(2008) 12 DEL CK 0140

Delhi High Court

Case No: Matrimonial Application No. 17 of 2008 and CM No''s. 2123, 2124, 4947 and 8621 of 2008

Dr. Vimla Balani	APPELLANT
Vs	
Sh. Jai Krishan Balani	RESPONDENT

Date of Decision: Dec. 17, 2008

Acts Referred:

- Constitution of India, 1950 - Article 142
- Hindu Marriage Act, 1955 - Section 10, 10(1), 13, 13(1), 28

Citation: (2009) 158 DLT 75 : (2009) 3 ILR Delhi 295

Hon'ble Judges: Vidya Bhushan Gupta, J

Bench: Single Bench

Advocate: Atul Wadera, for the Appellant; R.S. Sahni and Rajat Gaur, for CGHS, for the Respondent

Final Decision: Dismissed

Judgement

V.B. Gupta, J.

This appeal has been filed by appellant u/s 28 of Hindu Marriage Act, 1955 (for short as Act'') against the judgment and decree dated 7th November, 2007 passed by Shri Gurdeep Singh, Additional District Sessions Judge, Delhi, vide which the Trial Court has allowed the respondent''s petition in his favour and against the appellant.

2. Aggrieved with the impugned judgment, the appellant-wife has filed the present appeal.

3. The brief facts of this case are that parties to the appeal were married on 19th November, 1956 according to the Hindu Rites and ceremonies. Respondent who had joined the Indian Police Services in 1953 was posted at Jodhpur at the time of marriage as Superintendent of Police. The respondent was the only son of his parents and his mother was ailing with high blood pressure and needed care and attention of the parties.

4. The appellant since the inception of marriage did not show any inclination to remain with the respondent in the matrimonial home and in early 1957, appellant left the matrimonial house of the respondent at Jodhpur without any reasonable cause and without consent and against the will of the respondent. The appellant was rude, obstinate and insolent.

5. The job of the respondent was transferrable and in the year 1957 he was transferred from Jodhpur to Jaisalmer. The appellant was persuaded to join the matrimonial home and live with the respondent at Jaisalmer. By September 1957, the respondent was transferred to Tonk where he lived along with appellant for about six months.

6. In April 1958, the appellant again left the house of the respondent with the intention to put an end to the matrimonial status though she had not any cause at all to leave the house. The appellant''s parents belonged to Delhi where she was brought up and educated and she could not set her mind to live with the respondent in smaller town like Jaisalmer and Tonk. In spite of efforts made by the respondent''s relatives and friends, the appellant did not return to the matrimonial home.

7. In 1961, the respondent filed a petition u/s 9 of the Act for judicial separation and the proceedings went on for a considerable time. In 1963, the respondent was transferred to Delhi on deputation. There also the appellant did not return to respondent''s home. The respondent met with a serious accident in August 1965 and was hospitalized at Delhi but the respondent did not bother to return to the respondent. However in 1967, when the appellant expressed her desire to return to the respondent''s house the court proceedings ended with a compromise decree on 9th September, 1967.

8. After compromise, the parties lived in Delhi in Government house, as husband and wife. In October, 1967, the respondent had to move from Delhi to Bhopal, the appellant did not accompany him to Bhopal and stayed at Delhi as respondent had some time to settle down in his posting at Bhopal. The appellant was advised by respondent''s parents to go to Jodhpur till the respondent settles down at Bhopal. The respondent after settling down in Bhopal came to Jodhpur to fetch the appellant but found that she was living at the house of her maternal uncle Sh. K.K. Abhichandani and she declined to go to Bhopal with respondent on the plea that she was getting a good job. Thereafter, appellant got a job as teacher in High School and after some time she got the job of lecturer in Teacher Training College at Jodhpur. The appellant has since retired as lecturer from the said college and has shifted to Delhi and is living in her home. During her stay and service at Jodhpur, the appellant acquired and purchased house in Jodhpur and has also acquired residential plot.

9. In September, 1969, the respondent was posted at Delhi in Ministry of Home Affairs and remained in Delhi till 1971. Between 1971 to February 1977, the appellant was posted at different places on deputation in India. In February, 1977, the respondent was transferred and posted to Jodhpur as DIG of Police and at that time the appellant was living and working at Jodhpur. The respondent tried to bring appellant to the matrimonial home but she refused and rather said she would not live with the respondent.

10. From October 1979 to August, 1983 the respondent had remained posted at Jaipur and Jullundar. From August, 1983 to August, 1985 he was again posted at Jodhpur as IG of police and in June 1986 he retired from Government service.

11. The appellant falsely and malafidely has been claiming that respondent is a womanizer and is maintaining relations with other ladies outside the matrimonial house and appellant has leveled false allegations that the respondent is having illicit relations with Ms. Netra.

12. Since October, 1967 there is no cohabitation between the parties and the appellant has deserted the respondent for a continued period of thirty years without any reasonable cause and without the consent and against the will of the respondent. The appellant even did not care to attend the death ceremonies of respondent''s parents when his mother died in July, 1963 at Delhi and his step mother died in June 1988 at Jodhpur and his father in November, 1988 at Jodhpur, although appellant was living in Jodhpur.

13. Earlier, the respondent filed a petition for divorce on the ground of cruelty and desertion in the year 1991, which was dismissed by the Court of Additional District Judge on 22nd January, 1994 on the ground of lack of jurisdiction. The respondent filed an appeal against the said order which is pending in the High Court. It is further stated that after retirement, the appellant has shifted to Delhi and now she is residing in Delhi and as such the said appeal has become meaningless.

14. The respondent has not in any manner condoned the act of complained of and there has been no delay in filing the petition. The respondent is now 70 years old and in view of his official position in government and social status, he avoided to take recourse to legal proceedings.

15. The petition was contested by the present appellant who in her written statement stated that the requisite ingredients of the act are not attracted since the respondent did not create congenial atmosphere for the appellant to stay with him as he is keeping a woman namely Ms. Netra with him from the very beginning (just after marriage) as his mistress. Hence the question of cruelty does not arise.

16. She has further stated that the respondent has two living mothers. Respondent''s real mother was the first wife of his father who lived with the respondent. Respondent step mother Smt. Savitri was his father''s younger wife who

live separately with respondent''s father.

17. In 1957, the appellant had gone to her parent''s house on the customary visit with the consent of the respondent and she had come back when he called her to join him in Jaisalmer. The respondent did not raise this issue in his earlier suit in 1961. Appellant knew before the marriage that the service of respondent was transferrable. It is further stated that the appellant was not aware about the growing intimacy of respondent with his second cousin Ms. Netra, which effected their marital life.

18. In 1958, the appellant went to her parent''s house with respondent''s consent from Tonk where both of them were residing together. The respondent did not call her back but instead called Ms. Netra who left her husband and lived as mistress and is still living with him as his mistress.

19. In 1960, when appellant came to know regarding the illness of real mother of the respondent, she went to Didwana, Rajasthan where she was under treatment from Delhi with her father via Jodhpur station where her maternal uncle Sh. K.K. Abichandani joined them. The respondent had served as teacher under his maternal uncle before joining IPS. It is further alleged that the respondent forced her to leave at pistol point and threatened to shoot her dead and this incident is mentioned in the suit filed at Jodhpur Court.

20. Appellant admitted that respondent had filed a petition u/s 9 of the Act for judicial separation. It is denied she did not return to respondent''s home in the year 1963 and 1965. Appellant also denied that the case was compromised when she expressed her desire to live and thereafter they lived as husband and wife. It is also denied by the appellant that she willingly did not accompany respondent to Bhopal. It is further stated that when the respondent was transferred to Delhi in the year 1963, the case was still pending in the Court and Ms. Netra was already living with him as his mistress.

21. In 1965 when respondent was hospitalized in Delhi due to Jeep accident, appellant with her father had gone to see him but was forced to leave as Ms. Netra was with him in the hospital.

22. The compromise dated 9th September, 1967 turned out to be a camouflage and the parties never lived together after 9th September, 1967 and it was Ms. Netra who was living with respondent in Government allotted house. Ms. Netra accompanied respondent to Bhopal and other places of his posting and she used to address herself as respondent''s wife.

23. After the compromise, appellant was left alone by the respondent and his father took her to his nephew''s house at Jaipur where they lived for two days. Thereafter, respondent''s father brought her to Jodhpur house saying that she should live there till respondent settles at Bhopal. There, the appellant learnt that respondent did not

wish to take her back and his only aim was to get the case withdrawn. However, appellant lived in her father-in-law''s house till 9th March, 1968 as he wanted to mend his son''s erratic behavior. While at Jodhpur''s house, respondents'' parents wrote four letters dated 19th September, 19678, 3rd October, 1967, 9th October, 1967 and 16th October, 1967 to the respondent to which there was no reply. Thereafter appellant sent a registered inland letter dated 8th January, 1968 followed by another registered inland letter dated 29th November, 1968 in reply to his letter dated 11th January, 1968. Respondent''s father was very sad at the behavior of his son and wrote him to honour the compromise. On coming to know that the appellant was living with his parents at Jodhpur and his father advised him to honour the compromise, respondent came to Jodhpur and rebuked his father for keeping the appellant in his house. Thereafter he left never to be seen again.

24. Appellant being disappointed, after efforts for reconciliation failed, decided to re-settle and came back to her parents in March 1968 and joined a college for doing B.Ed. In July, 1969, she got lecturer''s job at Jodhpur University College where she remained till her retirement in February, 1996. Appellant admits that she had purchased her own house at Jodhpur from her own resources.

25. It is further stated that respondent belongs to Zamindar family where bigamy was considered as matter of pride. His father had two living wives, his real paternal uncle also had three living wives and the respondent followed the family tradition. The respondent was a womanizer, a fact appellant learnt after her marriage. The appellant also observed that respondent maintained relation with other ladies outside his maternal house.

26. Ms. Netra used to come and live with respondent in his house wherever he was posted. When the appellant objected to this, the respondent became furious and refused to call her back from her parental home, where she had gone on customary visit in April 1958 and also threatened to shoot appellant when she visited his ailing mother at Didwana and filed the suit for judicial separation. Ms. Netra taking advantage of the situation left her husband''s house and started living with respondent in his house as his mistress due to which she was divorced on ground of cruelty. It is further stated that respondent wanted to get rid of appellant and wish to regularise his relation with Ms. Netra and adopted son Rajiv, who is actually illegitimate child of respondent from Ms. Netra.

27. It is denied that the appellant had willfully neglected the respondent. Actually, it is the respondent who has deserted and neglected the appellant and it is he who is trying to put an end to the married life. No ground is made out for grant of decree of divorce.

28. Both the parties filed evidence by way of respective affidavits.

29. It has been contended by learned Counsel for the appellant that the trial court has wrongly held the issue of cruelty against appellant as well as appellant''s

deserting the respondent. The innocent party should not suffer at the hand of guilt party and in the present case, from the evidence on record, the innocence of appellant and the guilt of respondent is fully established. Since, the respondent in the present case is guilty of cruelty by openly keeping a mistress in the matrimonial home and he being a guilt party, is not entitled to any relief. There has been long delay in filing the present petition on behalf of the respondent which disentitle him to any relief.

30. It is further contended that since the respondent was committing act of adultery, under these circumstances, it was extremely difficult for any lady to stay in such a matrimonial home and desertion has been on the part of respondent by forcing the appellant, that is, driving out the appellant from the matrimonial home. The appellant in this case has written various letters to the respondent asking him to remove his mistress from the matrimonial home and only then she would join him. Moreover, when the appellant left the matrimonial home, the respondent made no efforts to bring her back. On the contrary when appellant went along with her father to meet the respondent and see his ailing mother, respondent on pistol point made them to leave threatening to shoot her.

31. It is also contended that after the earlier matter was compromised between the parties, the respondent immediately left the court premises leaving appellant alone because there was no intention on his part to take appellant back, as in that eventuality he would have to first remove her mistress, which under no circumstances, he was willing to do so. The appellant even had made efforts to get respondent''s mistress married to her cousin hoping that this may save her matrimonial home but she was divorced on the ground of adultery, after which the same situation persisted. The real intention of the respondent in getting the marriage nullified is that, the appellant should not take advantage of his name after his death and also to avoid further disputes regarding assets of respondent between adopted son of the respondent, Rajiv Balani.

32. It is further contended that in the telephone directory, address of the respondent and his mistress are the same.

33. Another contention raised by learned Counsel for the appellant is that the ground of cruelty was brought for the first time by the respondent in his third petition at a much later stage when the evidence was completed on 4th February, 2002 by way of amendment. It is the respondent who has failed in his duty as a husband and he has given the appellant mental torture, intimidation and humiliation coupled with forcible ouster from the matrimonial home and the decree of divorce would now deprive her of any inhabitance right, if allowed to attain finality.

34. In support of his contentions, learned Counsel for the appellant has cited following judgments:

(i) Dharam Dev Malik Vs. Raj Rani,

(ii) Mohinder Pal Singh Vs. Kulwant Kaur,

(iii) Narinder Singh Chauhan v. Vimla Kumari (1983) 1 DMC 156,

(vi Bipin Chander Jaisinghbhai Shah Vs. Prabhawati,

(v) Meera v. Pushottam (1983) 1 DMC 159,

(vi) Pushpa Devi v. Pawan Kumar Goyal 1 (1983) DMC 230,

(vii) Bannubai v. Ratana 1966 M.P.L.J. 793,

(viii) Adhyatma Bhattar Alwar Vs. Adhyatma Bhattar Sri Devi,

(ix) Shyam Sunder Kohli Vs. Sushma Kohli @ Satya Devi,

(x) 1994 (2) PLJR 61 (SC)

(xi) Lachman Utamchand Kirpalani Vs. Meena alias Mota,

(xii) Harbhajan Kaur v. Bhagwant Singh 2 (1982) DMC 95

(xiii) Madan Mohan Manna v. Chitra Manna 1993 (2) HLR 38

35. On the other hand, it has been contended by learned Counsel for the respondent that present petition is not barred by principle of res judicata, as the earlier petition between the parties was not decided on merits but was dismissed on the ground of jurisdiction.

36. It is contended that parties are leaving separately since 1958 which fact has been admitted by the appellant in her cross-examination and the main grievance of the appellant for not joining the matrimonial house of respondent was Netra, cousin of respondent, who was living with him in the matrimonial home of the parties. It is also contended that if there was difference between the parties due to this Netra, then why did appellant get Netra married to her own cousin in 1957 despite the appellant leveling serious allegations of adultery against the respondent. It is the respondent, who has been treated with cruelty, since the appellant has failed to live with the respondent, without any just and sufficient cause and has been staying separately away from her matrimonial home since 1958 and as such no infirmity can be found with the judgment of the trial court.

37. Present petition has been filed on the grounds of cruelty as well as desertion.

38. Section 13 of the Act, relevant for this case, reads as under:

13(1). Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party

(i) xxx xxx xxx

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) to (vii) xxx xxx xxx

Explanation- In this sub-section, 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.

39. The word ''cruelty'' has not been defined in the Hindu Marriage Act. D. Tolstoy in his celebrated book "The Law and Practice of Divorce and Matrimonial Causes" (Sixth Edition, p. 61) defined cruelty in these words:

Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such a 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.

40. The Shorter Oxford Dictionary defines "cruelty" as "the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another''s pain; mercilessness; hard-heartedness".

41. The term "mental cruelty" has been defined in Black''s Law Dictionary [8th Edition, 2004] as under:

Mental Cruelty - As a ground for divorce, one spouse''s course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse.

42. The concept of cruelty has been summarized in Halsbury''s Laws of England [Vol.13, 4th Edition, Para 1269] as under:

The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of

the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant''s capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exits.

43. In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

Mental Cruelty as a course of unprovoked conduct toward one''s spouse which causes embarrassment, humiliation, and anguish so as to render the spouse''s life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse.

44. In Dr. N.G. Dastane Vs. Mrs. S. Dastane, , the Apex Court has observed as under;

...whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the Respondent.

45. In the case of Shobha Rani Vs. Madhukar Reddi, , the Apex Court has observed as under;

Section 13(1)(ia) uses the word "treated the petitioner with cruelty". 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 behavior. 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.

The Court further observed;

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 the 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.

46. In the case of V. Bhagat Vs. Mrs. D. Bhagat, , the Apex Court has observed as under:

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 is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.

47. Again in Savitri Pandey Vs. Prem Chandra Pandey, , the Apex Court has observed as under;

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. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the 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.

48. In Praveen Mehta Vs. Inderjit Mehta, , the Apex Court has laid down as to what constitute cruelty;

Cruelty for the purpose of Section 13(1)(ia) is to be taken as a behavior by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other. Unlike the case of physical

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

49. Again in A. Jayachandra Vs. Aneel Kaur, a three judge Bench of Apex Court observed that;

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

The Court further held;

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 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.

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 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.

The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other''s fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes cruelty in each particular case and as noted above, always keeping in view the physical and mental conditions of the parties, their character and social status. A too technical and hyper- sensitive approach would be counter-productive to the institution of marriage. The Courts do not have to deal with ideal husbands and ideal wives. It has to deal with particular man and woman before it. The ideal couple or a mere ideal one will probably have no occasion to go to Matrimonial Court.

50. Now, coming to desertion, the essential ingredients of desertion are:

(i) Factum of separation;

(ii) Animus deserdendi;

(iii) Separation must be without the consent of the husband;

(iv) Separation must be without there being any reasonable cause or excuse on the part of spouse deserting. Thus, the spouse deserting, if has any reasonable cause or excuse for separating from the other spouse, it will not constitute desertion;

(v) Desertion must be for a continuous period of 2 years from the date when, for the first time, the spouse deserting has made up mind to desert the other spouse permanently and with no intention to join back till the completion of 2 years preceding the presentation of the divorce petition.

(vi) There must be permanent intention to forsake the other spouse. The intention must be to repudiate the relationship of husband and wife and to repudiate the matrimonial obligations permanently for a continuous period of 2 years immediately preceding the presentation of the divorce petition. Thus, there must be a permanent intention to live separate.

51. The law on the issue of desertion is fairly well settled. The ingredients that have to be established have been explained by the Apex Court in Lachman Utamchand Kirpalani Vs. Meena alias Mota, wherein it has been held;

The question as to what precisely constitutes "desertion" came up for consideration before this Court in an appeal from Bombay where the Court had to consider the provisions of Section 3(1) of the Bombay Hindu Divorce Act, 1947, whose language is in pari materia with that of Section 10(1) of the Act. In the judgment of this Court in Bipin Chander Jaisinghbhai Shah Vs. Prabhawati, there is an elaborate consideration of the several English decisions in which the question of the ingredients of desertion were considered and the following summary of the law in Halsbury''s Laws of England (3rd Edn.), Vol. 12 was cited with approval:

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. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

The position was thus further explained by this Court:

If a spouse abandon 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, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserdendi; 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.... 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.

Two more matters which have a bearing on the points in dispute in this appeal might also be mentioned. The first relates to the burden of proof in these cases, and this is a point to which we have already made a passing reference. It is settled law that the burden of proving desertion - the "factum" as well as the "animus deserendi" - is on the petitioner, and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause.

52. In view of the aforesaid, this Court has to find the answer to two questions:

(i) The factum of separation and

(ii) Whether the appellant has proved the respondent''s intention of bring cohabitation permanently to an end (animus deserdendi;

53. If the answers to both the questions is affirmative then the impugned decree deserves to be set aside and if otherwise, then this Court has to uphold the impugned judgment.

54. Coming to the incidents of cruelty first, the respondent had filed the divorce petition on the ground that appellant has not being joining him at various places of his posting and appellant is leveling allegations against him that, he being womanizer is living with his mistress, namely Ms. Netra.

55. Respondent in his statement has stated that his first transfer from Jodhpur was to Jaisalmer and on his request, the appellant joined him from Delhi but after few

days she left the house as she did not want to live in desert area. In April, 1958 while he was at Tonk (Rajasthan), appellant again left without informing him and called her brother from Delhi. Despite his request, that health of his mother was not good and he will accompany her in couple of weeks, the appellant did not listen to him.

56. It is an admitted case of the parties, that earlier there was a compromise between the parties, in Court on 9th September, 1997. The respondent had brought back the appellant, which means that the previous cruelties have been condoned.

57. Respondent in his statement has stated that on 10th September, 1997, he brought appellant to Delhi when he was under transfer to Bhopal but the appellant refused to accompany him to Bhopal saying that she will join him after he settles at Bhopal. During this period, appellant moved to Jodhpur to live with his parents and when he visited Jodhpur in October and asked her to join him at Bhopal, the appellant refused by saying that she will continue staying at Jodhpur. Vide letter dated Ex.PW1/A, the appellant wrote to respondent''s father that she will no longer be returning to the house and thereafter the appellant did not live with him.

58. Respondent has denied the suggestion that while he was at Bhopal he had asked appellant to join him but appellant stated that he (respondent) should sever his relations with Ms.Netra and create decisive atmosphere for living with him.

59. On the other hand, appellant in her statement has stated that she had lived with respondent till April, 1958 and she had not cohabited since 1958 and they are living separately, since then. Further, she has stated that she does not know whether the respondent has met with an accident in June, 1958 as nobody informed her. She also does not know about his surgery in July, 1967 and January, 1968. She came to know about accident through her maternal uncle and visited respondent in hospital.

60. Both the parties have relied upon certain letters. Respondent has relied upon Ex.PW1/A whereas appellant has relied upon Ex.RW1/1, Ex.RW1/3 and RW1/4 and these letters pertain to the year 1968. Ex.PW1/A is the letter written by the appellant to father of respondent in which she has mentioned about respondent living with Netra.

61. Ex.RW1/1 states about, that appellant has requested the respondent to remove his mistress so that she can live whim him honourably as his wife.

62. Ex.RW1/3 is the letter written by the respondent to the appellant wherein it was stated that upon appellant''s willingness to join him, he had withdrawn the petition in the Court. However, since he was under transfer, the respondent preferred to go to Jodhpur and live with his parents and when he came to the Jodhpur to take her back, the appellant refused saying that she will join him only after he settles at new place.

63. Ex.RW1/4 is the letter written by the appellant to the respondent, wherein she has acknowledged having received letter Ex.RW-1/3 and has stated that she never

suggested that she will join him later and the respondent avoided to state facts regarding Ms.Netra and deliberately did not directly ask her to join him.

64. Letters filed by the parties goes on to show one thing that appellant was making allegations that respondent is living with Ms.Netra while respondent has denied it.

65. Appellant has admitted that in letter Ex.RW1/3, it has been mentioned that the respondent has requested for help and respondent has stated that he was going to Indore for treatment. She also admits that in this letter, respondent has written requesting her to reconsider and join him and desists from indulging from false and malicious acquisition.

66. Letter Ex.RW1/4, was sent at Bhopal and appellant denied the suggestion that she had knowingly send letter at Bhopal despite knowing that respondent was going to Indore.

67. So, it stand clear that respondent was undergoing surgery in Indore and asked her (appellant) to join him after compromise but the appellant did not join him on the plea that respondent was living with Netra and she despite knowing that respondent was at Indore, sent the letter at Bhopal.

68. The main reason for appellant''s staying away from the respondent was that respondent was living with Ms. Netra. Appellant in her written statement has also stated that respondent was a womanizer and he is having relationship with other women outside matrimony and Ms. Netra used to come and live with him in his house. Appellant further stated that as per customs amongst Zamidari, bigamy is considered as a matter of pride, father of respondent was also having two living wives and his real paternal uncle was having three living wives, therefore, the respondent has followed the same tradition, though this fact has been denied by the respondent. The appellant has given names of certain girls with whom the respondent was having relations. However, the appellant has not mentioned these names in her written statement and affidavit, though appellant in her cross-examination has stated that she was aware of all the names at the time of preparing written statement and affidavit.

69. According to the statement of the appellant, Ms. Netra was married to the son of her real aunt(Bua). The appellant admits that she suggested to the respondent the name of her cousin brother for marriage with Netra and Netra got married in the year 1957 and stayed in her matrimonial home till April, 1958. Appellant admits that when she separated from respondent in April, 1958, Netra was at her matrimonial home. Appellant admitted that her main grievance for not joining the respondent was Netra and there is no other reason in not joining respondent. She also states that respondent had relation with Netra prior to 1959 and she had started living with him continuously from 1959. The fact that respondent was being womaniser was told to her by the relatives who had come to attend the marriage. The appellant has further stated that despite Netra having relations with respondent, she

proposed the name of her cousin for marriage with Netra, as she believed the respondent who stated that everything will get normal after Netra gets married.

70. It really sounds strange that when as per appellant''s case the real cause of dispute with respondent was Netra then despite that, appellant got Netra married to her cousin brother. The appellant also admits that, when she separated from the respondent in April, 1958, at that time Netra was in her matrimonial home. When from the very beginning, appellant is in doubt that respondent was having relationship with Ms.Netra, then still she has chosen Ms.Netra for marriage with her own cousin, which is highly improbable and goes against the human conduct.

71. It is an admitted case, that the marriage between the parties was got matrialised through the father of the respondent and maternal uncle of appellant under whom, the respondent was working as a teacher in a school and if as per appellant''s case, respondent was a womaniser even prior to marriage, then why did she marry him.

72. Appellant in her statement has stated that she has seen the respondent with Ms.Netra having intimacy in her own matrimonial home but she does not remember as to when she saw them together and has not mentioned about this fact in her written statement or affidavit. She in her cross-examination states that she had not mentioned in her affidavit or written statement about Netra and respondent sleeping together in her room at her matrimonial home.

73. Except for the bald statement that respondent and Netra were living together there is no other evidence. Moreover, none of those ladies, who have told the appellant, that respondent was a womaniser, have been examined as a witness nor their names have been mentioned in the written statement or in affidavit filed by the appellant.

74. Here the appellant has made very serious allegations against the character of her own husband, such as, that her husband is a womanizer; that he is keeping his cousin as mistress; his mistress has given birth to his child and he is involved with various other women.

75. Nothing has been substantiated by the appellant with regard to these allegations and making of such allegations which affects the reputation of a person and cause damage to his character, are nothing less then cruelty. As such, I find no reason to disagree with the finding of the trial court on this issue.

76. Now, coming to the second issue with regard to desertion. The respondent has stated that after the year 1968, the appellant has not lived with him while appellant''s case is that after April, 1958 they had not lived together and the only reason given by the appellant for staying away from the respondent was that Ms.Netra was living as the mistress of the respondent, with him. This reason, I have already held, does not appeal to common sense.

77. The appellant has admittedly left the matrimonial home in the month of April, 1958 on account of Ms.Netra and at that time admittedly, Ms.Netra was not at her (appellant''s matrimonial home) and thus appellant had no reason to live the matrimonial home. It is also proved on record that respondent has written various letters to the appellant asking her to join but the appellant has not joined the respondent and has not visited him on the death of his parents. Therefore, it is a clear case of desertion on the part of the appellant.

78. There is no dispute about the principle of law laid down in the various judgments cited by learned Counsel for the appellant. However, these judgments are not applicable to the facts of the present case.

79. It is an admitted fact that parties are living separately atleast since 1968, though the appellant states that she has living separately since 1958. Taking the year of separation as 1968, the parties are living separately for more than 40 years and, thus, there is no possibility that this marriage can revive and there is complete breakdown.

80. In Sanghamitra Ghosh v. Kajal Kumar Ghosh 1 (2007) DMC 105 (SC), the Apex Court has observed as under;

In the case of Ashok Hurra Vs. Rupa Bipin Zaveri, , this Court while dealing with a matrimonial matter quoted few excerpts from the Seventy-first Report of the Law Commission of India on the Hindu Marriage Act, 1955 - "Irretrievable Breakdown of Marriage" - dated 7.4.1978. We deem it appropriate to reproduce some excerpts from the said report as under:

Irretrievable breakdown of marriage is now considered, in the laws of a number of countries, a good ground of dissolving the marriage by granting a decree of divorce.

* * *

Proof of such a breakdown would be that the husband and wife have separated and have been living apart for, say, a period of five or ten years and it has become impossible to resurrect the marriage or to reunite the parties. It is stated that once it is known that there are no prospects of the success of the marriage, to drag the legal tie acts as a cruelty to the spouse and gives rise to crime and even abuse of religion to obtain annulment of marriage.

* * *

The theoretical basis for introducing irretrievable breakdown as a ground of divorce is one with which, by now, lawyers and others have become familiar. Restricting the ground of divorce to a particular offence or matrimonial disability, it is urged, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be

worked. The marriage has all the external appearances of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a facade, when the emotional and other bounds which are of the essence of marriage have disappeared. After the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce. The parties alone can decide whether their mutual relationship provides the fulfilment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.

* * *

Moreover, the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one''s offspring. Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage --"breakdown"- and if it continues for a fairly long period, it would indicate destruction of the essence of marriage - "irretrievable breakdown".

81. In Naveen Kohli v. Neelu Kohli 128 (2006) DLT 360 , the Apex Court has observed as under;

Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. Because of the change of circumstances and for covering a large number of cases where the marriages are virtually dead and unless this concept is pressed into services, the divorce cannot be granted. Ultimately, it is for the Legislature whether to include irretrievable breakdown of marriage as a ground of divorce or not but in our considered opinion the Legislature must consider irretrievable breakdown of marriage as a ground for grant of divorce under the Hindu Marriage Act, 1955.

The 71st Report of the Law Commission of India briefly dealt with the concept of Irretrievable breakdown of marriage. This Report was submitted to the Government on 7th April, 1978. We deem it appropriate to recapitulate the recommendation extensively. In this Report, it is mentioned that during last 20 years or so, and now it would around 50 years, a very important question has engaged the attention of lawyers, social scientists and men of affairs, namely, should the grant of divorce be based on the fault of the party, or should it be based on the breakdown of the marriage? The former is known as the matrimonial offence theory or fault theory. The latter has come to be known as the breakdown theory.

In the Report, it is mentioned that the germ of the breakdown theory, so far as Commonwealth countries are concerned, may be found in the legislative and judicial developments during a much earlier period. The (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920, included for the first time the provision that a separation agreement for three years or more was a ground for making a petition to the court for divorce and the court was given a discretion (without guidelines) whether to grant the divorce or not. The discretion conferred by this statute was exercised in a case in New Zealand reported in 1921. Salmond J., in a passage which has now become classic, enunciated the breakdown principle in these word:

The Legislature must, I think, be taken to have intended that separation for 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.

In the Report it is mentioned that restricting the ground of divorce to a particular offence or matrimonial disability, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked. The marriage has all the external appearances of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out Page 1408 of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a fagade, when the emotional and other bounds which are of the essence of marriage have disappeared.

It is also mentioned in the Report that in case the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce, then the parties alone can decide whether their mutual relationship provides the fulfillment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.

On May 22, 1969, the General Assembly of the Church of Scotland accepted the Report of their Moral and Social Welfare Board, which suggested the substitution of breakdown in place of matrimonial offences. It would be of interest to quote what they said in their basis proposals:

Matrimonial offences are often the outcome rather than the cause of the deteriorating marriage. An accusatorial principle of divorce tends to encourage matrimonial offences, increase bitterness and widen the rift that is already there. Separation for a continuous period of at least two years consequent upon a decision of at least one of the parties not to live with the other should act as the sole evidence of marriage breakdown.

Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties.

A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; divorce courts are presented concrete instances of human behavior as bring the institution of marriage into disrepute.

We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised 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 do not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

82. In Satish Sitole v. Smt. Ganga Civil Appeal No. 7567 of 2004, decided on 10.07.2008, the Apex Court has followed the decision in Romesh Chander Vs. Smt. Savitri, and observed as under;

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

In the said circumstances, following the decision of this Court in Romesh Chander''s case (supra) we also are of the view that since the marriage between the parties is dead for all practical purposes and there is no chance of it being retrieved, the continuance of such marriage would itself amount to cruelty, and, accordingly, in exercise of our powers under Article 142 of the Constitution we direct that the marriage of the appellant and the respondent shall stand dissolved....

83. The marriage between the parties was performed in the year 1956 and since 1968 there has been no cohabitation between the parties. There is complete loss of trust and faith between the parties and there is no love between the parties. There is a complete breakdown of the marriage and the marriage between the parties have broke down irretrievably and it cannot be said to be alive. This Court also made efforts for re-conciliation but failed. Since marriage between the parties has broken down and there is no chance of it being retrieved, the continuance of such marriage, would itself amounts to cruelty and as such the respondent is entitled to a decree of divorce on the ground of cruelty as per Section 13(1)(ia) of the Act.

84. Since the marriage has been broke down irretrievably and respondent has fully established his case with regard to the cruelty and desertion, the present appeal is liable to be dismissed and the same is, accordingly, dismissed.

CM Nos. 2123, 2124, 8621 & 4947/2008

85. Since the appeal filed by the appellant has been dismissed, consequently, applications being CM Nos. 2123, 2124 & 8621/2008 filed by the appellant and application being CM No. 4947/2008 filed by respondent also stand dismissed.

86. Parties are left to bear their own costs.

87. Trial court record be sent back.