

**(2003) 07 AP CK 0012**

**Andhra Pradesh High Court**

**Case No:** CMA No's. 2517 and 2518 of 2000

Usha Rani

APPELLANT

Vs

N. Sridhar

RESPONDENT

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**Date of Decision:** July 10, 2003

**Acts Referred:**

- Hindu Marriage Act, 1955 - Section 13(1)

**Citation:** (2003) 5 ALD 803 : (2004) 1 DMC 300

**Hon'ble Judges:** T. Meena Kumari, J; S. Ananda Reddy, J

**Bench:** Division Bench

**Advocate:** V. Suresh, for the Appellant; N. Vijayashree, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

S. Ananda Reddy, J

1. Since both the appeals involve common questions of fact and law, they are heard together and are being disposed of by this common order.

2. The appellant in both the appeals is the wife and the respondent is the husband. For the sake of convenience, the parties will be referred to as Appellant-wife and Respondent-husband respectively.

3. CMA No. 2517 of 2000 is filed by the appellant-wife aggrieved by the order of the learned Family Judge, Hyderabad dated 3.7.2000 made in O.P. No. 6 of 1995 whereas C.M.A. No. 2518 of 2000 is directed against the order in O.P. No. 592 of 1997.

4. The brief facts leading to the filing of the O.Ps. be stated as under: The Respondent-husband filed O.P. No. 6 of 1995 u/s 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955 (for short, the Act) for dissolution of the marriage by a decree of divorce on the grounds of cruelty and desertion. The marriage between the parties took place on 8.12.1993 at Visakhapatnam. According to the Respondent-husband,

the appellant-wife was older to him by five years and this fact was suppressed by the parents of the appellant. It is stated by him in the O.P. that on the nuptial day the appellant told him that she had a love affair with another person. It is also stated by him that the appellant-wife used to abuse him and his family members in unparliamentary language and they were shocked to see her behaviour. According to him, she was arrogant, adamant, negligent, careless and quarrelsome. The Respondent-husband further stated that she used to abuse in foul and filthy language, which is not expected of an educated woman and that made his life miserable and full of mental agonies. According to him, though he tolerated the same with the fond hope that she would change during the course of time, there was no improvement or change her behaviour. He further stated that the appellant used to leave the house for hours together and whenever it was objected to, she used to shout and abuse him and threaten his family members in front of others. He further stated that she used to behave cruelly and caused mental and physical torture to him and his family members. This according to the respondent-husband, amounts to cruelty. It is also stated by him that she is mentally imbalanced and used to charge his mother with a vegetable cutter. According to the respondent, he did not inform about this behaviour of the appellant either to the general public or to the police because he has grown up sisters and it would be difficult for him to perform their marriages. It is also stated that she tried to implicate him and his family members in false and frivolous cases with the active influence of his influential brothers, one of whom is working in the Police Department. The respondent-husband further stated that the appellant stayed with him for two months after the marriage and left the matrimonial house in the month of September 1994 and did not turn up thereafter. According to him, though he issued a legal notice dated 1.2.1995, it was returned with an endorsement addressee left on 25.2.1985 and it was received by her on 4.3.1995. The respondent-husband further stated that there was no consummation of the marriage and the marriage between them has broke down irretrievably.

5. The appellant wife resisted the above O.P. by filing counter-affidavit denying and disputing all the material allegations levelled against her in the O.P. It is stated in the counter-affidavit, that soon after the marriage it was consummated. She denied, that she suppressed her age from 45 to 40. She denied the allegations of cruelty levelled against her. She also denied that she has any love affair with anyone and that she did not disclose any such thing to her husband. She further stated that she never abused or attacked her husband or his family members and, in fact, she was necked out of the house by her husband and his family members in October, 1994 and she did not leave the house on her own accord. She also stated that in the third week of December 1994, she along with her brothers Chitti Babu and Venkatesh, went to the house of the Respondent-husband in Hyderabad and tried to join his Society, but she was not allowed inside the house. She admitted having received the notice sent by her husband. She further stated in her counter-affidavit that on

9.12.1993 they visited Annavaram temple and on the same night consummation took place for three days and they came back to Hyderabad on 12.12.1993 and stayed together till 1.1.1994 and lived happily. She also stated that the Respondent-husband, with the support of his mother and sisters threatened her with dire consequences of setting fire to her by pouring kerosene over her and that they have challenged to get him another marriage and that even now she is ready and willing to join him.

6. The appellant-wife filed O.P. No. 592 of 1997 on 16.10.1997 u/s 9 of the Act for restitution of conjugal rights making the very same averments that were made in the counter affidavit filed by her in O.P. No. 6 of 1995. In this O.P., the appellant-wife contended that the Respondent-husband demanded her to sell away the properties so as to perform the marriages of his sisters, that he has a fancy of changing wives and in spite of all these things she is ready to join his society. The respondent-husband resisted this O.P. by filing a counter-affidavit on 15.9.1998 making similar allegations that were made in O.P. No. 6 of 1995. In addition to it, the Respondent-husband contended that his wife had a love affair with a Brahmin boy, that she married him with the force of her brothers, that his sisters were all married and they are living elsewhere and there was no occasion for the appellant to live with him and his family members and that he did not insist her to sell away the properties for the marriage of his sisters. He further stated that he did not drive her away from the house.

7. Since both the O.Ps. involved common questions of fact and law, they were tried together by leading common evidence and disposed of by a common order.

8. Before the Court below, the Respondent-husband examined himself as P.W.1, his mother as P.W.2 and his neighbour as PW.3 and Exs.A.1 to A. 18 were marked on his behalf. On the other hand, the appellant-wife examined herself as R.W.1, the wife of one of the mediators as R.Ws.2 and his younger brother as R.W.3 and no documents were marked on her behalf.

9. The Court below, on a consideration of the entire material placed on record and after hearing both the parties, though held that the respondent-husband failed to prove the grounds of cruelty and desertion for dissolution of the marriage, allowed O.P. No. 6 of 1995 filed by the Respondent-husband granting a decree of divorce on the ground that the marriage ties between the parties broke down irretrievably, and dismissed O.P. No. 592 of 1997 filed by the appellant-wife for restitution on conjugal rights by common order dated 3.7.2000. Hence, these appeals by the aggrieved wife.

10. The learned Counsel for the appellant, assailing the validity of the impugned order of the learned Family Court, Hyderabad, contended that the Court below erred in allowing the O.P. filed by the Respondent-husband on the ground of irretrievable break down of the marriage, as there is no provision under the Act for

granting the relief The learned Counsel further contended that the Court below failed to appreciate the evidence in proper perspective and misdirected itself to the facts of the case and came to erroneous conclusions. The learned Counsel further contended that the Court below having found that the respondent-husband failed to prove the ground of cruelty and as the statutory period of two years immediately preceding the presentation of the O.P. was not completed, ought to have dismissed the O.P. filed by the husband and allowed the O.P. filed by her for restitution of conjugal rights.

11. On the other hand, the learned Counsel for the Respondent-husband supported the order of the Court below. The learned Counsel further submitted that as the marriage ties between the parties broke down irretrievably and there is no chance of the parties coming together, no exception can be taken to the order of the Court below.

12. Heard both sides and perused the material on record.

13. Basing on the material available on record, now it has to be seen whether the respondent-husband is entitled to the relief of dissolution of the marriage by a decree of divorce on any of the grounds urged by him in his application.

14. Cruelty is one of the grounds for granting a decree of divorce u/s 13(1)(ia) of the Act. The word "cruelt" has not been defined in the Act. It is contemplated as a conduct of such type which endangers the living of the Petitioner with the Respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty, for the purposes of the Act, may be either physical or mental. It means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the Petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the Petitioner to live with the other party. However, cruelty, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of sensitivity of the Petitioner and has to be adjudged on the basis of the course of conduct, which would, in general, be dangerous for a spouse to live with the other, (see for the proposition, [Savitri Pandey Vs. Prem Chandra Pandey](#), Further, the Supreme Court in V Bhagat v. Mrs. D.Bhagat AIR 1984 SC 710, had an occasion to consider the question, what is "mental cruelty". Dealing with the said question, the Supreme Court held as follows: "Mental cruelty in Section 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together.

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

The Supreme Court in the above decision categorically held that even where the marriage has irretrievably broken down, the Act, even after the 1976 (Amendment) Act, does not permit dissolution of the marriage on that ground and that this circumstance may have to be kept in mind while ascertaining the type of cruelty contemplated by Section 13(1)(ia).

15. On the anvil of the above settled legal position, we have to examine whether the Respondent-husband was able to prove the ground of cruelty for dissolving the marriage by a decree of divorce, on the facts and circumstances of this case. The Respondent, as P.W.1, deposed to what all he has stated in his O.P. for divorce. P.W.2 is his mother and P.W.3 is the neighbour. It was suggested to P.W.1 in the cross-examination that his first wife, Jyothi was harassed by him and that she filed a case u/s 498-A Indian Penal Code against him and he tortured her to give divorce and contract a Second marriage. P.W.2, in her evidence, stated that the appellant-wife never co-operated for the consummation of the marriage, as disclosed to her by P. W. 1 and that her enquiry revealed that she loved a Brahmin boy. She also stated in her evidence about the alleged attack on her by the appellant with the vegetable cutter. P.W.3, the neighbour, was examined to say about the alleged incident of the appellant-wife attacking P.W.2 with a vegetable cutter. According to his evidence, in the first week of September, 1994, on hearing the cries of P.W.2 from the first floor, he went there and saw P.W.2 lying on the ground and a vegetable cutter by her side and the appellant in an angry mood. He further stated that he took her to the clinic in the first floor and informed about this incident to the Respondent-husband who came there after an hour, by which time P.W.2 regained consciousness and she was shifted to a hospital. He further stated that at the same time, the appellant also left the house by taking her luggage. He is not an eye-witness to the said incident. According to him he goes to the extent of saying that there was no consummation of the marriage between the parties. Except making an allegation in the application that the appellant-wife behaved with cruelty, there is no evidence, either oral or documentary, to prove the same. The Court below, on the basis of the oral and documentary evidence in this regard, held that the Respondent-husband has failed to prove the ground of "cruelty" for granting

the relief prayed for by him. Having perused the entire material on record, we are also of the considered opinion that the Respondent-husband has utterly failed to prove the ground of cruelty for granting a decree of divorce.

16. Now this takes us to the other ground of desertion. No decree of divorce could be granted on the ground of desertion in the absence of pleading and proof. "Desertion" 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. 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. (See for the proposition, Savitri Pandey's case (supra). In [Bipin Chander Jaisinghbhai Shah Vs. Prabhawati](#), it was 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.

17. In Savitri Pandey's case (supra), the Supreme Court further held that for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there viz., (1) the factum of separation and (2) the intention to bring cohabitation permanently to an end (animus deserendi), and 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. It was also held therein that the burden of proving these elements in the two spouses respectively is on the Petitioner for divorce. It was also held therein that the offence of desertion commences when the fact of separation and the animus deserendi co-exist and it is not necessary that they should commence at the same time.

18. In the light of the above well-settled legal position, it has to be seen on the facts and circumstances of this case, whether the Respondent-husband is entitled to the relief of dissolution of the marriage on the ground of desertion. In his application for divorce, the Respondent-husband stated that the appellant-wife left his house in the month of September, 1994 and thereafter did not return. There is absolutely no evidence on the record to show that in spite of his best efforts to get her back, she did not return and she has deserted him. No mediators were examined nor any letters were marked to the said effect. But it is the consistent case of the appellant-wife that when she went to the house of the Respondent-husband in the month of December, 1994 along with her brother, she was not allowed into the house. She has categorically stated that in spite of all the bickering and the attitude of the Respondent-husband, she is ready and willing to join his society. Therefore, by no stretch of imagination, it can be said that the appellant-wife deserted him and

none of the ingredients, as set out by the Supreme Court, were proved by the Respondent-husband. As rightly pointed out by the learned Counsel for the appellant, the statutory period of two years immediately preceding the presentation of the O.P., in 1995 was also not elapsed as according to the husband, the wife deserted him in September 1994 and, therefore, the Respondent-husband is not entitled to the relief prayed for by him. The evidence of P.W.3 that there was no consummation of the marriage between the parties, cannot be believed and quite rightly, the Court below also has not taken into consideration his evidence in this regard. Therefore, as rightly pointed out by the Court below, the respondent-husband is not entitled to the decree of divorce on this ground also.

19. However, the Court below, holding that there has been irretrievable break down of the marriage ties between the parties and as there is no chance of reunion, allowed the O.P. filed by the respondent-husband for divorce and dismissed the O.P. filed by the appellant-wife for restitution of conjugal rights. This finding of the Court below is not in accordance with law in view of the authoritative pronouncement of the Supreme Court in V. Bhaghat's case (supra), that irretrievable break down of the marriage itself is not a ground for dissolution of the marriage, by a decree of divorce, as it is not made as one of the grounds even in the Amendment Act of 1976. The order of the Court below, therefore, cannot be sustained.

20. In view of our findings above, we do not find any reason whatsoever to refuse the relief of restitution of conjugal rights to the appellant-wife.

21. In the result and for the foregoing reasons, the appeals are allowed and the common order of the Court below dated 3.7.2000 made in O.P. Nos. 6 of 1995 and 592 of 1997 is set aside. Consequently, O.P. No. 6 of 1995 filed by the respondent-husband for divorce is dismissed and O.P. No. 592 of 1997 filed by the appellant wife for restitution of conjugal rights is allowed. In the circumstances of the case, we direct the parties to bear their two costs.