(2002) 08 DEL CK 0228

Delhi High Court

Case No: LPA No''s. 593 of 2000 and 82 of 2001

Sushma Kohli @ Satya Devi	APPELLANT
Vs	
Shyam Sunder Kohli	RESPONDENT

Date of Decision: Aug. 14, 2002

Acts Referred:

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

Citation: (2002) 100 DLT 558

Hon'ble Judges: S.B. Sinha, J; A.K. Sikri, J

Bench: Division Bench

Advocate: N.K. Khetrapal, for the Appellant; Aman Lekhi and Rajesh Goyal, for the Respondent

Judgement

S.B. Sinha, C.J.
These two letter patent appeals arise out of a judgment and decree dated 8th September, 2000 passed by a learned Single Judge of this Court in FAO 501/99.

The fact of the matter is as follows:

The parties were married on 18th November, 1981. They have been living separately since February, 1987.

Shri Shyam Sunder Kohli, the respondent/appellant in LPA 82/2001, filed an application for divorce purported to be u/s 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955 alleging cruelty and desertion on the part of his wife, the respondent herein. It was further alleged that there had been no cohabitation between them. The respondent contested the said application on diverse grounds. Before the learned Additional District Judge, both the parties adduced their respective evidences. By a judgment dated 5th October, 1999, the Trial Judge dismissed the petition. The appellant preferred an appeal there against before the learned Single Judge. The learned Single Judge rejected the contention of the appellant so far as

the ground of cruelty is concerned. However, the appeal was allowed on the ground of desertion. Both the parties have filed these LPAs against the said judgment.

2. LPA 593 /2000 was filed by the wife on divorce being granted on the ground of desertion whereas LPA 82/2001 was filed by the husband against the order refusing divorce on the ground of cruelty.

3. Apart from these appeals, some other proceedings were/are going on between the parties under various provisions in various Courts such as:

Case No. 577/93 (pages 169-172 of LPA 82/2001)

Petition or maintenance u/s 125, Cr .P.C. was filed by Sushma Kohli in Meerut on 24.9.1993.

Same was dismissed in default on 8.12.1994.

Case No, 667/94 (pages 173-178 & 34 para N of LPA. 82/2001)

Sushma Kohli again filed a fresh petition u/s 125, Cr.P.C. in Meerut on 19.12.1994.

The same was allowed by the Family Court on 16.3.1998. Cr. Revision 624/98.

Against the order of Family Court dated 16.3.1998, Shri. S.S. Kohli filed a criminal revision in Allahabad High Court.

Allahabad High Court issued notice to her and stayed the operation of order dated 16.3.1998 and the matter is still pending.

Complaint No. 59/97 (pages 34 Para N of LPA 82 of 2001)

Shri S.S. Kohli filed a criminal complaint against Sushma Kohli for committing an offence of Bigamy u/s 494, IPC in Karkardooma Courts, Delhi and summons were issued to her.

The matter is still pending

Complaint Case No. 51 of 1999/2668 of 2000

Sushma Kohli filed a criminal complaint against S.S. Kohli and all his family members for return of Istridhan u/s 406, IPC. Summons have been issued.

Cr. Revision 3866/2001

Notice was issued to her and proceedings have been stayed by Allahabad High Court in Cr. Rev. No. 3866/2001 on 1.8.2001.

C.R. 474/92 (pages 186-187 LPA 82/2001)

Sushma Kohli filed a C.R. 474/92 in Delhi High Court for enhancement of maintenance which was granted by the Trial Court.

The same was dismissed in default on 8.2.1995.

The order granting maintenance was also recalled by the Trial Court on 8.1.1996, as she got the order for maintenance by filing the false affidavit. (pages 183-186 of LPA 83/2001)

C.R. 149/97 and C.R. 350/97 (pages 106-121 of LPA 82/2001

Sushma Kohli filed the revision petition in Delhi High Court challenging the order of Trial Court vide which her evidence was closed. The same was allowed.

It is significant to mention here that Sushma Kohli got her matter transferred from the Court of Shri M.C. Garg, ADJ to the Court of Shri Kuldeep Singh, ADJ on the ground that he is disposing of the matter quickly.

T.P. 257/97 in Supreme Court of India

After getting transferred from one ADJ to another, Sushma Kohli filed the transfer petition in Supreme Court of India for transfer of proceedings from Delhi to Meerut.

The same was dismissed by the Hon''ble Supreme Court of India on 27.8.1997.

4. The status of the parties in these appeals before the learned Single Judge are being referred to herein.

5. Before proceeding to deal with the respective contentions of the parties, we may notice that at our instance, the parties had appeared before us on 19th April, 2002. Whereas the wife expressed her unequivocal willingness to go back to her husband, the appellant refused to take her back on the ground that he had been too much harassed by her. It was further alleged that she had illicit relations with someone else.

6. Dr. Khetrapal, learned Counsel appearing on behalf of the respondent/wife in LPA No. 593/2000, would submit that his client had all along been and still is ready and willing to go back to her husband and thus it is not a case wherein the animus deserendi can be said to have proved. The learned Counsel would argue that the learned Single Judge committed serious errors of fact and law in so far as it failed to take into consideration that unless and until all the conditions precedent to prove desertion are established, a suit for divorce cannot be decreed on the said ground. The learned Counsel would further contend that keeping in view the findings arrived at by the learned Trial Court, the learned Single Judge ought not to have interfered therewith. The learned Counsel would further contend that in the instant case, the learned Single judge has relied upon certain evidences which had not been pleaded that thus, the same cannot be taken into consideration. Reliance in this connection has been placed on N.D. Khanna Vs. Hindustan Industrial Corporation, . He further contends that the onus to prove cruelty lay on the applicant, in this connection, he relied on Maya v. Brij Nath, 1 (1982) DMC 31.

7. It was submitted that the learned Single Judge committed a serious error in so far as it took into consideration her allegations relating to Hari Shanker Sharma, which were beyond the pleadings in the matter. Our attention in this connection has been drawn to the fact that even in the amended divorce petition, the husband had raised only the following contentions:

(a) Conduct of the wife towards him, his friends and parents was not caring.

(b) The wife was not submitting to the matrimonial obligations of performance of sex by the husband.

(c) After wife left the matrimonial home, husband made attempts to reconcile the matter and had even gone to Meerut in the parents'' house of the wife.

(d) In para 13 of the divorce petition it was stated:

"The petitioner (husband) who was under the pressure of the respondent (wife) not to file the present petition (divorce petition) as has been forced to file the present petition on account of the fact that the petitioner has been able to lay hands on certain certificates of the respondent showing her age and date of birth as 12th October, 1952 by virtue of which she became older in age than the petitioner for more than five years. It became impossible for the petitioner to live with the respondent under such circumstances. Hence the present petition."

8. The learned Counsel would furthermore contend that the allegation to the effect that his client had not submitted to the demand of her husband relating to sex, is not correct.

9. Mr. Lekhi, learned Counsel appearing on behalf of the appellant/husband in LPA No. 82/2001 on the other hand, would contend that the marriage between the parties is emotionally dead and there has been an irretrievable breakdown of marriage. He would urge that admittedly since 1987, the respondent had been living separately. According to the learned Counsel, if she intended to go back to her husband, it was expected that she would file an application for restitution of conjugal rights, it was submitted that in her written statement, false and scandalous allegations had been made against her husband and family members alleging demand of dowry, physical assault as also an attempt to kill by pouring kerosene oil on her, etc. and, thus, in the aforementioned situation, he would contend that as the same would amount to cruelty, it is a fit case where the inherent jurisdiction of this Court should be invoked for passing a judgment of divorce. Reliance in this connection has been placed on V. Bhagat Vs. Mrs. D. Bhagat, Chanderkala Trivedi (Smt) Vs. Dr. S.P. Trivedi, ; Smt. Kusum Lata v. Shri Satish Kuntar Khanna, 1993 4 AD (Del) 595.

10.

The learned Counsel would further contend that between the parties as even other proceedings including a proceeding in the Family Court and a criminal complaint of Bigamy have been going on, a decree for divorce should be passed having regard to the factual circumstances of the present case.

11. As regard the question of desertion, the learned Counsel would contend that the question of animus deserendi is essentially a question of fact. Drawing our attention to an application for appointment dated 7th December, 1990 filed by the respondent it was contended that she therein even did not describe herself as wife of the appellant and filed the same through one Shri Hari Shanker Sharma from his residential address bearing 138, Anandpuri, Meeruti City. It was further contended that even she had taken a Life Insurance Policy on 12th February, 1992 wherein she described herself to be wife of Shri Hari Shanker Sharma who was also made her nominee. She, it was contended, filled the requisite form and signed therein as Satya Devi. It has further been pointed out that even she had opened a joint bank account with Shri Hari Shanker Sharma and the payment of the aforesaid policy was paid from the said account.

12. The learned Counsel would submit that it is not correct to contend that no evidence is admissible which has been rendered beyond the pleadings inasmuch as if the parties had led evidence on a point which, although not pleaded, but if thereby no prejudice had been caused, reliance can be placed upon such evidence. Reliance in this connection has been placed on Ganesh Shet Vs. Dr. C.S.G.K. Setty and Others, and Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others,

13. Dr. Khetrapal, in reply, would submit that not only his client had been thrown out of the matrimonial home but having regard to the facts and circumstances of this case, she had good reasons to live separately. According to the learned Counsel, taking of such alternative defense is permissible in law. It has been pointed out that not only the respondent but also other witnesses in their evidences before the learned Trial Judge categorically stated that she had sent many relatives of her husband and made serious efforts to live with him.

14. Dr. Khetarapal would further contend that irretrievable breakdown of marriage is not a ground of divorce. The learned Counsel would contend that the decision of the Apex Court in V. Bhagat v. D. Bhagat (Mrs.) (supra), was rendered in exercise of its jurisdiction under Article 142 of the Constitution of India, which power, this Court does not possess.

15. In the aforementioned backdrop, the question which arises for consideration in these two letter patent appeals are:

(i) Whether the learned Single Judge erred in allowing the appeal on the ground of desertion on the part of the wife? and

(ii) Whether the learned Single Judge erred in not granting a decree against the wife on the ground of cruelty?

(iii) Whether a degree for divorce can be granted on the ground that there has been an irretrievable breakdown in marriage?

RE: QUESTION NO. 1

16. The plea relating to desertion was raised in para 14 of the petition wherein it was contended by the appellant that the respondent deserted him on 28th January, 1987 where after there had not been any cohabitation between the parties.

17. The contention of the respondent on the other hand is that on 10th February, 1987 her father had visited the matrimonial home of the parties. The appellant, instead of treating them with respect, insulted them and even the respondent was turned out of her matrimonial home by her mother-in-law. It had been denied and disputed that there had been any desertion on her part.

18. The learned Trial Judge in his judgment having analysed the evidences on record, inter alia, held that the appellant herein had not been able to prove desertion on the part of the respondent. In the said judgment, it was pointed out that the story that the appellant had gone to her parents'' place on 20th June, 1990 along with one Ram Singh and on 21st January, 1991 along with Shri J.M. Medhok, had not been corroborated as neither of them had been examined.

19. Referring to the testimonies of the father of the appellant who examined himself as PW 3 and one Kundan Lal as also one Madan Lal who examined themselves as PW 5 and PW 6 respectively, the learned Trial Judge arrived at the finding that their evidences do not inspire confidence. It was held:

"PW 3 Sh. Ram Saren father of the petitioner could not give the date or the month of his visit and he even could not give the particulars of the place where he had allegedly met the respondent and her father. Similarly, the other witnesses have not stated as to when and with whom they had gone to the house of the father of the respondent and their testimonies also thus do not help the petitioner in any way."

20. The learned Trial Judge observed that the very fact that even according to the appellant himself, he had gone to bring back his wife for the first time after a period of three years of alleged separation, is also a pointer to the fact that he was not serious in relation thereto.

21. Referring to the evidence of the respondent herein, the learned Trial Judge found that having regard to the clear and unequivocal assertion made by her that she had been waiting for the husband to come and take her back to her matrimonial home, no case for separation had been made out.

22. The learned Single Judge unfortunately reversed the said findings of fact without discussing the evidence on record.

It was held:

"25. I have read the evidence or the appellant PW 1 and evidence of the respondent RW 3.1 don''t think any other conclusion is possible except to say that the respondent is guilty of desertion. She has not been able to explain which should be expected in law about her opening of an account along with Hari Shanker Sharma and denied the same with impunity and her attempt to show that on her behalf people attempted to bring about reconciliation and the appellant did not accept the same. The respondent being an educated lady was fully conscious what she was doing and I can only say that she had made an attempt to defeat the right of the appellant to have decree for divorce in accordance with law. When there had been no meeting point and when the respondent-wife had not made serious efforts to join the marital home she cannot escape by trying to put the blame on the parents of the appellant and the appellant, on the ground that they were demanding dowry, She had ignored the fact that the appellant and the respondent had lived together for about 4-5 years with all the differences which each of them had been alleging against each other. In the light of the conspectus of events, I am clearly of the view that the appellant has made out his case of desertion.

26. The evidence of RW 3 in the light of her allegations in the written statement and her evidence is all artificial, not trust-worthy. She would deny the suggestion that she left the matrimonial home on 28.1.1987. She would further state:

''I was not at the matrimonial home and it is further wrong that my father and other persons never came to the matrimonial home on 10.2.1987. At the P.S. Krishna Nagar my father and my brother were with me and it was about 10 a.m. on 10.2.1987 it had taken only 15 minutes that we remained in the P.S. to lodge the report and from P.S. we had gone to Meerut. No prior information was given to the petitioner or his family members that my father and other persons of Panchayat will be visiting on 10.2.1987. The aforesaid persons came at about 8.30 a.m. in the morning on 10.2.1987 at the matrimonial house. Sona Ram and Rajinder Kumar accompanied me to the P.S. on 10.2.1987. The statements of Sona Ram and Rajinder Kumar were not recorded by the police on that day in support of the report. They also left the P.S. Along with me to Meerut. It is wrong that I was not insulted or pushed on 10.2.1987, from the matrimonial home in the presence of my father and other persons. It is further wrong that I am deposing falsely that I was not turned out from the house in 3 clothes. It is further wrong that petitioner has not kept any of my Istridhan. I had not stated in my report lodged with the police that I was insulted and pushed from the matrimonial home''."

23. The approach of the learned Single Judge, to say the least, is not correct. Section 13(1)(ib) reads thus:

"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) has after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(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 (iii) 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 willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly."

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."

24. Desertion is the break up in the matrimonial home, which is by one spouse from the company of the other. When one spouse has to leave the matrimonial home under compulsion, the same would not amount to desertion. Physical leaving of home by itself would not amount to desertion unless animus deserdendi is established. One of the spouses by reason of circumstances obtaining in the matrimonial home may be forced to leave. In the instant case, the learned Trial

Judge has categorically held that the respondent was forced to leave the matrimonial home by reason of acts, omissions and commissions on the part of the appellant and his parents.

25. Learned Trial Judge as noticed hereinbefore, however, found that the purported attempt on the part of the appellant to bring his wife back to the matrimonial home was not serious enough. Who is to be blamed Therefore is a question of fact. Such a question of fact in absence of any perversity or reasonable cause as indicated hereinbefore may not be interfered with at the appellate stage.

26. In Bipin Chander Jaisinghbhai Shah Vs. Prabhawati, the Apex Court upon referring to "Rayden on Divorce" and "Halsbury''s Laws of England (3rd Edn.), Vol. 12 held:

"Thus the quality of permanence is one of the essential elements which differentiates desertion from willful separation. If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. 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 to 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."

27. Holding that the inference of desertion may vary from case to case, it was observed:

"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 minus 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 deserdendi 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."

28. Reference in this connection may also be made to V. Sulochana v. K. Rajigopal, reported in 1 (1997) DMC 139.

29. It is now a well-settled principle of law that the Appellate Court normally would not interfere with the findings of fact arrived at by the learned Trial Judge. In Kalipada Saha v. Smt. Lila Rani Saha, (1995) (1) Cal. HC 284, it was held:

"52. Moreover the learned Court below upon appraisal of the evidence brought on records accepted the plea of marriage. Such a finding based on oral testimonies of the witness shall not be ordinarily interfered with by the Appellate Court.

53. In Mandholal v. Official Assignee of Bombay, reported in AIR 1950 Fed 21, it has been observed:

"It is true that a Judge of first instance can never be treated as infallible in determining on which side the truth lies and like other Tribunals he may go wrong on question of fact but on such matters if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at, the Appeal Court should not lightly interfere with the judgment."

To the same effect is the judgment of the Supreme Court in Madhusudan Das Vs. Smt. Narayanibai (Deceased) by Lrs. and Others, In this case, the learned Trial Court had considered the testimonies of the witnesses examined on behalf of the plaintiff relating to the fact at issue. I find that the findings arrived at by the Trial Court are reasonable and as such there is no reason as to why this Court would differ with the said findings on the aforementioned point.

"54. In Rajbir Kaur and Another Vs. S. Chokesiri and Co., the Apex Court upon consideration of a large number of decisions observed as follows:

"18. Reference on the point could also usefully be made to A.L. Goodhard''s Article (71 LQR 402 at 405) in which the learned author points out:

''A Judge sitting without a jury must perform dual function. The first function consists in the establishment of the particular facts. This may be described as the perceptive function. It is what you actually perceive by the five senses. It is a datum of experience as distinct from a conclusion.''

It is obvious that, in almost all cases tried by a Judge without a jury, an Appellate Court, which has not had an opportunity of seeing the witnesses, must accept his conclusions of fact because it cannot tell on what ground he reached them and what impression the various witnesses made on him''.

The following is the statement of the same principle in ''the Supreme Court Practice'' (White Book 1988 Edn. Vol. 1)

''Great weight is due to the decision of a Judge of first instance whenever, in a conflict of testimony, the demeanor and manner of witnesses who have been seen

and heard by him are material elements in the consideration of the truthfulness of these statements. But the parties to the cause are nevertheless entitled as well on questions fact as on questions of law to demand the decision of the Court of Appeal, and that Court cannot excuse, itself from the task of weighing conflicting evidence, and drawing its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance-in this respect.'' (pp. 854-55)

"..... Not too have seen witnesses puts Appellate Judges in a permanent position of disadvantage against the trial Judge, and unless it can be shown that he was failed to use or has palpably misused his advantage for -- for example has failed to observe inconsistencies or indisputable fact or material probabilities (ibid, and Yuill (1945)/ 15; Watt v. Thomas, (1947) AC 484.-- the higher Court ought not to take the responsibilities of reversing conclusions so arrived at merely as the result of their own comparisons and criticisms of the witnesses, and of their view of the probabilities of the case...." (p. 855)

"..... But while the Court of Appeal is always reluctant to reject a finding by a Judge of the specific or primary facts deposed to by the witnesses, especially when the finding is based on the credibility or bearing of a witness, it is willing to form an independent opinion upon the proper inference to be drawn from it....." (p. 855)

A consideration of this aspect would be incomplete without a reference to the observations of B.K. Mukherjee, J., in Sarju Pershad Vs. Raja Jwaleshwari Pratap Narain Singh and Others, which as a succinct statement of the rule cannot indeed be bettered:

"The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the Appellate Court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in Court. This certainly does not mean that when an appeal lies on facts, the Appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is and it is nothing more than a rule of practice that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge''s notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the Appellate Court should not interfere with the finding of the trial Judge on a question of fact."

19. The area in which the question lies in the present case is the area of the perceptive functions of the trial Judge where the possibility of errors of inference does not play a significant role. The question whether the statement of the witnesses in regard to what was amenable to perception by sensual experience as

to what they say and heard is acceptable or not is the area in which the well-known limitation on the powers of the Appellate Court to reappreciate the evidence falls. The Appellate Court, if it seeks to reverse those findings of fact, must give cogent reasons to demonstrate how the Trial Court fell into an obvious error.

With respect to the High Court, we think, that, what the High Court did was perhaps even an Appellate Court with full-fledged appellate jurisdiction would, in the circumstances of the present case, have felt compelled to abstain from and reluctant to do. Contention (c) would also require to be upheld."

30. Before this Court purported subsequent events have been brought on record. The judgment of the Trial Court was passed on 5.10.1999. The appellant during the pendency of the divorce petition, as noticed hereinbefore, sought to bring on records certain documents namely the application for a job by the respondent wherein her address of one Hari Shankar Sharma was shown, an insurance policy dated 12.2.1992 wherein she allegedly showed Mr. Hari Shankar Sharma as her husband as also a joint bank account with him.

31. Having regard to the fact that such evidence was beyond the pleadings of the parties, the same was wholly inadmissible in evidence. From a perusal of the judgment passed by learned trial Judge it appears that no reliance has been placed thereupon by the appellant on those evidences. It is trite that no evidence would be admissible where for no pleading has been raised.

32. In Ram Sarup Gupta v. Bishun Narain Inter College and Ors. (supra), the Apex Court held thus:

"6. The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the license was irrevocable as contemplated by Section 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. It order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the Court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about the pleading is raised the enquiry should not be so much about the

form of the pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal. In Bhagwati Prasad Vs. Shri Chandramaul, , a Constitution Bench of this Court considering this question observed (at p. 738 of AIR):

"If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

33. Having regard to the seriousness of the allegations, it must be held that the respondent was sufficiently prejudiced.

34. Mr. Lekhi however, has relied upon Romesh Chander v. Smt. Savitri, 1 (1995) DMC 231 : 1995 SC 851 and Ram Sarup Gupta v. Bishun Narmn Inter College and Ors. (supra). The said decisions are not applicable to the facts of this case inasmuch as not only thereby the respondent has been prejudiced, serious aspersions against her character had been made. It was, Therefore, obligatory on the part of the appellant to file appropriate application for amendment of the pleadings bringing the said facts on the records so as to enable the respondent not only to file additional written statement controverting the said allegations, but also adducing evidences far rebutted thereof. The allegations made by the appellant against the respondent were serious in nature and amounted to Bigamy and/or living in adultery. The appellant did not take any steps for amending his application for divorce nor imp leaded the said Hari Shankar Sharma as a party therein. Allegations were made without any proof and the same cannot be a ground for divorce,

35. The learned Single Judge in his impugned judgment did not state as to why the findings of the learned trial Judge are unsustainable. There is also no finding that

there exists ''animus deserdendi''.

36. The learned Single Judge has erroneously placed the burden of proof upon the respondent. It was not for the respondent to make a serious effort to come back nor the same is a legal requirement. In fact, the learned Single Judge failed to notice the evidence of the respondent to the effect that she did make such efforts. Not only she had sent her relatives for that purpose, but also categorically stated in her evidence that she wanted to live with appellant.

The learned Single Judge in his impugned judgment jumped to the conclusion that the plea of desertion has been proved without discussing the evidences on records holding:

"When there had been no meeting point and when the respondent-wife had not made serious efforts to join the marital home she cannot escape by trying to put the blame on the parents of the appellant and the appellant, on the ground that they were demanding dowry. She had ignored the fact that the appellant and the respondent had lived together for about 4-5 years with all the differences which each of them had been alleging against each other. In the light of the conspectus of the events, I am clearly of the view that the appellant has made out his case of desertion."

38. We, Therefore, are of the opinion that the findings of the learned Single Judge cannot be sustained. Question No. 1 is answered accordingly.

Re. Question No. 2:

39. The appellant on his plea of cruelty made the following allegations against the respondent:

"That even driving the period the respondent lived with the petitioner, the respondent has been neglecting the petitioner and was not submitting herself for performance of the matrimonial obligation and as and when the petitioner has attempted to have sexual intercourse with the respondent the respondent did not allow the petitioner and in fact the respondent has stated to the petitioner that she will not allow him to have sexual intercourse with her as she was not liking the petitioner but at the same time the respondent has threatened the petitioner that in case petitioner shall try to perform matrimonial obligation forcibly or without her consent in that event the petitioner will be involved in criminal cases with the result the petitioner has always been under the threat of the respondent which has made the life of the petitioner a hell and the petitioner who thought that his life will be peaceful and enjoyable after the marriage has never thought that he will be involved in such circumstances which will make his life a hell."

"That in fact initially when the marriage between the petitioner and the respondent was solemnized and was consummated for a period of a about 5-6 months and the respondent insisted the petitioner to use contraceptives so that the respondent may

not give birth to a child to the petitioner and after the period of 5-6 months the respondent reduced the frequency to have sexual intercourse with the petitioner. In fact, the respondent never submitted herself to have sexual intercourse with the petitioner at the desire of the petitioner with a result that there has not been any child out of the wedlock of the respondent and the petitioner. There has not been any cohabitation between the petitioner and the respondent at least since 1986 onwards."

"That the petitioner has always been objecting and advising the respondent not to leave the matrimonial home and to go to Meerut but the respondent did not care to the advice of the petitioner. It was in the month of March, 1984 the mother-in-law of the petitioner had taken the respondent with her only for a period of one week but the respondent did not come back up to August, 1984 although the petitioner has been insisting the respondent to come back. Even thereafter it has been routine or the respondent to leave the matrimonial home and go to Meerut and live there for a long time without caring for the petitioner. Even in December, 1986, the father-in-law of the petitioner had written to the petitioner that he will be coming to take the respondent and thereafter taken her on 28.1.1987 in the absence of the petitioner when the petitioner was in the office and it has been learnt that some report was also lodged by the respondent against the petitioner with Police Station Krishan Nagar, Delhi and since then the respondent has not come back in spite of various efforts on the part of the petitioner and the respondent has been continuously residing on the address given in the heading of this petition. A number of relations of the petitioner are living in Meerut. They have also contacted the respondent and her parents but their efforts have always been of no avail and the respondent has been continuously living separately. It is important to mention that by leaving the matrimonial home, on 28th January, 1987, the respondent has taken with her of her valuable articles and golden ornaments."
"In paragraph 13 the appellant has stated that the parents of the respondent had concealed her real age from the appellant. Normally the wife is always younger to the husband. On these averments, the appellant came forward with a case of cruelty and desertion."

40. The said allegations were traversed by the respondent in her written statement in the following lines:

"The contents of para No. 4 are wrong and denied excepting that the respondent lived with the petitioner at the places alleged in the para and that the pay of the petitioner initially was Rs. 600/- per month. It is wrong to state that only initially for the period of six months the behavior of the respondent was cooperative. It is further submitted that the respondent/wife was always co-operative and courtesy during her stay at the matrimonial house with the petitioner and other members of his family. The respondent is ignorant about what the petitioner thought and dreamed about his marriage and type of girl he wanted to marry before petitioner

actual married with the respondent. Thus the respondent does not know about the dreams and expectations of the petitioner before the marriage with the respondent. It is further submitted that it was the spirit of greed and avarice of the petitioner and his parents that played havoc with the married life of the respondent. The fact is that the respondent''s parents could not fulfill the every day demands made by the petitioner and his parents. The petitioner and his parents failed to come upon the expectations of the petitioner and his parents and cater to and meet the demand made by the in-laws of the respondent."

"The contents of para No. 9 are again false, fabricated, motivated, misleading and denied. It is categorically denied that during the period the respondent lived with the petitioner. She was not submitting herself for performance of matrimonial obligations as and when the petitioner wanted to have sexual intercourse with her. It is vehemently denied that she ever said that she did not like the petitioner and Therefore she ever stopped him from having sexual intercourse with her. It is further wrong and denied that she ever threatened the petitioner to involve him in criminal case if he forcibly did intercourse with her. All the allegations made in the para are baseless and without any substance Therefore absolutely denied. Besides the petitioner has failed to specify the day or the month pertaining to the alleged allegations against her."

"The allegations in the para are baseless unfounded and the repetition of the allegations made in para 9, Therefore vehemently denied. It is wrong and denied that respondent asked to petitioner to use the contraceptive during first 5/6 months of the period soon after marriage while doing intercourse with her. It is further wrong and denied that respondent had no intention to give birth to a child. It is further wrong to state that later the respondent reduced the frequency to have cohabitation with the petitioner, which become a reason for not having a child out of the wedlock. It is wrong and categorically denied that since 1986 there has not been any cohabitation between the petitioner and the respondent. Whereas the fact is that even during the compromise talks whenever the respondent came to Meerut or whenever the petitioner came to Delhi they used to have sexual intercourse with each other for couple of time at night. The respondent has got her medically checked up and it was proved that she was fit for conceiving a child and Therefore the allegations of the petitioner made in the para are baseless, unnatural and against the women''s instinct to become mother."

41. The marriage was solemnized on 18.11.1981. There had been alleged stoppage of cohabitation only from 10.1.1987. For six years the appellant did not make any complaint. On the other hand his stand had all along been that he was interested to live with his wife and he made attempts on 20.6.1990 and 2.1.1991 to bring her home back.

42. Para 4 of the amended petition suggests that there is no admission on the part of the appellant that initially for a period of 5-6 months the respondent had never

cooperated with him. He accepted that the said time had lived with ease and comfort. The reasons for change in the attitude of the respondent had not been pleaded.

43. The learned trial Judge as also the Court of the First Appeal had elaborately discussed the evidences on records and arrived at concurrent findings of fact that the appellant had not been able to prove his plea of cruelty.

44. Cruelty having regard to the long line of the decisions would inter alias mean: "conduct of such character as have because danger to life or to heath (bodily or mentally), or may raise reasonable apprehension of such danger".

45. Discomfort by itself would not amount to cruelty. However, there can be a mental cruelty. Psychological behavior may be amounting to or greater than results of physical danger came to be regarded as mental cruelty. We are, however, of the opinion that it is not necessary to delve deep into the matter having regard to the concurrent findings of fact arrived at by the learned Trial Court as also the learned Single Judge to the effect that the appellant has singularly failed to prove cruelty.

46. It has been accepted that for the first 5-6 months, the behavior of the respondent was normal. Allegedly, thereafter only she had started neglecting the appellant and had not been submitting herself to the performance of the matrimonial obligations. The learned Trial Court, who had the occasion to note the demeanour of the parties in their witnesses, when they were being examined, has arrived at a finding of fact that no specific incident has been cited when the respondent had allegedly misbehaved with the petitioner, his parents and other family members or when she had disobeyed him and had not respected his friends and colleagues when they visited him. It was noticed:

"29. In his statement, the petitioner has stated that:

"After 28.1.19871 had no sexual relations with the respondent before that whenever I tried to have sex with her she used to compel me to use contraceptives and also used to misbehave in the bed and she used to push me as by her legs and I used to fall down from the bed and she used to pull my sex organ brutally causing me great pain and hurt etc."

In regard thereto, the learned Trial Court has held:

"30. A perusal of the record reveals that these allegations as mentioned in the petition are also general in nature and no specific incidents have been mentioned when the respondent had allegedly refused to submit herself for sexual intercourse and that threatened to involve the petitioner in criminal cases if he attempted to do forcibly. The statement of the petitioner that the respondent used to misbehave in the bed, she used to push him by her legs and he used to fall down from the bed, she used to pull his sex organ brutally causing him great pain and hurt etc. is also beyond pleadings. Strangely enough, no such incident has been mentioned in the

petition and this statement of the petitioner cannot be relied upon being beyond pleadings.

31. The petitioner has failed to prove that the respondent has ever refused to have sexual intercourse with him and the statement of the petitioner that the respondent used to compel him to use contraceptives shows that the petitioner was having sexual intercourse with the respondent and there is nothing to indicate that the respondent had ever threatened to involve him in criminal cases. The statement of the petitioner in this regard can easily be characterized as false particularly when the respondent has specifically denied these allegations and this contention of the petitioner is thus liable to be rejected."

The learned trial Judge observed:

"34. The petitioner has though stated that the respondent had told him that she did not want to marry him but there is no such averment in the petition. Similarly, there is no mention in the petition that the respondent was interested in one Sh. Hari Shanker. Merely that the respondent had opened an account in the bank jointly with Sh. Hari Shanker, it cannot be inferred that she was having any affair with him or that she was not interested to marry the petitioner. Similarly, the apprehension of the petitioner that the respondent was older than him and that is why she was not submitting herself for the sexual intercourse is unfounded. There is nothing to prove that the age of the respondent was concealed a the time of her marriage. The petitioner has stated that after the respondent had left the matrimonial home he had discovered from some documents of the respondent that she was older than Mm in age. No document has been placed on the record to prove this contention. Even otherwise such like marriages where the bride is older than the bride-groom are not uncommon and this can hardly be any reason for the denial of sexual intercourse by the wife to her husband or for causing any tension or agony. The respondent has examined herself and while denying all the allegations she has deposed that after about 5-6 months of the marriage the petitioner started taunting her for bringing insufficient dowry and he used to beat him for not bringing dowry to his expectations. She also deposed that once her mother-in-law hit her on her face for not bringing sufficient dowry and her right cheek got injured due to the fist blow and she was treated by Dr. Kundra. She also added that her mother-in-law demanded a scooter or Rs. 20,000/- in lieu thereof and when she showed her inability to bring the same from her parents she was threatened that she would be burnt. This statement of the respondent finds full corroboration from the statement of her father. Both these witnesses i.e. the respondent and her father were cross-examined at length by the learned Counsel for the petitioner but nothing favorable could be elicited and it stands established that after the marriage the petitioner and his family members including his mother started making demands of more dowry as they were not satisfied with the dowry brought by the respondent and on showing her inability she was beaten, tortured, ill-treated and humiliated by

the petitioner and his mother. The greed of the petitioner and his family members made the life of the respondent gloomy in the matrimonial home. It is thus evident that it is the petitioner and his family members who have treated the respondent with cruelty and petitioner cannot take advantage of his own wrongs."

It was further held:

"35. The demand of dowry is unlawful and constitute cruelty within the meaning of Section 13(1)(ia) of the H.M. Act. The Hon''ble Supreme Court has also held in Shobha Rani v. Madhukar Reddy, in AIR 1988 121, that the demand of dowry is prohibited under the law and that by itself is bad enough and amounts to cruelty."

The learned Single Judge did not upset the said findings.

47. In view of the aforementioned finding of fact, it is difficult to hold that the appellant has been able to prove the allegation of cruelty against the respondent.

48. In Shobha Rani Vs. Madhukar Reddi, , the Court held:

"5. 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. There may be a generation gap between us and the parties. 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 v. Sheldon, (1966) 2 All ER 257, "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 wonderful (sic) realm of cruelty."

49. We, Therefore, are of the opinion that no case has been made out for interference with the findings of the learned trial Judge as also the learned Single Judge, Question No. 2 is answered accordingly.

Re: Question No. 3:

50. The submission that the Court should exercise its inherent jurisdiction in passing a decree for divorce on the ground that the marriage his irretrievably broken down

had not been raised before the learned Trial Court or before the learned Single Judge. Such a plea has been raised for the first time herein. Having regard to the facts of this case in particular the conduct of the appellant, it is not possible for us to allow the appellant to raise the said plea for the first time in this proceeding.

51. In the aforementioned backdroo, the decisions cited by the learned Counsel for the appellant may be noticed.

52. It is true that one of the decisions of the Apex Court in V, Bhagnt v. D. Bhagat (Mrs.) (supra), it has been held:

"10. That this is a rather unusual case can hardly be disputed. The divorce petition has been pending for more than 8 years. With a view to expedite its disposal it was transferred from the District Court to the High Court. This Court repeatedly requested (in 1987 and 1991) the High Court to try the matter on a day-to-day basis and dispose it of expeditiously. The petition is still at the stage of trial. It is not possible for us to apportion the blame. Each side attributes it to the other. Five learned Judges of the High Court have tried their hand at the case, but it still remains at the stage of trial. The cross-examination of the petitioner alone took one full year. The cross-examination of the respondent is yet to begin. Having regard to the number of allegations made by the petitioner in his divorce petition and the material relied upon by him, it may safely be presumed that the cross-examination of the respondent Would take as much time as the cross-examination of the petitioner, if not more. Each party, it appears, is out to punish the other for what the other is supposed to have said or done. This appears to be the single thought ruling their lives today. A good part of the lives of both the parties has been consumed in this litigation and yet the end is not in sight. The assertion of the wife that she wants to live with the husband even now, appears to be but a mere assertion. After all the allegations made against her in the petition and the allegations leveled by her against the petitioner, living together is out of question. Re-approachment is not in the realm of possibility. For the parties to come together, they must be super-humans, which they are not. The parties have crossed the point of no return long ago. The nature of the allegations leveled against each other show the intense hatred and animosity each bears towards the other. The marriage is over except in name. The desirability of allowing the continuation of the divorce proceedings in the particular facts and circumstances of this case, is open to grave doubt. The matter may take more than a year -- at the minimum -- to conclude in High Court and then there is the right of appeal to the losing party. Both the parties are well settled. The children are grown-up and are on their own. It is significant to note that this is not a case where allegations are made only by one party against the other; both have leveled serious allegations against the other. The husband calls the wife an adulteress and the wife calls the husband a lunatic."

53. In that case also cruelty had not been proved. The Apex Court itself held that the matter was unusual one. It is not a case wherein jurisdiction of this Court as is

prayed for can be invoked nor this Court has any power like Article 142 of the Constitution of India.

54. In Chanderkala Trivedi (Smt) Vs. Dr. S.P. Trivedi, , the Apex Court observed:

"3. The submission of the learned Counsel for the appellant that the Division Bench committed error in observing that matrimonial proceedings are quasi criminal in nature Therefore it was for the wife to prove beyond all reasonable doubt that the husband was leading an adulterous life appears to have some merit in view of the decision of this Court in Dr. N.G. Dastane Vs. Mrs. S. Dastane, . But we do not propose to examine it as we are satisfied that the marriage is dead and the findings of fact cannot be set aside by this Court except the the appeal can be sent back to the Division Bench to decide it again which would mean another exercise in futility leading to tortuous litigation and continued agony of the parties. We may also mention that the findings of unbecoming behavior of the appellant appear to be shaky. We, Therefore, direct that such findings in the judgment of all the Courts shall stand deleted. Yet we have decided not to interfere with the order passed by the Division Bench. One of the reasons for this is that the husband on our persuasion agreed to provide a one-bedroom flat to the appellant in locality where it can be available between Rs. 3 to 4 lakhs. He also agreed to deposit a sum of Rs. 2,00,000/- for the welfare of the appellant.

4. Therefore, while dismissing this appeal we direct the husband (respondent) to purchase a flat for the appellant in Thane between Rs. 3 to 4 lakhs. He shall further deposit a sum of Rs. 2,00,000 A by a demand bank draft in name of the appellant with the Family Court, Bombay which shall be withdrawn by her. The house shall be purchased within six months from today and vacant possession shall be handed over to the appellant."

55. In Smt. Kusum Lata v. Shri Satish Kumar Khanna, (supra), it was held:

"20. The sum and substance, Therefore, is that mere delay is not an absolute bar to the grant of decree of divorce in cases of desertion. Whether it is unnecessary or improper depends upon the facts of each case. In the instant case, both the spouses are over 50 years in age, they have been away from each other for the last 14 years and there has been no serious effort for patch up during this long period, both are as cold as ever and the material tie appears to have been irretrievably broken. Though no specific Explanation to late filing of the divorce petition is given by the respondent I feel that no useful purpose would be served in prolonging uncertainty and agony any longer on the ground of delay, which taken as a bar is based on the theory of condensation and estoppel. Judging the case by all these standards in my view, the delay in filing the divorce petition should not operate as a bar to the grant of divorce to the respondent."

56. In the instant case, wife intends to go back her matrimonial home.

57. Bhagat (supra), was distinguished by the Calcutta High Court in Sukhendu Bikash Chatterjee v. Smt. Anjali Chatterjee, 1 (1996) DMC 388:(2) 1995 CLT 464, wherein it was held:

"6. Upon consideration of the materials on record both oral and documentary, the reasonings of the learned Trial Judge and the principle as laid down by the Apex Court of our country as regards grant of a decree on the ground of irretrievable breaking up of the matrimonial home in the case of V. Bhagat Vs. Mrs. D. Bhagat, , we are of the view that the findings of the learned Trial Judge, on which the dismissal of the suit is based, do not call for any interference. We fully affirm the reasonings of the learned Trial Judge and we hold further that in the case referred to above it was clearly laid down that the ground of irretrievable breaking of the matrimonial home can be taken recourse to only in exceptional case and the instant case cannot be said to be such an exceptional case. The allegations of the husband not having been established apart from the same being of very feeble nature and speculative. The wife''s willingness to go back to the matrimonial home could not be shown to be mala fide or lacking bonafides. In such a situation we are not prepared to grant any decree on the ground of irretrievable breaking up of the matrimonial home."

58. Yet again a learned Single Judge of this Court in Sudhir Singhal Vs. Neeta Singhal, , observed:

"19. Another submission of the learned Counsel appearing for the appellant that the marriage had irretrievably broken down. The said plea was sought to be supported on the fact that the respondent had collected all the articles by executing a receipt with no intention of coming back to the matrimonial home. In my considered opinion the same could not be a ground for allowing the dissolution of marriage. In this connection, it may be appropriate to state that irretrievable break down of marriage is not a ground recognized by law for grant of decree of divorce. The Supreme Court, of course, by exercising the powers under Article 142 of the Constitution of India granted such a decree for irretrievable break down of marriage in the case of V. Bhagat v. D. Bhagat (Mrs.) (supra). The said power, in my considered opinion, is, however, not available to the High Court for the High Court is bound by the statutory provisions made in that regard and cannot grant a decree which is not recognized by the aforesaid statutory provisions. In this connection, reference may be made to the decision of the Gujarat High Court in Anil Kumarv. Sunita; reported in 1 (1998) DMC 345, and the decisions of the Gauhati High Court in Gouri Shankar Chakravarty v. Smt. Basna Roy, reported in AIR 1999 Gauhati 48. Reference may also be made to a Division Bench decision of this Court in Nitu alias Asha Vs. Krishan Lal,

59. In Chetan Dass Vs. Kamla Devi, , the Apex Court held:

"14. Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for

reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case."

60. In this view of the matter we have no other option but to answer the Question No. 3 also against the appellant

61. For the reasons aforementioned LPANo.593/2000 is allowed and LPANo. 82/2001 is dismissed with costs quantified at Rs. 5,000/- with hope and trust that the appellant shall take the respondent back in his matrimonial home and start their conjugal life afresh.

IP A 593/2000 allowed.

LPA 82/2001 dismissed.