse is not an essential requisite for cruelty. The question in all such cases is, to my mind, whether the

acts or conduct of the party charged were "cruel" according to the ordinary sense of that word, rather thank whether the party charged was

himself or herself a cruel man or woman.

23. Mr. Deb, learned senior counsel for the respondent further referred to V. Bhagat Vs. Mrs. D. Bhagat, wherein it was held that what is cruelty

in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of

that case. If it is a case of accusation and counter accusation, regard must also be had to the context in which they were made. The Apex Court

further stated in that case: ""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 stigmatized 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.

We, the Judges and Lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. It would be better if we

keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon vs.

Sheldon vs. Sheldon ''the categories of cruelty are not closed''. Each case may be different. We 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 behavior, capacity or incapability to tolerate the conduct complained of. Such is the wonder realm of cruelty

These principles as stated have provided the basis of understanding the meaning of ''cruelty'' as appearing in Section 13 (1)(i-a) of the Hindu

Marriage Act.

24. In Savitri Pandey Vs. Prem Chandra Pandey, , the Apex Court quite substantively considered the meaning and purport of ''desertion'' as is

appearing in Section 13(1) (i-b) of the Hindu Marriage Act, 1955, wherein the Apex Court held:

8. ""Desertion"", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by

the other without that other''s consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage.

Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations

i.e. not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into

consideration the concept of marriage which in law legalizes the sexual relationship between man and woman in the society for the perpetuation of

race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself,

it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to a host of authorities and the

views of various authors, this Court in Bipin Chander Jaisinghbhai Shah Vs. Prabhawati, held that if a spouse abandons the other in a state of

temporary passion, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion. It further held

: (AIR pp. 183-84, para 10)

For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely (1) the factum of

separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the

deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the

matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two

spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas

under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the

suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for

divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case.

Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which

may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed

by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a

separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences

when the fact of separation and the animus deserendi coexist. But it is not necessary that they should commence at the same time. The de facto

separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time;

for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to

a close. The law in England has prescribed a three years" period and the Bombay Act prescribed a period of four years as a continuous period

during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and

decide to come back to the deserted spouse by a bone fide offer of resuming the matrimonial home with all the implications of marital life, before

the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end

and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former. Hence it is necessary that during all the

period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such

conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and

other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist

upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court.

9. Following the decision in Bipin Chander Jaisinghbhai Shah Vs. Prabhawati, this Court again reiterated the legal position in Lachman Utamchand

Kirpalani Vs. Meena alias Mota, by holding that in its essence desertion means the intentional permanent forsaking and abandonment of one

spouse by the other without that other"s consent, and without reasonable cause. For the offence of desertion so far as 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 by capable of leading to the same inference; that is to say the

facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent

to the actual acts of separation.

10. To prove desertion in matrimonial matter it is not always necessary that one of the spouses should have left the company of the other as

desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage.

Desertion may also be constructive which can be inferred from the attending circumstances. It has always to be kept in mind that the question of

desertion is a matter of inference to be drawn from the facts and circumstances of each case.

11. There is another aspect of the matter which disentitles the appellant from seeking the relief of divorce on the ground of desertion in this case.

As desertion in matrimonial cases means the withdrawal of one party from a state of things i.e. the marital status of the party, no party to the

marriage can be permitted to allege desertion unless he or she admits that after the formal ceremonies of the marriage, the parties had recognized

and discharged the common obligation of the married life which essentially requires the cohabitation between the parties for the purpose of

consummating the marriage. Cohabitation by the parties is an essential of a valid marriage as the object of the marriage is to further the

perpetuation of the race by permitting lawful indulgence in passions for procreation of children. In other words, there can be no desertion without

previous cohabitation by the parties. The basis for this theory is built upon the recognized position of law in matrimonial matters that no one can

desert who does not actively or willfully bring to an end the existing state of cohabitation.

25. On the touchstone of the law as developed by the Supreme Court, importing some precepts from the foreign laws, if the evidence as laid by

the parties is appreciated broadly, it would appear that the appellant was instrumental for creating matrimonial trouble as nowhere she denied the

allegation that often times she used to leave matrimonial home at her whims and sometimes even without leaving any information to the inmates. In a

highly orthodox family, particularly in the rural segment where the values attached to the concept of the family are highly passionate and perhaps the

role of a wife or a daughter-in-law is quite succinctly highlighted in the norms of the family life. If it is found that even an educated wife or daughter-

in-law frequently leaves the matrimonial home without discharging the obligations it would only invite the trouble even if someone approves it or

not, in the case in hand, the similar conduct was the springboard for the entire discord. No doubt, the mother of the respondent treated such

conduct of the appellant as exception and it appears that the relation between the mother-in-law and the appellant was thus deteriorated. It was

difficult for the respondent to bring a truce. Definitely the appellant desired a dominant role of the respondent but the respondent could not make

the balance and ultimately the respondent was also accused of torturing the appellant. However, as it appears, the said Chief Judicial Magistrate

while considering the maintenance for the appellant found that there was no reasonable cause for the appellant to leave the matrimonial home.

What is found by him is that the respondent stooped even low to bring back the appellant to the matrimonial home and his such conduct absolved

him of the allegation that the respondent was not willing to take the appellant back to the matrimonial home. On the other hand, it is found that the

appellant, both before the Court of the Chief Judicial Magistrate as well as before the Family Court, in unequivocal terms stated that she would not

go to the matrimonial home again and those statements are now the part of the judicial records. There has been no endeavour by the appellant to

make amend to such judicial records by following appropriate recourse before coming to this Court.

26. Since 05.08.2002, the appellant has been living separately by depriving the respondent from cohabitation, which is the integral part of the

marriage. Apart that, the appellant had deliberately severed the tie and asserted that she would not return to the matrimonial home, surprisingly

though in the written statement she stated that she was ready to live with her husband but in fact whenever the occasion so arose she had never

shown any inclination to accompany the respondent for living together as husband and wife. On making an overall assessment of the evidence so

laid by the parties, it surfaces that the appellant had deserted the respondent by intentional permanent forsaking and abandonment without any

reasonable cause. Even when the respondent started living at Agartala, far away from his ordinary residence at Amarpur, the appellant did never

show any propensity to reconstruct the matrimonial home. Therefore, the required two essential conditions such as (1) the factum of separation and

(2) intention to bring the cohabitation permanently to an end are manifest in the conduct of the appellant.

27. Mr. A.K. Bhowmik, learned senior counsel appearing for the appellant contended stoutly that the impugned judgment and decree as passed

by the learned Judge, Family Court is solely based on the finding that the marriage between the parties has irretrievably broken down but such

ground is not available u/s 13 of the Hindu Marriage Act. To this position of law, Mr. S. Deb, learned senior counsel for the respondent did not

disagree but he submitted that irretrievable break down even though is not a ground for divorce, it leads to cruelty.

28. The Apex Court in Naveen Kohli Vs. Neelu Kohli, , referring a case of New Zealand reported in 1921, enunciated the breakdown principle in

the following words:

The legislature must, I think, be taken to have intended that separation of three years is to be accepted by this Court, as prima facie a good ground

for divorce. When the matrimonial relation has for that period ceased to exist de facto, it should, unless there are special reasons to the contrary,

cease to exist de jure also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain

bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the

essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous.

The Supreme Court ultimately held that once the marriage has broken down beyond repair, it would be unrealistic for the law not to notice of the

fact and it would be harmful to society and injurious to the interest of the parties where there has been a long period of continuous separation. In

other words, that such dead marriage perennially enveloped the spouses with a perceived cruelty. However, the learned Family Judge was by

granting the decree of divorce on the ground of irretrievable break down of marriage without much analysis whether that had been creating

perceived cruelty as stated or not has committed a serious illegality as within the ambit of Section 13 of the Hindu Marriage Act there is no room

for granting divorce on irretrievable break down of marriage. But when cruelty and desertion have been established in evidence, this Court cannot

shut their eyes rather for substantial ends of justice would resort to Order 41, Rule 33 of the CPC as exception to the general rule. Profitably,

Order 41, Rule 33 of CPC is reproduced hereunder:

33. Power of Court of Appeal :- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed

or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court

notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although

such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross-suits or where two or

more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such

decrees.

29. Therefore, there cannot be any legal bar, though the respondent has not filed any appeal against the said finding of the learned Judge, Family

Court, South Tripura, Udaipur to grant him the relief as would have otherwise been available to him in law.

30. Mr. A.K. Bhowmik, learned senior counsel appearing for the appellant, attacked the impugned judgment on another ground that, whether by

recording of depositions of witnesses adduced by the respondent (the appellant herein) and thereafter recording the depositions of the witnesses of

the petitioner (the respondent herein), the learned Judge, Family Court violated the provisions of Rule 3-A of Order 18 of CPC or so to say the

provisions laid down in Order 18 and as adopted by Section 10(1) of the Family Court Act, 1984. In support of his above contention, Mr.

Bhowmik, learned senior counsel placed reliance in N.C. Kaladharan Vs. Kamaleshwaran, as, (2002) 10 SCC 184 , where the Apex Court

expounds the law as under:

The main question which is addressed to this Court against the impugned order is, whether the High Court was right to insist on the examination of

the appellant first before the examination of the witnesses to formally prove the will. The High Court relying on the provisions of Order 18 Rule 3-

A CPC observed that normal and healthy practice which is adopted by the trial court is, to call upon the parties to the suit before their witnesses

are examined. The High Court did not find any fault in such approach, hence rejected the case of the appellant. The contention for the appellant

before the High Court was that Sections 67 and 68 of the Evidence Act, require formal proof of a will and only when the will is properly proved,

he can lead his evidence, in case he is examined first it will not be possible for him or for the Court to use the will as evidence in the course of his

examination. This submission of the appellant was rejected by the High Court."" The Supreme Court, in that fact situation, held:

In view of this, the Court may proceed to examine the evidence in terms of Sections 67 and 68 of the Evidence Act. Hence no question of insisting

upon the appellant to be examined first arises now.

The decision is perhaps not apposite in the backdrop of this case. In that case, the Supreme Court rather by way of interference reiterated the

principle as laid down in Order 18 Rule 3 of CPC. In Rule 3, it has been provided that where there are several issues, the burden of proving some

of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer

to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party

has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party

beginning will then be entitled to reply generally on the whole case.

31. Mr. S. Deb, learned senior counsel for the respondent, fiercely came down on the said submission holding that the rules of procedures are

hand-maids of justice and not its mistress. Mr. Deb further contended that the sequence of evidence can be chosen by the Court in the interest of

the enquiry. He relied on paragraph 933 of Halsbuty''s Laws of England [4th Edition, Volume 44], where it has been commented upon that

although no universal rule can be laid down, the provisions relating to the steps to be taken by the parties to legal proceedings in the widest sense

have been construed with some regularity as mandatory, but the requirement which appears to be in unqualified terms must be read subject to the

other provisions in the Act and where a requirement, even if in mandatory terms, is purely procedural and is imposed for the benefit of one party

alone, that party can waive the requirement. It has been further held that, no universal rule can be laid down for determining whether provisions are

mandatory or directory; in each case the intention of the legislature must be ascertained by looking at the whole scope of the statute and, in

particular, at the importance of the provision in question in relation to the general object to be secured. Thus it is not possible to generalise by

reference to the nature of what is prescribed. No great reliance can be placed, either, on the suggestion that provisions framed purely in affirmative

language are normally construed as directory, although the converse proposition, that negative provisions are prima facie mandatory, would seem

on principle to be less open to criticism.

Mr. Deb, learned senior counsel further relies on Craies on Statute Law to get support from the comments made thereon, which is as follows :

If the requirements of statute which prescribes the manner in which something is to be done are expressed in negative language, that is to say, if the

statute enacts that it shall be done in such a manner and in no other manner, it has been laid down that those requirements are in all cases absolute,

and that neglect to attend to them will invalidate the whole proceeding.

32. Mr. S. Deb''s endeavour was to show that there is no such negative language used in the provisions of Order 18 Rule 3 and 3-A of CPC and

as such the contentions of Mr. Bhowmik, learned senior counsel for the appellant is without any substance. To buttress his contentions, Mr. Deb,

learned senior counsel for the respondent further referred to the decisions of various High Courts in (1) Paramananda Fate Singh & Ors. Vs.

Labanya Bewa & Ors., as reported in AIR 1979 Orissa 132, (2) Bholanath Mondal and Others Vs. Kalipada Mondal, and (3) Gulvir Singh Vs.

Tara Chand, as reported in AIR 1982 Allahabad 250, wherein it has been held that Order 18 Rule 3-A of CPC is not mandatory in its import, but

directory by design. In sequel, Mr. Deb farther pressed decisions of the Apex Court in State of U.P. Vs. Manbodhan Lal Srivastava, and The

State of Uttar Pradesh and Others Vs. Babu Ram Upadhya, .

33. Both the learned senior counsel appearing for the parties, while making the submissions, did not attend the provisions of Section 10 of the

Family Courts Act, 1984 in its perspective else it would appear that the Family Courts have been enabled by the statute to devise its own

procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceeding or at the truth of the facts alleged by the

one party and denied by the other. Usefully, sub-section (3) of Section 10 of the Family Courts Act, 1984 is extracted hereunder.

10 (3) Nothing in sub-section (1) or subsection (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a

settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.

The above non-obstante clause is a special provision enabling the Family Courts to devise their own procedure for achieving the object of the Act.

For engrafting such provision, provision of sub-section (1) of Section 10 of the Family Courts Act, 1984 becomes optional to the Family Court,

however, while this observation is made, we are not oblivious that generally the time tested procedure as laid down in the CPC is expected to be

availed of by the Family Courts but they are not denuded of their power, at the same time to devise or lay down their own procedure as per sub-

section (3) of Section 10 of the Family Courts Act, 1984.

34. Mr. A.K. Bhowmik, learned senior counsel for the appellant, further questioned the procedure of the ''Family Court'' of not recording the

cross-examination by the adverse parties. Mr. Bhowmik with sufficient vehemence submits that unless the cross-examination is allowed, the part of

the examination in chief cannot be read in evidence and for that purpose no finding can be retuned on the basis of such deposition.

35. No doubt, usually in the Civil Courts, unless the opportunity of the cross-examination is given, the examination in chief are not as a whole

admitted in the evidence save and except where some admission appears. But in this case what we curiously find that the learned Judge, Family

Court, South Tripura, Udaipur, has deviated from the normal rule of recording evidence but he has done the same uniformly and following a very

simple method of inquiry. The respondent (the appellant herein) was even allowed to adduce her witnesses first and thereafter the petitioner (the

respondent herein) was allowed to adduce his witnesses. No grievance surfaces from the record stated to have demonstrated by either of the

parties in this regard. This Court is also not oblivious of the fact that usually in the proceeding of the Family Court, no lawyer is permitted to

represent the parties unless of course if permitted by the Court. In view of this, even though this procedure cannot be claimed to be foolproof,

cannot be even questioned at this stage by the appellant. However, this procedure is not advisable to be followed by the Family Courts, rather the

Principal Counselor of the Family Court where no legal practitioner is permitted to represent the case of the parties would demonstrate the rights of

cross examination available to the parties and how to exercise the same before recording of the evidence in a detached manner without making any

reference to the subject matter of the case. It is also expected that the adverse party would be asked by the Family Court to question or to suggest

or to bring contradiction or omission of previous admission from the witnesses appearing for the one party or from the other party.

36. Mr. Bhowmik, learned senior counsel for the appellant has severely attacked the judgment and decree of the Family Court for recording the

statement of the respondent (the appellant herein) at para 13 that:

At the time of final hearing, the respondent Smt. Manidipa Bhowmik has submitted that she is no longer interested to live with the petitioner but

since the son begotten with the petitioner is living with her and the son is presently studying in Don Bosco School, he should be given maintenance

so as to enable to continue his studies.

Mr. Bhowmik, learned senior counsel claimed on instruction that no such statement was ever made by the appellant herein.

Having confronted by this Court, Mr. Bhowmik, learned senior counsel for the appellant, however, candidly submitted that no attempt was made

by the appellant to get that statement reviewed by the learned Judge, Family Court Therefore, it remained as apart of the records in the judicial

proceeding.

37. Mr. S. Deb, learned senior counsel for the respondent herein submitted that the only way to have the record corrected is to call attention of the

very Judge who had made the record to the effect that the statement was made. If no such step is taken, the matter must necessarily end there. In

support of this contention, Mr. Deb, learned senior counsel relied the decision of the Apex Court in (1) State of Maharashtra Vs. Ramdas

Shrinivas Nayak and Another, , (2) Ram Bali Vs. State of Uttar Pradesh, and (3) Food Corporation of India and Others Vs. Bhanu Lodh and

Others, . Ramdas Shrinivas Nayak (supra) has been followed in other decisions of the Apex Court. In Ramdas Shrinivas Nayak (supra), the Apex

Court held:

If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The

principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts

so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly

recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very

Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error.

That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there.

38. Such statement, however, not for the first time made before the learned Judge Family Court, as it is available from the records that even the

appellant herein made such statement before the learned Chief Judicial Magistrate while the said Court was hearing her plea for grant of monthly

maintenance u/s 125 of the Code of Criminal Procedure.

In view of this, the correctness of that statement should not have been questioned by the appellant in this appeal.

39. In the result, we are of the view that the respondent herein was successful in establishing the cruelty and desertion as pleaded against the

appellant herein. On fresh appreciation of the records, we find still there remains an explorable room for settlement but at this stage, it would not be

expedient to direct the appellant and the respondent to restore their conjugal life after their living separately for about ten years.

40. Situated thus and taking recourse to the power as provided u/s 13A of the Hindu Marriage Act, 1955, which provides that in any proceeding

under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned

in clauses (ii), (vi) and (vii) of sub-section (1) of Section 13, the Court may, if it considers it just so to do having regard to the circumstances of the

case, pass instead a decree for judicial separation, the impugned decree of divorce dissolving the marriage as passed by the learned Judge, Family

Court, South Tripura, Udaipur is converted to a decree of judicial separation. Accordingly, the appeal is dismissed, however, with modification as

indicated above. No order as to costs.