

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:29.08.2011

Coram

THE HONOURABLE Mr. JUSTICE ELIPE DHARMA RAO

AND

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

C.M.A.Nos.3769 and 1775 of 2010 and

M.P.Nos.1 and 2 of 2011 in

C.M.A.No.1775 of 2010

R.Natarajan ... Appellant in both CMAs

Vs.

Sujatha Vasudevan ... Respondent in both CMAs

Prayer: Appeals filed against the Common Order dated 07.07.2009 made in O.P.No.519 of 2008 and O.P.No.993 of 2007 on the file of the II Additional Family Court, Chennai.

For Appellant : Mrs.K.Bhavatharani

For Respondent : Mr.V.Jayachandran

## COMMON JUDGMENT

M.VENUGOPAL,J.

The Appellant/Respondent (Husband) has preferred these instant two Civil Miscellaneous Appeals as against the Common Order dated 07.07.2009 in O.P.No.519 of 2008 and O.P.No.993 of 2007 on the file of the II Additional Family Court, Chennai.

2.The trial Court, on appreciation of the oral and documentary evidence available on record, while passing the Common Order in O.P.Nos.993/2007 and 519/2008 on 07.07.2009, has, among other things, observed that '... In this case on hand, both the parties are throwing the allegations against each other and both of them did not adduce any documentary evidence to prove their allegations. Further in this case, the allegations made by the Petitioner would be in the nature of normal wear and tear between the parties, that will not amount to cruelty. Hence, considering the age of the parties and the future welfare of the child, since the respondent/wife is willing to live with the petitioner/husband and filed the Restitution of Conjugal Rights Petition before this Court, this Court finds that the petitioner is not entitled for divorce on the ground of cruelty etc.' and resultantly, dismissed the O.P.No.993 of 2007 filed by the Appellant/Husband and allowed the O.P.No.519 of 2008 filed by the Respondent/Wife by ordering the restitution of conjugal rights.

3.Being dissatisfied with the Common Order passed by the II Additional Family Court, Chennai dated 07.07.2009 in O.P.Nos.993 of 2007 and 519 of 2008, the Appellant/Husband preferred these Civil Miscellaneous Appeals.

4.The Point that arises for consideration in C.M.A.No.3769 of 2010 is:

Whether the Respondent/Wife is entitled to seek the relief of Restitution of Conjugal Rights as per Section 9 of the Hindu Marriage Act, 1955?

The Point that arises for consideration in C.M.A.No.1775 of 2010 is:

Whether the Appellant/Husband is entitled to claim the relief of Divorce against the Respondent/Wife?

The Contentions, Discussions and Findings on Points in both CMAs:

5.The Learned Counsel for the Appellant/Husband contends that the Common Order of the trial Court passed in O.P.Nos.993 of 2007 and 519 of 2008 are contrary to law, weight of evidence and probabilities of the case.

6.It is the contention of the Learned Counsel for the Appellant/ Husband that both the parties never had any understanding right from the first day of the marriage, which was not taken into account by the trial Court.

7.According to the Learned Counsel for the Appellant/Husband, the trial Court should have considered that the Respondent/Wife made frequent calls to the Police Department, when they resided together in United States of America and further, she had not discharged her duties as a daughter-in-law.

8.Lastly, it is the submission of the Learned Counsel for the Appellant/Husband that the trial Court ought to have considered the evidence of R.W.1 (Wife) that she had not lived with the Appellant/Husband under the same roof continuously for more than a month.

9.Per contra, it is the contention of the Learned Counsel for the Respondent/Wife that the trial Court had taken note of the material facts and circumstances of the case and after appreciating the oral and documentary evidence on record, had come to a clear conclusion that the Appellant/Husband was not entitled to claim the relief of dissolution of marriage in O.P.No.993 of 2007 and also that quite rightly the trial Court granted the relief of restitution of conjugal rights to the Respondent/Wife in O.P.No.519 of 2008, which need not be interfered with by this Court.

10.At this stage, it is not out of place for this Court to refer to the averments made by the Appellant/Husband in O.P.No.993 of 2007 on the file of the II Additional Family Court, Chennai.

11.The Appellant/Husband, in O.P.No.993 of 2007 filed under Section 13(1)(i)(ia)(ib) of the Hindu Marriage Act, 1955, had averred that the marriage between him and the Respondent/Wife took place on 25.02.2002 at Chennai according to Hindu Rites and Customs and from the very beginning of the marriage, the Respondent/Wife was so arrogant, indifferent and used to abuse him in filthy and ugly language and he had tolerated all the cruelty and cruel treatment meted out to him. Further, he hoped that the Respondent/Wife would be alright and would mend her ways in the near future. But, the same ended in vain. Also, he averred that the Respondent/Wife deserted him on 24.04.2005 without just or sufficient cause and ran away from the matrimonial home and therefore, he was forced to be alone from 24.04.2005 till date. As such, he was entitled to divorce the Respondent/Wife based on the reason of cruelty and wilful desertion for more than one year.

12. As a result of the wedlock, a female child was born on 08.02.2003 viz., Varshinee at the Respondent/Wife's parents house. Further, the Respondent/Wife failed and neglected to discharge her parental duty as a mother and he was even prevented from seeing his child by the Respondent/Wife and her father. Furthermore, all sorts of pin pricks had been caused by the Respondent/Wife on the motivation of her father.

13. Earlier, the Appellant/Husband filed a Petition for restitution of conjugal rights in O.P.No.605 of 2006 on the file of the II Additional Family Court, Chennai with a fond hope that the Respondent/Wife would be tamed on the belief that he being a pious Hindu and things would be alright in due course, which ended in vain. The Respondent/Wife was not prepared to reunite and therefore, he was forced to file a Petition for divorce on the ground of cruelty and desertion and there was no possibility of reunion with the Respondent due to her incorrigible attitude.

14. In the counter filed by the Respondent/Wife, it is, inter alia, mentioned that she went to United States of America with the Appellant/Petitioner (Husband) and when she conceived, the Appellant had not acted properly and therefore, she went to San Francisco and stayed at her cousin's house and the matter reached the ears of her parents and at the instance of relatives of both parties, a talk was held wherein the Appellant/Husband assured to behave properly. She gave birth to a female child Varshinee on 08.02.2003.

15. Since the Appellant/Husband's project at United States of America was over, they returned back to India. Prior to that, both parties discussed about the stay in Chennai on return from America. When she suggested to stay away from the parents of the Appellant/ Husband, he suggested on return from USA itself that she should stay at her parents house to avoid any unpleasantness at the hands of his mother, promising that he would later come and take her back. But, the Appellant/Defendant did not turn up.

16. The Appellant/Husband had a duty to lead a happy matrimonial life with her. But, for reasons best known to him, he avoided her and because of the attitude of the Appellant/Husband, her female baby had suffered and now she grew up and the absence of father was placing her in great sorrow.

17. The Appellant/Husband filed O.P.No.605 of 2006 seeking the relief of Restitution of Conjugal Rights as if she deserted him. The Respondent/Wife, in the counter, had narrated the sufferings faced by

her at the hands of the Appellant/Husband in detail. She was willing to join, if the Appellant/Husband was ready to have a separate family. The reason for a separate family was because of her mother-in-law not liking her.

18.The Appellant/Husband filed the present Original Petition seeking divorce with the main aim of remarrying with heavy dowry. There was no change of circumstance in filing the present petition for divorce after filing the petition for restitution of conjugal rights. She was in the mercy of the Appellant/Husband and his mother. It was the Appellant/Husband's mother, who was instigating him to ill-treat her further. There was no desertion on her part and it was the Appellant/Defendant, who left her at her parents' home without taking her back to her matrimonial house. Any mother would intend that a father should visit the child. What she needs was that the Appellant/Husband should assure to provide happiness. This would be possible only, if the Court was pleased to direct the Appellant/Husband to take her back and lead a matrimonial life.

19.The Respondent/Wife, in O.P.No.519 of 2008 filed under Section 9 of the Hindu Marriage Act praying for Restitution of Conjugal Rights, had, among other things, stated that her marriage with the Appellant/Husband took place on 25.05.2002 at Chennai as per Hindu Rites and Customs and in April 2002, she went to USA with the Appellant/Husband, that she conceived etc.

20.During April 2005, both the Appellant/Husband and Respondent/Wife returned to India after the project of her husband at USA was over and even before coming to India, the parties discussed regarding the stay in Chennai on return from America and when she suggested to stay away from Appellant/Husband's parents on account of her mother-in-law not liking her from the beginning, a big quarrel arose etc.

21.The Respondent's female child studying in L.K.G. in Chinmaya Vidyalaya, Chetpet, requires the care and affection of the Appellant/ Husband as Father. The Appellant/Husband had a duty to lead a happy married life with her and the child. The Appellant/Husband taking advantage of dismissal of O.P.No.605 of 2006 and to avoid her filed O.P.No.993 of 2007 seeking divorce with the sole object of remarrying, to get dowry.

22.The Appellant/Husband left her at her parents house assuring to take back soon. But not took her back. Therefore, she had prayed for the relief of Restitution of Conjugal Rights.

23.The Appellant/Husband, in the counter, had stated that the Respondent/Wife was so arrogant and treated him with cruelty and started to abuse him in vulgar language and started to humiliate within a week. Only with great pressure, he was able to bring the Respondent/Wife back from her cousin's house to the matrimonial home. Thereafter, only at the pressure of the wife, he came to

India by force on accepting the illegal demand of the Respondent/Wife to come over to India from United States of America.

24. According to the Appellant/Husband, the Respondent/Wife ran away from the Airport to her parent's house as pre-planned by them and thereafter she had never turned up to the matrimonial home and despite the repeated mediations and counselling and the advices of the elders, she was so adamant and refused to come back to the matrimonial home and finally, he felt there was no purpose in pursuing the said petition for conjugal rights. He filed a divorce petition on the ground of desertion and cruelty against her. Also, he was not informed about the birth of the child and he was not allowed to see the child at her parents house where she was living on her own accord.

25. Whenever he attempted to make a visit to see the child, the Respondent/Wife, his father-in-law and mother-in-law not allowed him to see the child and threatened him that if he made any attempt to see the child, he would be put to task. The Restitution of Conjugal Rights filed by the Respondent/Wife was only a counter-blast to the Divorce Petition filed by the Appellant/Defendant.

26. The term 'cruelty' is a state of mind and feeling with one of the parties due to the behavioural attitude of the other. In fact, "cruelty" as per Section 13(1)(ia) is to be construed as a behaviour by one party towards the other, which cause a genuine and reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the wedlock relationship with the other. Like physical cruelty, mental cruelty is difficult to be proved by a direct evidence, as per the Division Bench decision in Victor Sebastain V. Thorulatha, [2006(4) R.C.R. (Civ.) 577 at p. 579 (Knt.).

27. Where there is a proof of wanton course of conduct on the part of a person, intended to hurt and humiliate other spouse, and such a conduct is persisted, cruelty can be inferred easily. In the decision of the Hon'ble Supreme Court in Sujata Uday Patil V. Uday Madhukar Patil, [2007 (3) S.C.J. 458 at p. 459], it is held that 'Neither actual nor presumed intention to hurt the other spouse is a necessary element in cruelty.'

28. For passing a Decree of divorce on the ground of cruelty, the acts complained of ought to be so grave and weighty so as to arrive at the conclusion that the husband cannot reasonably be expected to live with the wife. In a petition for divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955, the Petitioner has to prove that after the solemnisation of marriage the Respondent treated him with

cruelty as per the decision in Sukharam Yadav V. Nirupama Yadav, [2007 (3) M.P.L.J. 396 at p. 398 (M.P.)]. The dissolution of marriage is the last and the last option a Court of Law must exercise in a given situation.

29. The term 'Cruelty' mentioned in Clause (i-a) denotes and includes both physical and mental cruelty. It is to be noted that the Hindu Marriage Act, 1955 is silent as regards the nature or degree of cruelty which needs to be established in any matrimonial case as per the decision Poonam Mehta alias Poonam Prasad V. Naresh Prasad, [AIR 2009 (N.O.C.) 505 (Orissa)]. If the cruelty is physical, it is an aspect of degree which is essential. However, if it is mental, an enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the other party whether it caused reasonable apprehension that it would be injurious or harmful to live with the other party. Finally, it is a matter of inference to be deduced by taking into account the nature of the conduct and its effect on the complaining spouse.

30. In Suman Kapur V. Sudhir Kapur, [A.I.R. 2009 S.C. 589], it is observed that 'there may be cases where the conduct complained of itself is bad enough and per se unlawful or illegal.' In Black's Law Dictionary (8th Edition, at page 2004) the term 'Mental Cruelty' is defined as follows:

"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. [vide Surender Pal V. Kanwaljit Kaur, II (2008) D.M.C. 183 at p. 187 (Delhi)]

Furthermore, it is not necessary to establish that the mental cruelty is such as to cause injury to the health of the Petitioner as per the decision Vimla Mehra V. K.S. Mehra [158 (2009) D.L.T. 136 at p. 150 (Delhi)].

31. In regard to the expression 'Cruelty' as seen under Section 13(1)(i-a) of the Hindu Marriage Act, a Court of Law should be satisfied that such differences surfacing from the conduct of either party to the marriage makes it impossible for the other spouse to continue to live with him/her. Intention to be cruel is not a requisite element of 'cruelty' as contemplated as per Section 13(1-A) of the Hindu Marriage Act, 1955. It is needless for this Court to state that if bitter waters are flowing it is not necessary to enquire from which source they spring. The motive behind the cruelty has faded into insignificance in the present day changing society. To put it shortly, in matrimonial matters, the feelings and attitudes of minds are material as per the decision Neelu Kohli V. Naveen Kohli, [A.I.R. 2004 All. 1 at p. 12].

32. As far as the mental cruelty is concerned, it must be of such a kind that the parties cannot reasonably be expected to live jointly. A wronged party cannot be required to put up with the other. We

worth recall the decision of the Hon'ble Supreme Court in Sirajmohmedkhan Janmohamadkhan V. Hafizunnisa Yasinkhan, [(1981) 4 SCC 250] wherein it is held thus:

"... The concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty."

33. The concept of cruelty is to be something more serious than that of an ordinary wear and tear of marital life. The mental cruelty may consider all verbal abuses and insults by using filthy and abusive language in leading to persistent disturbance of mental peace of the other individual. No wonder, mental cruelty is a matter relating to human behaviour.

34. In the decision of the Hon'ble Supreme Court in Samar Ghosh v. Jaya Ghosh, [(2007) 4 SCC 511], at paragraph No.101, some instances of human behaviour, which may be relevant in dealing with the case of mental cruelty have been enumerated and the relevant paragraph runs as follows:

"101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of mental cruelty. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommodate or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

35. In the decision of the Hon'ble Supreme Court in *Shobha Rani v. Madhukar Reddi*, [1 (1988) DMC 12 (SC) = (1988) 1 SCC 105], the concept of cruelty has been stated hereunder:

"The word 'cruelty' has not been defined in the Hindu Marriage Act. It has been used in Section 13(1)(i-a) of the Act in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or 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, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, 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 absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment."

36. The term 'desertion' is not the withdrawal from a place but from the state of things. Therefore, it means withdrawing from the matrimonial obligations i.e. in not permitting or facilitating cohabitation between the parties. It is a continuous course of conduct to be decided based on the facts and circumstances of each case. The concept of desertion is a completed repudiation of the obligations of the marriage. The two elements which are crucial insofar as the deserted spouse is concerned viz., (i) absence of consent; (ii) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention as mentioned supra. If the parties are living separately and the wife has no intention to resume matrimonial relationship. The Animus Deserendi on the part of the wife is established and in these circumstances, it is held that it is better to close the chapter when the parties cannot live together as per the decision in *Shrawan Kumar Giri V. Rita Devi* [2002 (3) Jhr, L.J.R. 88 at p. 90 (Jhr)].

37. In the decision of the Hon'ble Supreme Court in *Savitri Pandey V. Prem Chandra Pandey*, [(2002) 2 Supreme Court Cases 73], at Page 75, the Honourable Supreme Court has held as follows:

" 'Desertion', for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations, i.e., not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent

licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case."

38. In the decision of the Hon'ble Supreme Court in Lachman Utamchand Kirpalani V. Meena Alias Mota, [(1964) 4 SCR 331 : AIR 1964 SC 40], wherein, in Paragraphs 70 and 71, the Hon'ble Supreme Court has observed as follows:

70....The husband, for one reason or other, either because of his respect for his parents or because of his weakness or because of both, though at the beginning he was affectionate to his wife, was not able to stand up for her and later on he fell in line with his parents and sisters and began to ill-treat her. Though in the earlier years she was allowed to go to her parents' house now and then, later on the appellant and his parents refused her permission to go to her parents' house or allowed her to do so once in a while with great reluctance, when her father, on one of his infrequent visits, was in India. She was not even permitted to go when her uncle died. The appellant also contemplated a second marriage, but, for one reason or other, it did not come off. By the year 1954 she was in a nervous strain and necessarily that must have affected her health. Her father, who came to India at the end of 1953, heard her complaints and saw her physical and mental condition. He did what a loving father should do in the circumstances. Giving up the ideas of false prestige, he approached the parents of the appellant directly and through a friend and persuaded them to permit the respondent to go to his house and thereafter to the Far East with him for a short stay to recoup her health. The respondent also took the permission of her husband. After some time, the husband - I am assuming that his version of the visit along with Dr. Lulla, to Poona was true - changed his mind and asked her to come back, but she refused to come back. From her standpoint she obviously did not like her husband going back on his word and disturbing her planned holiday, to which she was looking forward. From the standpoint of the husband, he was angry because as a Hindu husband he expected his wife to obey him whether his demand was reasonable or not. The wife, perhaps, did not tell him the day when she would be leaving with her father to the Far East. She must have been afraid that he would prevent her somehow from going abroad. That explains her conduct in not seeing him or his parents at Bombay before she boarded the ship. The subsequent correspondence shows that the appellant was telling her from his commanding position that she should give up her holiday and come back to him immediately and she, on her part, was persuading him in a subdued tone to permit her to stay for a few months and promising to come back thereafter. The letter dated April 2, 1955, was an unexpected and unmerited blow to her. Therein she was charged with unchastity and leading a fast and reckless life. Even a Hindu wife would be enraged and insulted by such dastardly conduct on the part of her husband. Even so she sent a reply couched in a dignified and controlled language denying his allegations and stating that she would return in a few months. She was not even invited by the appellant when his sister was married in November 1955. She therefore, came back to India only in April 1956. In view of the serious allegations made by the appellant in his letter dated April 2, 1954, and in view of his determined attitude disclosed therein, she naturally and properly expected that the husband would invite her or send somebody to take her back to his home. Instead of doing so, though he knew that the respondent had come to India, he did not make any attempt to invite her or send a relation to bring her to his home as he used to do on previous occasions when she went to

her father's house. By that time as the Act came into force, he found his opportunity for which he was waiting and took advantage of the situation. As the statutory period of two years had expired from the date she left India, he rushed to the Court. On these facts, I have no doubt that the appellant failed to establish that the respondent deserted him without any reasonable cause.

71. Even if she deserted him within the meaning of Section 10 of the Act, I would hold that by writing the letter dated April 2, 1955, she ceased to be in desertion from that date. A fair reading of that letter, read in the context of her offer to return within a few months, shows beyond any doubt that he closed the door for her return long before the statutory period had expired. When the respondent wrote to the appellant telling him that she would come in a few months, he wrote to her saying that she was leading an immoral life and that he would no longer be "drawn into her game." Even after that letter, she wrote back denying his charges and promising to come as soon as her health improved. I have no doubt that, at any rate from April 2, 1955, the desertion, if any, on the part of the respondent, came to an end and from that date the appellant was guilty of desertion.☒

39. In the decision of this Court in *Rajendran v. R. Dhanalaxmi*, [2009-2-L.W.571], at Page 572, it is held thus:

"The onus of proof was on the husband to prove that there was animus deserendi on the part of the wife in shunning the company of the husband and in this Case, the wife despite having underwent torture at the hands of the husband, has chosen to file the application for restitution of conjugal rights and that shows her intention to resume cohabitation with the husband and it was because of the husband's attitude, the separation resulted in their matrimonial relationship and in such a case it is crystal clear that absolutely there is no ground for granting divorce.☒

40. The term 'Desertion' within the meaning of Section 10(1)(a) of the Act read with explanation does not imply only separate residence and separate living. It is also necessary that there must be a determination to put end to marital relationship and cohabitation.

41. In short, there must be a cogent and coherent evidence to prove that the wife had no intention to join the matrimonial home as a parted company as per the decision in *Amarjit Kaur V. Babu Singh*, [1990 (1) H.L.R. 58 at p.60 (P. & H.)].

42. The factum of desertion speaks of the intentional permanent abandonment of one spouse by the other, without a reasonable cause and without the consent of the others. As a matter of fact, it is for the Petitioner to establish the factum of desertion and animus deserendi, to the satisfaction of the Court as per the decision in *Arundhati Deepak Patil V. Deepak Bhaurao Patil*, [2008 (5) Bom C.R.1 at p.12].

43. In the decision of the Hon'ble Supreme Court in Dharmendra Kumar vs Usha Kumar, AIR 1977 SUPREME COURT 2218, it is held as follows:

☒ In order to be a "wrong" within the meaning of s. 23(1)(a) the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled. ILR (1971) Delhi 6 (FB) and AIR 1977 Delhi 178, Approved.

Where after a little over two years of passing of decree of restitution of conjugal rights in her favour, the wife applied for dissolution of marriage under S.13(1A)(ii) and the husband in his written statement alleged that the wife refused to receive or reply to the letters written by the husband and did not respond to his other attempts to make her agree to live with him, this allegation, even if true, did not amount to misconduct grave enough to disentitle the wife to the relief she asked for.☒

44. In the decision of the Hon'ble Supreme Court in Smt. Saroj Rani V. Sudarshan Kumar Chadha, [(1984) 4 Supreme Court Cases 90], at Page 91 wherein it is observed that 'The 'wrong' under Section 23(1)(a) has to be something more than mere disinclination to agree to an offer of reunion; it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled.'

45. In Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi, [(2002) 1 Supreme Court Cases 308], at Page Nos. 309 and 310, the Honourable Supreme Court, in Paragraph 7, has held as follows:

☒ Desertion in the context of matrimonial law represents a legal conception. It is difficult to give a comprehensive definition of the term. The essential ingredients of this offence in order that it may furnish a ground for relief are :

1. The factum of separation;
2. The intention to bring cohabitation permanently to an end animus deserendi;
3. The element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period."

46. In law, the animus reverendi is not sufficient to terminate the act of desertion. The said intention must also be with the factum of reverendi viz., the wife should have, in fact, returned to the matrimonial home. In the absence of the same, it could not be said that the desertion had come to an end.

47. In P. Kalyanasundaram V. K. Paquialatchamy, [(2003) 1 M.L.J. 669 at p. 680 (Mad.)], it is held by this Court that the conclusion of the Family Court that the expression of willingness to come back to the home was sufficient and it terminate the desertion was an erroneous one. To grant a decree for divorce on the basis of desertion the fact of physical desertion and also the animus to desert must be proved as per the decision of this Court in K. Palanisamy V. P. Samiathal, [AIR 2002 Mad. 156 at p.158].

48. As far as the present case is concerned, it is the case of the Appellant/Husband that the Respondent/Wife ran away from the Airport to her parents house after returning from USA and thereafter, she never turned up to the matrimonial home, despite the repeated mediations, counselling etc. According to the Appellant/Husband, the Respondent/Wife was so adamant and refused to come back to the matrimonial home. The marriage between the parties took place on 25.05.2002 at Chennai. As a result of wedlock, a female child by name Varshinee was born on 08.02.2003. The Respondent/Wife deserted the Appellant/Husband and ran away from the matrimonial home on 24.04.2005, according to the Appellant/Husband.

49. It is the stand of the Respondent/Wife that in April 2005, the Appellant/Husband and herself came to India and as per plan and his direction, she went to her parents place and was staying with them. According to her, she visited the Appellant/Husband from her parents house and even she was ready to stay with the Appellant/Husband in the matrimonial house and that he used to send her to her parents house by telling that his mother was not liking her and therefore, she would not stay in their house. Moreover, he assured to set up an independent house in Chennai. In paragraph 11 of the Proof Affidavit filed before the trial Court, the Respondent/Wife had stated that in order to help the Appellant/Husband, her parents used to see some house and the Appellant/Husband had also on the lookout for an independent house and when the relationship was so smooth, she had requested him to see a house at the earliest, but the Appellant/ Husband was, with ulterior motive, did not take proper interest to set up the family in Chennai.

50. The Respondent/Wife, as R.W.1, in her cross examination, had deposed that her husband viz., the Appellant (P.W.1) ill-treated her by hitting her, holding her hair and dashed her towards the wall as she did not bring 4 or 5 gold chains as demanded by her mother-in-law.

51. It is the evidence of R.W.1 that she was treated in a cruel manner and inspite of cruelty, she tolerated the same and stayed with her husband and when the Appellant/Husband came back from America during 2002, there were problems and after that 4 to 5 days she lived with her husband and she does not remember till what date she stayed with him.

52.The evidence of R.W.1 (Wife) also goes to the effect that she led her matrimonial life with the Appellant/Husband in his house for nearly 3 months. Further, when she was residing with her Appellant/ Husband in America, he used to assault her and therefore, she called the police three times and after coming back to Chennai, she along with her husband went to psychiatrist for consultation and medicines were prescribed for mental depression and her husband was prescribed for paranoid disorder. In fact, R.W.1 denied the suggestion that she was with the Appellant/Husband, she abused her mother-in-law with unparliamentary words and also denied that while she was staying with her husband, she never used to cook and wash the clothes and did not do any household work and never prepared even a single tea for her Appellant/Husband or mother-in-law.

53.R.W.1, in her cross examination, had stated that even in her counter she had mentioned that her Husband (Appellant) was an abnormal person and when they were living together, all of a sudden he used to fight with her and then apologise and therefore, to live with her Husband/Appellant was very difficult because he used abusive language and assaulted her and therefore, she thought that continuing the family life with him was difficult.

54.Added further, it is the evidence of R.W.1 that she was residing alone for 3 to 4 years without marital life as she was tortured physically and mentally and she wanted to avoid such kind of torture. Moreover, her mother-in-law used to treat her cruelly but not directly.

55.The evidence of R.W.1, during her cross examination, is that she studied M.C.A. through Distance Education and obtained a degree and working in CTS and was earning Rs.25,000/- per month and stayed in the Appellant/Husband's house from 25.02.2002 to 02.03.2002 and in 2002 until 1st week of April she lived in that house. Further, from 04.04.2002 to 06.06.2002 and 25.08.2003 to 25.04.2005 she stayed with her husband in America.

56.Before the trial Court, the Appellant/Husband was examined as P.W.1 and the Respondent/Wife was examined as R.W.1. No independent witnesses were examined on the side of both parties. Both parties had made allegations and counter allegations and except their oral evidences, no independent or documentary evidence was adduced on behalf of them to establish their respective contentions.

57.The marriage being dead practically or emotionally, the continuance of the same would procrastinate the mental pain and affliction and therefore, it is cruelty.

58.The Respondent/Wife in O.P.No.519 of 2008 prayed for Restitution of Conjugal Rights as against the Appellant/Husband. In paragraph 7 of the Petition, she had categorically averred that she was willing to join, if the Appellant/Husband was ready to have a separate family and the reason for the separate family was the Appellant's mother was not having any liking towards her, but for which she was ready to live jointly.

59.In the Proof Affidavit filed in O.P.No.993 of 2007, the Appellant/Husband had categorically stated that the Respondent/Wife and her parents went to the extent of harassing him and his family members by lodging a false complaint and dragged them to R.3 Police Station on 28.01.2006. They also challenged him that they will put him behind bars and would see that he would dance according to the tunes of his wife's parents etc.

60.It is true that a husband cannot ask his wife that he does not like her company, however, a wife can or should stay with the other members of the family in the matrimonial house.

61.A mutual respect of each other apart, differences of opinion and disagreements between the spouses, are not an uncommon. But the lack of admiration between the parties in the instant case can only point out irretrievability of the situation lost out. The marriage between the parties had completely broken down warranting its dissolution rather than being bound in a futile bond.

62.R.W.1 (wife), in her cross examination, had specifically deposed that her mother-in-law used to treat her cruelly, but not directly and further, in her counter, she had stated that her husband was an abnormal person and also she had stated that it was very difficult to live with the Appellant/Husband because he used abusive language and assaulted her and hence, she thought that continuing the family life with him was difficult and further that he misused her womanhood and found faults and used to argue with her. In her evidence, (in cross examination), she categorically stated that she was residing alone for the past 3 to 4 years without marital life since she was tortured physically and mentally and she wanted to avoid such kind of torture.

63.R.W.1, in her common proof affidavit in O.P.Nos993/2007 and 519/2008, at paragraph 18, had stated that she was earlier insisted to live in separate house on account of the reason that in her mother-in-law was not liking, but for which she was going to her mother's place and even now she was ready and willing to perform her duties to the Appellant/Husband and ready and willing to go to his place. At this stage, it is to be pointed out that during her staying away from her husband from April 2005 till 08.12.2008, the date of filing of the proof affidavit before the trial Court, she had not made any effort to join her husband. It shows that she had completely neglected the Appellant/Husband and denied him the matrimonial obligation. Because of the stand taken by both sides, each side had

developed repulsion over the other. Without the consent of the Appellant/ Husband, the Respondent/Wife was staying in her parents house ever since April 2005. The differences between the parties could not be settled and it had reached a stage of point of no return and their bondage has irretrievably broken.

64.R.W.1 (Respondent/Wife), in her cross examination, before the trial Court, had deposed that after returning to Chennai she along with her Husband (Appellant) went to Psychiatrist for consultation and medicines were prescribed for his mental depression and further, he was treated for his paranoid disorder. However, she had not produced any documentary proof in this regard. Further, she only stated in her evidence (in cross examination) that her mother-in-law used to treat her cruelly, but not directly. In fact, in the cross examination, she had not expatiated as to what kind of indirect cruelty or instances of cruelty to have been meted out to her mother-in-law by her.

65.In view of explanation to Section 9 of the Hindu Marriage Act, 1955, the burden was upon the Petitioner to prove the pleading in a Petition under Section 9 of the Act. If the Respondent pleads a defence for reasonable excuse for withdrawal from the society of the Petitioner, the onus of proving such a plea is on the Respondent. If the Respondent pleads as a defence the ground of desertion by the Petitioner in a petition under Section 9, that would be a legal ground within the meaning of Section 9 of the Act.

66.While granting the relief under Section 9 of the Hindu Marriage Act, it was for a party to prove, (i) that the Respondent has, without reasonable cause, withdrawn from the Society of the Petitioner; (ii) that the Court was satisfied about the truth of the statement made in the petition; (iii) that there was no legal ground why such petition ought not to be granted.

67.The discretion of the Court, based on facts and circumstances of the case to pass a Decree for restitution of conjugal rights, must be exercised with care, of course, after due deliberation. The Petitioner had to succeed on the strength of his/her own case. Where ill-treatment was pleaded as a defence to a petition for Restitution of Conjugal Rights, the onus of establishing the same was on the Respondent as per the decision Anna Saheb V. Tarabai [AIR 1970 MP 36 (DB)].

68.In a petition for Restitution of Conjugal Rights, the Petitioner must show that he has sincere and bona fide desire to resume the matrimonial cohabitation and to render the rights and duties of such cohabitation, as per the decision B.R. Sayal (Capt.) V. Smt. Ram Sayal [AIR 1968 P & H 489].

69.R.W.1 (Wife) had given a complaint before the R.3 Police Station Police Station on 28.01.2006 against the Appellant/Husband and his family members. The lodging of complaint by the Respondent/Wife certainly would have caused immense pain and anguish to the Appellant/Husband and after that, it would be difficult for the Appellant/Husband to forget everything and live with the Wife. The lodging of criminal complaint by the Wife before the R.3 Police Station was admitted by the Respondent/Wife. The lodging of complaint against the Appellant/Husband and his family members would certainly result in loss of reputation and prestige in the society would amount to cruelty, in the considered opinion of this Court.

70. It transpires that pending O.P.No.503 of 2009 between the parties in Application Nos.4737 and 4738 of 2009, this Court had passed orders on 18.06.2010 permitting the Appellant/Husband (Applicant) to reconstitute the payments made by the Respondent/Wife to the school authorities for the expenditure incurred for the studies during the past 3 years viz., LKG, UKG and 1st standard of minor child Varshinee on production of any proof or receipts by the Respondent/ Wife through her counsel and also permitted to pay the tuition fees and other school fees payable for the studies from this year till the disposal of main O.P. etc. Further, the Appellant/Husband was permitted to have the interim custody of the minor child Varshinee from the Respondent/Wife from 8.30 a.m., of every Saturday till 6.00 p.m. of the next day i.e., Sunday and the Applicant (Appellant/ Husband) to get such custody of the minor child Varshinee at the neutral place i.e. Arulmighu Panchaliamman Temple, at Arumbakkam, Chennai in between 8.00 a.m. and 8.30 a.m. on Saturday either from the Respondent/Wife or through her father duly authorised in that behalf and to hand over the custody of the minor child Varshinee at the same place on the next day i.e., Sunday in between 6.00 p.m. and 6.30 p.m., to the Respondent/Wife or to her father authorised on that behalf. Therefore, it is open to the parties to pursue their course of action, if they so desire/advised, in accordance with law, in this regard.

71. In this connection, this Court very pertinently points out that the Respondent/Wife in her counter to O.P.No.605 of 2006 (filed by the Appellant/Husband), in paragraph 7, had categorically stated that it was a fact that her father had told the Appellant/Husband that his daughter would be in a position to live with him only if he chose to stay away from his mother and brother, but the same was in the nature of a suggestion or request.

72. The trial Court, in its Common Order in O.P.Nos.993 of 2007 and 519 of 2008 at paragraph 10, had stated that the medical certificate of the Respondent shows that she always had mood swings and had aversion towards husband and his family members.

73. From the stand taken by the respective parties, we are of the considered view that the marriage tie between the parties had irretrievably broken down and it is beyond repair. Each spouse had expressed a feeling of anguish, disappointment and frustration caused by the conduct of the other and by taking note of the overall assessment and attendant facts and circumstances of the present case in which the two partners of matrimonial life are living, the inference could be drawn based on the legal burden of proving lack of reasonable cause rested on the complaining spouse. In the instant case, the Respondent/Wife was living in her parents house ever since April 2005. Also, that between parties the differences had grown up and the distance had also widened (from April 2002 onwards when the Respondent/Wife had conceived) for 9 years which could not be brushed aside so lightly. Also, if not impossible, it would be very difficult for the Appellant/Husband and the Respondent/Wife to forget the past and to begin a new leaf like relationship of Husband and Wife and also they had separated themselves in the last 9 years. Moreover, they had learnt to live in their own isolation and also

developed their self thinking. As such, the irretrievably broken down of marriage between the Appellant/Husband and the Respondent/Wife was quite obvious in the present case.

74. We are satisfied that the aspect of breaking of the marriage tie between the parties, which had created an emotionally dead relationship was an act of oppressive mental cruelty, considering the cumulative effects of the overall assessment of the facts and circumstances of the case including the averments and counter averments made by the parties in the respective petitions and in their own ipsi dixi evidences. Therefore, we come to an inescapable conclusion that the Appellant/Husband is entitled to get the relief of Divorce, as claimed by him in O.P.No.993 of 2008 on the file of the II Additional Family Court, Chennai and consequently, we set aside the order of the trial Court in O.P.No.993 of 2007 dated 07.07.2009 (dismissing the O.P. filed by the Appellant/Husband). Resultantly, the C.M.A.No.1775 of 2010 succeeds.

75. Since this Court has allowed C.M.A.No.1775 of 2010 filed by the Appellant/Husband and granted him the relief of Divorce as prayed for by him in O.P.No.993 of 2007 on the file of the II Additional Family Court, Chennai, we hold that the Respondent/Wife is not entitled to get the relief of Restitution of Conjugal Rights as prayed for by her in O.P.No.519 of 2008. As such, we set aside the order passed by the trial Court in O.P.No.519 of 2008 granting the relief of Restitution of Conjugal Rights in favour of the Respondent/Wife and accordingly, allows the C.M.A.No.3769 of 2010 filed by the Appellant/Husband.

76. In the result, both the Civil Miscellaneous Appeals are allowed, leaving the parties to bear their own costs. Connected Miscellaneous Petitions are closed.

Sgl

To

The II Additional Family Court,

Chennai 41