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Reserved

AFR

Court No. - 29

Case :- FIRST APPEAL No. - 819 of 2019

Appellant :- Col. Manoj Kumar Gupta
Respondent :- Sangeeta
Counsel for Appellant :- Pankaj Agarwal

Hon'ble Vivek Kumar Birla,J.
Hon'ble Donadi Ramesh,J.

1. Heard Sri Tarun Agarwal, holding brief of Sri Pankaj Agarwal, learned counsel for the appellant.

2. Present appeal has been filed against the judgment and order dated 18.10.2019 passed by Principal Judge, Family Court, Moradabad in Case No. 492 of 2015.

3. The plaintiff is the appellant herein. He filed an application under Section 13 (1) (ia) (ib) of the Hindu Marriage Act, 1955 before the court of Principal Judge, Family Court, Moradabad, numbered as Complaint Case No. 492 of 2015. The said petition was dismissed vide order dated 18.10.2019. Aggrieved by the same, present appeal has been filed.

4. The plaintiff-appellant solemnized first marriage with Anuradha on 15.11.1989 as per Hindu Customs and Rites. The said marriage was dissolved on 31.05.2007. After that plaintiff solemnized his second marriage on 21.11.2007 with the respondent herein. The first husband of

the respondent herein had died and she has two children out of the wedlock with the first husband. During the marriage, the first husband has adopted one girl child namely, Astha, she is living with the plaintiff-appellant. Both the appellant and the respondents were doctors and they lived in District Budaun and the appellant has served in the Indian Army about 30 years. The defendant-respondent is also a senior doctor and she is presently posted at Ghaziabad and she is also running a private nursing home at Buddhi Vihar in Moradabad.

5. After marriage, the defendant-respondent has deserted the appellant and lived separately at Moradabad, that she deserted the appellant for six years before filing the suit and has stated that no physical relationship has been established between the appellant and the respondent. Further, she is accusing plaintiff as well as the adopted daughter and subjected to mental cruelty and misbehaved with the appellant and there is no cordial relationship with the adopted daughter of the appellant and she called Astha as a orphan and illegitimate child and she should be thrown out of the house. Due to the above said behaviour of the defendant-respondent, mental condition of the appellant's daughter Astha started deteriorating. The respondent behaved indecently and insulted the appellant in front of his friends and relatives, which caused great embarrassment to him. She used to quarrel with the appellant's daughter over small issues and hates her. More so, she assassinated the character of the appellant without any proper reason and also alleged that he was involved in illegal activities in his house at Greater Noida.

6. The respondent has filed her objections to the above said allegations by denying the statements and allegations and she has stated that she married the appellant by knowing the former wife had adopted a girl child Astha as the defendant-respondent is also having two children namely, Pallavi Swaroop and Rijul Swaroop from her former husband. The respondent was a doctor in Central Police Hospital, Moradabad, but

is currently working in the District Hospital, Ghaziabad. Eight years have passed since her marriage with the appellant. Whenever the respondent got leave she kept visiting the appellant and the appellant also keep coming to her from time to time. She has denied that she never misbehaved with the appellant and she always had good relations with the appellant and adopted daughter Astha as well. In fact, the marriage of the respondent's sister's daughter took place on 20.02.2015, in which the adopted daughter Astha was also present and had good relationship with the respondent.

7. Based on the above averments, the court below has framed following issues:

> *"1- क्या प्रत्यर्थी के द्वारा याची के साथ क्रूरता पूर्वक व्यवहार किया गया ?*
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> *2- क्या प्रत्यर्थी के द्वारा याचिका प्रस्तुत किये जाने के दो वर्ष पूर्व से याची का परित्याग किया हुआ है ?*
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> *3- याची किस अनुतोष को प्राप्त करने का अधिकारी है ?"*

8. In response to the above issues, the court below has answered that the plaintiff-appellant has stated regarding his adopted daughter Astha for having cruely treated by the defendant-respondent. As per plaintiff, defendant used to call Astha as orphan/illicit child and used to say to throw her in dustbin. It has also been stated by plaintiff that defendant used to treat Astha cruely and used to quarrel with her for minor issues. The defendant has denied the said allegations in her defence as the plaintiff and defendant both are doctors by profession and it is an admitted fact that adopted daughter Astha, who is adult and eligible for marriage and Astha is an intelligent girl, but Astha has not got examined by the plaintiff during recording of statements, who is corroborating the misbehaviour done and filthy language used by defendant towards her and no statement has been given by the Astha in the corroboration of statements of plaintiff by appearing in court and the plaintiff had not proved the statement from his evidence. No such evidences have been

produced by the appellant which confirms ill-treatment, insulting behaviour and filthy words used by the respondent to his adopted daughter Astha.

9. In view of the said circumstances, appellant filed the petition against the respondent for dissolution of marriage on the ground of cruelty, but the appellant could not prove the cruelty, hence, this issue is disposed of negatively.

10. As far as issue no. 2 is concerned, both the appellant and respondent got married on 21.11.2007 with consent and admitted that both the parties were already married before this marriage and at the time of marriage, the respondent being lady doctor was working as Medical Officer in Central Hospital, Moradabad. The statement of the appellant that the respondent has deserted the appellant for more than six years before the date of filing the petition i.e. on 19.05.2015. As per the statement of the respondent, on 10.02.2015, her daughter Pallavi's marriage was solemnized in Mumbai and the appellant attended the pre-marriage rituals in Moradabad and also attended the wedding in Mumbai. The statement of the appellant that the respondent has deserted him has not been proved by the appellant. Hence, the issue is disposed of negatively.

11. The said appeal was admitted by this Court vide order dated 3.12.2019. As per the office report dated 23.01.2020, notices issued to the sole respondent through ordinary post fixing 24.01.2020 were not returned and nobody has put in appearance. Subsequent office report dated 4.9.2021 reflects that the sole respondent has been served by ordinary post personally. This fact was noticed by this Court in its order dated 6.9.2021. Apparently in the interest of justice, vide order dated 1.10.2021 fresh notices were issued to the respondent by way of publication in the newspaper. After publication, the appellant has filed affidavit of service dated 1.11.2021 and annexed therewith original copy

of newspapers 'Times Nation', 'Hindustan', 'Hindu' and 'Times of India' dated 16.10.2021. In such view of the matter, the Court find that the service on sole respondent is deemed to be sufficient.

12. Based on the above findings of the court below, Sri Tarun Agarwal, learned counsel for the appellant has submitted that the court below has not appreciated the facts in perspective manner, in fact, the respondent has made allegations against the appellant in her written statement and the cruelty made by the appellant was not specifically controverted in the defence statement filed by the respondent, and in fact, in paragraph 40 and 41 of the said reply, she has made character assassination of the appellant, the said aspect has not been considered by the court below while deciding the application filed by the appellant under Section 13 (1) (ia) (ib) of the Hindu Marriage Act, 1955. The court below while giving finding with regard to issue no. 1 has travelled beyond the pleadings of the parties and totally ignored the relevant statements as well as cross-examination of DW-1.

13. He further submitted that despite service of notice, the respondent has not chosen to appear before this Court and in fact, admittedly even after the date of filing of the suit till today, she is living separately, that itself shows that the respondent is not interested to live with the appellant, even on this ground alone, the suit filed by the appellant has to be decreed by granting divorce. He further submitted that it is well accepted proposition that ‘cruelty’ is a course or conduct of one party, which adversely affects the others. The ‘cruelty’ may be mental or physical, intentional or unintentional.

14. In the instant case, admittedly the respondent is staying away from the appellant since long, that comes under mental cruelty as held by the Apex Court in catena of judgments. The cruelty has to be construed and interpreted considering the type of life the parties are accustomed to or their economic and social conditions and their culture and human values

to which they attach importance. In the instant case, both the appellant and respondent are doctors and they are living a high profile life. She is not interested to live with the appellant and she is living separately.

15. As decided by the Apex Court consistently in various judgments that the desertion means intentional abandonment of one spouse by the other without the consent of the other and without a reasonable cause. In the instant case, that could be taken into consideration that the wife deserted the husband or treated him with cruelty. When the period of separation should be sufficiently long, and it is relevant factor to consider under mental cruelty continued long separation with dead emotions used to be construed as a case of irretrievable break down of marriage, which is also a facet of mental cruelty.

16. In support of his contentions, learned counsel for the appellant relied on the judgments of the Apex Court in **Sukhendu Das Vs. Rita Mukherjee, AIR 2017 SC 5092, Dr. Nirmal Singh Panesar Vs. Mrs. Paramjit Kaur Panesar @ Ajinder Kaur Panesar, 2023 (3) ARC 244, Shilpa Shailesh Vs. Varun Sreenivasan, Transfer Petition (Civil) No. 1118 of 2014.** He also relied upon the judgment of this Court passed in **Shashi Bala Vs. Rajendrapal Singh, 2020(2)ADJ 745.**

17. Relevant paragraph of **Sukhendu Das (supra)** is as under:

> *"8. This court in a series of judgments has exercised its inherent powers under Article 142 of the Constitution for dissolution of a marriage where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted [Manish Goel v. Rohini Goel. Admittedly, the Appellant and the Respondent have been living separately for more than 17 years and it will not be possible for the parties to live together and there is no purpose in compelling the parties to live together in*

matrimony [Rishikesh Sharma v. Saroj Sharma]. The daughter of the Appellant and the Respondent is aged about 24 years and her custody is not in issue before us. In the peculiar facts of this case and in order to do complete justice between the parties, we allow the Appeal in exercise of our power under Article 142 of the Constitution of India, 1950."

18. Relevant paragraphs of **Dr. Nirmal Singh Panesar (supra)** is as under:

"2. The appellant is a qualified doctor, and was Commissioned Air Force Officer. He retired on 30.04.1990 as Wing Commander. The respondent is also a qualified teacher, who was working in a Central School, and has retired now. The appellant had filed the Divorce proceedings on 12.03.1996 before the District Court, Chandigarh on two grounds, namely 'cruelty' and 'desertion' as contemplated in Section 13(1)(ia) and 13(1)(ib) respectively of the Hindu Marriage Act 1955 (hereinafter referred to as the said Act)."

8. Per contra, the learned advocate Ms. Madhurima Tatia for the respondent submitted that the respondent being an aged lady does not want to die with the stigma of a "Divorcee." According to her, the respondent had made all efforts to respect the sacred relationship between the parties all through out and is still ready to look after the appellant with the assistance of her son. Mere long period of separation could not tantamount to irretrievable break down of the marriage. She lastly submitted that the appellant having failed to make out any ground either of cruelty or desertion, the Court may not interfere with the concurrent findings recorded by the Single Bench and the Division Bench of the High Court in this regard.

9. We have given anxious thought and consideration to the submissions made by the learned advocates for the parties in the light of the evidence on record. There could not be any disagreement with the proposition of law canvassed by the learned

counsel for the appellant that the allegations of 'cruelty' and 'desertion' are legitimate grounds for seeking a decree of divorce under Section 13(1) of the said Act. It is well accepted proposition that "cruelty" is a course or conduct of one party which adversely affects the other. The "cruelty" may be mental or physical, intentional, or unintentional. This court in Naveen Kohli (supra) has summarised the principles of law on "cruelty" as under: -

> *"46. The principles of law which have been crystallised by a series of judgments of this Court are recapitulated as under:*
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> *In Sirajmohmedkhan Janmohamadkhan v. Hafizunnisa Yasinkhan [(1981) 4 SCC 250 : 1981 SCC (Cri) 829] this Court stated that 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.*
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> *47. In Shobha Rani v. Madhukar Reddi [(1988) 1 SCC 105 : 1988 SCC (Cri) 60] this Court had an occasion to examine the concept of cruelty. 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.

48. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions and their culture and human values to which they attach importance. Each case has to be decided on its own merits.

49. ……..

50. …….

51. …….

52. This Court in ***Savitri Pandey v. Prem Chandra Pandey [(2002) 2 SCC 73]*** *stated that mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It*

> *cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other."*

10. The crux of the various decisions of this Court on the interpretation of the word "cruelty" is that it has to be construed and interpreted considering the type of life the parties are accustomed to; or their economic and social conditions and their culture and human values to which they attach importance. Each case has to be decided on its own merits.

11. Similarly, the law is also well settled as to what could be said to be "Desertion" in the divorce proceedings filed under Section 13 of the said Act. The expression "Desertion" had come up under the judicial scrutiny of this Court in ***Bipin Chandra Jai Singh Bai Shah vs. Prabhavati AIR 1957 SC 176****, which was again considered in case of* ***Lachman Utam Chand Kirpalani vs. Meena alias Mota, AIR 1964 SC 40****. This Court collating the observations made in the earlier decisions, stated its view as under: -*

> *"Collating the aforesaid observations, the view of this Court may be stated thus: Heavy burden lies upon a petitioner who seeks divorce on the ground of desertion to prove four essential conditions, namely, (1) the factum of separation; (2) animus deserendi; (3) absence of his or her consent; and (4) absence of his or her conduct giving reasonable cause to the deserting spouse to leave the matrimonial home."*

13. Coming back to the facts of the present case, the Single Bench of the High Court holding that the appellant-petitioner had failed to prove the grounds of "cruelty" and "desertion" as contemplated in Section 13(1) of the said Act, had reversed the decree of divorce passed by the Trial Court. The Division Bench vide the impugned order confirmed

the order passed by the Single Bench and observed by holding as under: -

> *"16. Coming now to the facts of the present case, it is undisputed that the wife continued to live with the husband without any grievance for 21 years and gave birth to three children. She looked after the children. One daughter was married in the year 1984 before separation. The grievance put-forward by the husband for the first time was that the wife did not join him when he was transferred to Madras. The parties were settled at Amritsar and lived there for 21 years where children and parents of the appellant were also living. Case of the wife is that the husband got himself transferred of his own volition. At this stage of life when there were three grown up children and the wife had been living with the husband for 21 years, if unilateral decision was taken by the husband and the wife expressed her opposition, could it be held that the wife deserted the husband or treated him with cruelty. We have already referred to the settled principles on the subject. If the wife did not agree to have herself transferred to Madras, in the given situation, it could not be held that the wife wanted to bring cohabitation permanently to an end without reasonable cause. This did not show any animus deserendi nor it could be held that the wife was cruel to the husband. Taking an overall view of the matter, it cannot be held that the view taken by the learned Single Judge is not a possible view so as to call for interference in an appeal under Letters Patent. The fact remains that the wife continued to look after the children and arrange their marriages. There is nothing to show that the husband made any effort to join the wife, who was living in the matrimonial home or to look after any of the children. The burden of proof is on the appellant to prove desertion and cruelty."*

> *"17. Learned counsel for the appellant refers to Exh.A-8, which is a letter addressed to the wife, in response to her representation for maintenance. The contents of the letter are as under: -*

> *"2. It is informed that we have tried our best to help you both to reconcile in the long-term interest of the welfare of the family and children. Accordingly, it is learnt that Wg Cdr. N.S. Panesar, in good faith and on our counsel signed for 15 reconciliation. But it seems that you are not ready to reconcile even in the interest of children. Under the circumstances, there is no other alternative for this HQ except to advice you to redress your grievance, if any, in the Court of law. However, on moral and humanitarian grounds we have counselled your husband to continue remitting Rs.800/- p.m. till the matter is settled to mutual satisfaction."*

He also refers to Exh.A-17, which is letter written by the son of the appellant, asking the appellant to send money to the Court."

"18. Next contention raised is that the jewellery should not be given to the wife. Learned counsel for the appellant suggested that a grand-daughter of the appellant should visit the appellant, in which case, the appellant will have no objection to the jewellery being given to the grand daughter. Learned counsel for the wife states that the grand-daughters will visit the appellant as often as possible and also depending on desire and attitude of the appellant but not as a condition for finding of learned Single Judge to be upheld. Finding of learned Single Judge in this regard is as under: -

" ... This is a fit case to hand over the jewellery which was given to appellant (wife) at the time of marriage and thus, I direct the Manager, Bank of Baroda, Sector 22, Chandigarh to hand over all the jewellery to the appellant lying in the locker ... "

19. Relevant paragraph of **Shilpa Shailesh (supra)** is as under:

> *"33. Having said so, we wish to clearly state that grant of divorce on the ground of irretrievable breakdown of marriage by this Court is not a matter of right, but a discretion which is to be exercised with great care*

and caution, keeping in mind several factors ensuring that 'complete justice' is done to both parties. It is obvious that this Court should be fully convinced and satisfied that the marriage is totally unworkable, emotionally dead and beyond salvation and, therefore, dissolution of marriage is the right solution and the only way forward. That the marriage has irretrievably broken down is to be factually determined and firmly established. For this, several factors are to be considered such as the period of time the parties had cohabited after marriage; when the parties had last cohabited; the nature of allegations made by the parties against each other and their family members; the orders passed in the legal proceedings from time to time, cumulative impact on the personal relationship; whether, and how many attempts were made to settle the disputes by intervention of the court or through mediation, and when the last attempt was made, etc. The period of separation should be sufficiently long, and anything above six years or more will be a relevant factor. But these facts have to be evaluated keeping in view the economic and social status of the parties, including their educational qualifications, whether the parties have any children, their age, educational qualification, and whether the other spouse and children are dependent, in which event how and in what manner the party seeking divorce intends to take care and provide for the spouse or the children. Question of custody and welfare of minor children, provision for fair and adequate alimony for the wife, and economic rights of the children and other pending matters, if any, are relevant considerations. We would not like to codify the factors so as to curtail exercise of jurisdiction under Article 142(1) of the Constitution of India, which is situation specific. Some of the factors mentioned can be taken as illustrative, and worthy of consideration."

20. Relevant paragraphs of **Shashi Bala (supra)** is as under:

7. Court below upon consideration of pleadings, oral and documentary evidence on record decided issues framed by it. In respect of Issue no.1, Court below concluded that Plaintiff is clearly entitled to grant of decree of divorce in terms of Section 13 (1) (1b) of Act 1955 i.e. on the

ground of 'desertion'. Court below however concluded that Plaintiff has failed to establish commission of any physical or mental 'cruelty' upon him by Appellant. In the opinion of Court below, from material filed by Plaintiff it is apparent that it is Plaintiff, who has committed mental cruelty upon Appellant. However, since it is an admitted position that Appellant has 'deserted' Plaintiff for the last 11 years and aforesaid fact, is an admitted fact therefore same is not required to be proved under Indian Evidence Act. Consequently, suit for divorce filed by Plaintiff was decreed by Court below on the ground of 'desertion' vide judgement dated 13.03.2015 and decree dated 27.03.2015.

18. Section 13(I) (ib) of Act 1955 is a mandatory provision and therefore, if a suit for divorce is filed on the ground of 'desertion', the precondition provided in above Section for grant of decree of divorce on the ground of desertion must be fulfilled on the date of presentation of suit. Admittedly, date of desertion by Appellant, pleaded in plaint is 28.02.2004 whereas plaint was presented on 07.03.2005. Evidently, period of two years of desertion on the part of Appellant had not expired on the date of presentation of plaint. Therefore, precondition provided in Section 13(I) (i-b) of Act 1955 was not fulfilled on the date of presentation of suit. Subsequent events which have taken place after the institution of suit are irrelevant as same cannot be taken into consideration under scheme of Act 1955. Therefore, we have no hesitation to hold that decree passed by Court below decreeing suit for divorce filed by Plaintiff on ground of 'desertion' is manifestly illegal.

21. Similarly this Court in First Appeal No. 792 of 2008 (Ashwani Kumar Kohli Vs. Smt. Anita) decided on 17.11.2016 has also considered this question and observed as follows in paragraphs 7, 8, 10, 11, 12 and 13:-

> *"7. Therefore, point for adjudication in this appeal is "whether a decree of reversal can be passed by granting divorce to the appellant on the ground which was not subject matter of*

adjudication before the Court below and is being raised for the first time in appeal".

8. Under the provisions of Act, 1955 there is no ground like any "irretrievable breakdown of marriage", justifying divorce. It is a doctrine laid down by judicial precedents, in particular, Supreme Court in exercise of powers under Article 142 of the Constitution has granted decree of divorce on the ground of irretrievable breakdown of marriage.

10. This aspect has been considered by this Court in Ram Babu Babeley Vs. Smt. Sandhya AIR 2006 (All) 12 = 2006 AWC 183 and it has laid down certain inferences from various authorities of Supreme Court, which read as under:-

"(i) The irretrievable break down of marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the grounds on which divorce is sought are made out, this circumstance can be taken into consideration as laid down by Hon'ble Apex Court in the case of Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and V. Bhagat versus D. Bhagat, AIR 1994 SC 710.

(ii) No divorce can be granted on the ground of irretrievable break down of marriage if the party seeking divorce on this ground is himself or herself at fault for the above break down as laid down in the case of Chetan Dass Versus Kamla Devi, AIR 2001 SC 1709, Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and Shyam Sunder Kohli v. Sushma Kohli, (2004) 7 SCC 747.

(iii) The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases where both the parties have levelled such allegations against each other that the marriage appears to be practically dead and the

parties can not live together as laid down in Chandra Kala Trivedi versus Dr. SP Trivedi, (1993) 4 SCC 232.

(iv)The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases also where the conduct or averments of one party have been so much painful for the other party (who is not at fault) that he cannot be expected to live with the offending party as laid down in the cases of V. Bhagat versus D. Bhagat, (supra), Ramesh Chander versus Savitri, (1995) 2 SCC 7, Ashok Hurra versus Rupa Bipin Zaveri, 1997(3) AWC 1843 (SC), 1997(3) A.W.C. 1843(SC) and A. Jayachandra versus Aneel Kaur, (2005) 2 SCC 22.

(v) The power to grant divorce on the ground of irretrievable break down of marriage should be exercised with much care and caution in exceptional circumstances only in the interest of both the parties, as observed by Hon'ble Apex Court at paragraph No. 21 of the judgment in the case of V. Bhagat and Mrs. D. Bhagat, AIR (supra) and at para 12 in the case of Shyam Sunder Kohli versus Sushma Kohli, (supra)."

11. The above authorities have been followed by this Court in "Pradeep Kumar Vs. Smt. Vijay Lakshmi' in 2015 (4) ALJ 667 wherein one of us (Hon'ble Sudhir Agarwal,J.) was a member of the Bench.

12. In Vishnu Dutt Sharma Vs. Manju Sharma, (2009) 6 SCC 379, it was held that under Section 13 of Act 1955 there is no ground of irretrievable breakdown of marriage for granting decree of divorce. Court said that it cannot add such a ground to Section 13, as that would amount to amendment of Act, which is the function of legislature. It also referred to some judgments of Supreme Court in which dissolution of marriage was allowed on the ground of irretrievable breakdown but held that those

judgments do not lay down any precedent. Supreme Court very categorically observed as under:-

> *"If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Court. Hence, we do not find force in the submission of learned counsel for the appellant."*

> *13. The above view has been followed in Darshan Gupta Vs. Radhika Gupta (2013) 9 SCC 1. Similar view was expressed in "Gurubux Singh Vs. Harminder Kaur' (2010) 14 SCC 301. This Court also has followed the above view in Shailesh Kumari Vs. Amod Kumar Sachan 2016 (115) ALR 689."*

21. We would also like to make reference to some old landmark judgments and some latest judgments on the issue involved.

22. Reference may be made to the judgments of **Naveen Kohli Vs. Neelu Kohli, AIR 2006 Supreme Court 1675, Samar Ghosh Vs. Jaya Ghosh, 2007 (4) SCC 511, Rajib Kumar Roy Vs. Sushmita Saha, 2023 SCC Online SC 1221, Rakesh Raman Vs. Kavita, AIR 2023 SC 2144 and Prakashchandra Joshi Vs. Kuntal Prakashchandra Joshi alias Kuntal Visanji, 2024 SCC Online SC 68.**

23. Relevant paragraphs of **Naveen Kohli (supra)** are as under:

> *"78. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the*

matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases do not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

79. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

80. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist.

81. Some jurists have also expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for grant of the decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems then are sought to be solved.

82. The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.

83. When we carefully evaluate the judgment of the High Court and scrutinize its findings in the background of the facts and circumstances of this case, then it becomes obvious that the approach adopted by the High Court in deciding this matter is far from satisfactory.

90. Undoubtedly, it is the obligation of the Court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever

to a marriage which in fact has ceased to exist. In the instant case, there has been total disappearance of emotional substratum in the marriage. The course which has been adopted by the High Court would encourage continuous bickering, perpetual bitterness and may lead to immorality.

91. In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.

92. The High Court ought to have visualized that preservation of such a marriage is totally unworkable which has ceased to be effective and would be greater source of misery for the parties.

93. The High Court ought to have considered that a human problem can be properly resolved by adopting a human approach. In the instant case, not to grant a decree of divorce would be disastrous for the parties. Otherwise, there may be a ray of hope for the parties that after a passage of time (after obtaining a decree of divorce) the parties may psychologically and emotionally settle down and start a new chapter in life.

94. In our considered view, looking to the peculiar facts of the case, the High Court was not justified in setting aside the order of the Trial Court. In our opinion, wisdom lies in accepting the pragmatic reality of life and take a decision which would ultimately be conducive in the interest of both the parties."

24. Relevant paragraph of **Samar Ghosh (supra)** is as under:

"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, discommode 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 sterilization 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."

25. Relevant paragraph of **Rajib Roy (supra)** is as under:

"7. We have heard the learned counsel for the petitioner as well as the learned counsel for the respondent (wife) at length. Today, the parties are also before us through virtual mode, and we had a chance to interact with both. Considering the entire gamut of facts which are there before us, we have absolutely no doubt in our mind that this is a case of irretrievable breakdown of marriage.

8. The husband and wife have been living separately, the wife is at Udaipur (district Gomati), Tripura and husband at Agartala, Tripura for the last 12 years. Nothing would give us more satisfaction if the two could work out their differences and decide to live together, if only for the sake of their child. But under the circumstances, with the rigid attitude of both the parties, who have failed to appreciate the beauty of compromise, we have been forced to convince ourselves, albeit regrettably, that the two cannot now live together. Twelve years of separation, is a sufficiently long period of time to have sapped all emotions which the two perhaps may have had once for each other. We therefore cannot take the 11 same hopeful view as that of the High Court, which still believes that the matrimonial bond between the two has not ruptured beyond repair or that the two cannot still give a new lease of life to their relation. Frankly, no matter how much we would have liked this to happen but in reality, this is a possibility, which under the facts and circumstances of the case, can only be called wishful.

9. Continued bitterness, dead emotions and long separation, in the given facts and circumstances of a case, can be construed as a case of "irretrievable breakdown of marriage", which is also a facet of "cruelty". In Rakesh Raman v. Kavita reported in 2023 SCC OnLine SC 497, this is precisely what was held, that though in a given case cruelty

as a fault, may not be attributable to one party alone and hence despite irretrievable breakdown of marriage keeping the parties together amounts to cruelty on both sides. Which is precisely the case at hand.

10. Whatever may be the justification for the two living separately, with so much of time gone by, any marital love or affection, which may have been between the parties, seems to have dried up. This is a classic case of irretrievable breakdown of marriage. In view of the Constitution Bench Judgment of this court in Shilpa Sailesh v. Varun Sreenivasan, 2023 SCC OnLine SC 544 which has held that in such cases where there is irretrievable breakdown of marriage then dissolution of marriage is the only solution and this Court can grant a decree of divorce in exercise of its power under Article 142 of the Constitution of India.

11. We therefore declare the marriage to have broken down irretrievably and therefore in exercise of our jurisdiction under Article 142 of the Constitution of India we are of the considered opinion that this being a case of irretrievable breakdown of marriage must now be dissolved by grant of decree of divorce."

26. Paragraph 18 of **Rakesh Raman (supra)** is as under:

"18. We have a married couple before us who have barely stayed together as a couple for four years and who have now been living separately for the last 25 years. There is no child out of the wedlock. The matrimonial bond is completely broken and is beyond repair. We have no doubt that this relationship must end as its continuation is causing cruelty on both the sides. The long separation and absence of cohabitation and the complete breakdown of all meaningful bonds and the existing bitterness between the two, has to be read as cruelty under Section 13(1) (ia) of the 1955 Act. We therefore hold that in a given case, such as the one at hand, where the marital relationship has broken down irretrievably, where there is a long separation and absence of cohabitation (as in the present case for the last 25 years), with multiple Court cases between the parties; then continuation of such a

'marriage' would only mean giving sanction to cruelty which each is inflicting on the other. We are also conscious of the fact that a dissolution of this marriage would affect only the two parties as there is no child out of the wedlock."

27. Relevant paragraphs of **Prakashchandra Joshi (supra)** is as under:

"5. The petition proceeded ex parte as, despite due service, the respondent remained unrepresented. After considering the pleadings and evidence, the learned Family Court dismissed the petition of the appellant, inter alia, observing that no case had 4 been made from the alleged cruelty caused to the appellant by the respondent.

6. Being aggrieved with and dissatisfied by the dismissal of the petition by the learned Family Court, the appellant moved a Family Court Appeal before the High Court. The High Court dismissed the appeal by holding that no case has been made out by the appellant for seeking a decree of divorce on the ground of either cruelty or desertion. Hence, this appeal.

7. Considering the facts and circumstances, a short question arises for our consideration as to whether a decree for divorce can be granted for the reason that the marriage has irretrievably broken down.

8. Notice was issued to the sole respondent/wife on 21.01.2022, which was duly served upon the respondent. The respondent once again did not put in appearance either inperson or through an advocate.

12. It is also to be seen that in the proceedings initiated by the appellant for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, the respondent did not appear despite receiving the summons. Similarly, in the present divorce proceedings also the respondent failed to enter appearance despite service of notice in the Trial Court, High Court and Supreme Court as well. Thus, it is apparent that the respondent does not wish to continue the marital chord and is 7 not

responding to court summons much less the request made by the appellant.

15. Reverting back to the case in hand, to accord satisfaction as to whether the present is a fit case for exercise of power under Article 142 (1) of the Constitution of India to dissolve the marriage on the ground of irretrievable breakdown, we see that the parties are residing separately since February, 2011 and there have been no contact whatsoever between them during this long period of almost 13 years. The respondent-wife is not even responding to the summons issued by the courts. It seems she is no longer interested in continuing the marital 10 relations with the appellant. Therefore, we have no hesitation in holding that the present is a case of irretrievable breakdown of marriage as there is no possibility of the couple staying together."

28. The above discussion would clearly reflect that the ground of irretrievable break down is being consistently recognized for ground of divorce by the Hon'ble Apex Court since long.

29. Even the need of amending the Act by including ground of irretrievable break down for grant of divorce was felt and expressed as back as in the year 2006 by Hon'ble Apex Court in **Naveen Kohli (supra).**

30. Needless to point out that the case as referred to above clearly reflects that in exercise of power under Article 142 of the Constitution of India, decree of divorce is being consistently granted on the ground of irretrievable break down by the Hon'ble Apex Court.

31. The Apex Court, realising the absence of this ground in the statute, ultimately realised that under such circumstances this amounts to mental cruelty on both parties as continuation of matrimonial ties in normal circumstances, is not possible.

32. Considering the submissions made by learned counsel for the appellant and also the law laid down by the Apex Court as noted above, admittedly, the respondent is staying away from the appellant for six years before divorce petition filed in the year 2015 and despite receipt of the notice, she is not inclined to appear before this Court to defend her case, which shows that she is not interested to live with the appellant and she is not interested to continue the matrimonial life with the appellant and the marriage has become totally unworkable and emotionally dead.

33. Apart from the facts and circumstances of the present case, generally speaking, the Hindu Marriage Act is of the year 1955. Section 13 of the Act provides for grounds of divorce. Needless to point out that several amendments have been carried out in the aforesaid section in the grounds so provided under the section originally. The ground of desertion for a continuous period of not less than two years, immediately preceding the presentation of the petition is also one of the ground. Needless to highlight that this desertion necessarily includes separate living of the husband and wife and therefore, in other words, two years continuous separation, can be taken as a ground for divorce and has been statutorily provided. The law must keep pace with the time. When the Hindu Marriage Act was enacted in the year 1955, the manner in which the marriages were taking place and the sentiments and respect attached to such matrimonial ties were different and the manner in which marriages are taking place in the present days were unheard of in those days. For a fairly long period, the term ‘cruelty’ came to be interpreted as physical cruelty only but now it is settled that the cruelty need not be physical only but can be mental as well.

34. We, however, have no intention to make an impression that we have anything negative about the same. It is because of education, financial independence, breaking of caste barriers, modernization, effect of western culture. The time is changing and the society is becoming more

and more open and individualistic in nature, leading to lesser need of emotional support as well. Whether it is a love marriage or is an arranged marriage, all such factors do affect the relationship between the two. However, needless to say that to every action, there is equal reaction. Easily entered marriages like love marriages are also easily resulting in matrimonial dispute between the two. No matter, who is responsible for the same. The parties are not willing to continue such relationship or atleast one party starts living separately. These facts are clearly emerging from our experience, while dealing with the such disputes. There may be so many reasons for living separately, however, on the other hand, there may be or there are several reasons for opposing the divorce petition as well. Hence, when the parties mutually agree for divorce, petition is filed under Section 13B of the Hindu Marriage Act.

35. In view of this changing time and experience, the Courts cannot remain mute spectators to such ground realities of life. The Courts are answerable to the litigant seeking justice. Needless to say that the law must keep pace with the time.

36. In **Naveen Kohli (supra)** in the year 2006 itself, Union of India was strongly recommended by the Hon'ble Apex Court to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce and copy of the judgment was sent to Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps. Paragraph 96 of the aforementioned judgment is as under:

> *"96. Before we part with this case, on the consideration of the totality of facts, this Court would like to recommend the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce. A copy of this judgment be sent to the Secretary,*

Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps."

37. It is known to all concerned with the subject that even after expiry of about 18 years, nothing has been done in this regard. On one hand, the law recognises desertion of a petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition as one of the grounds for grant of divorce, whereas on the other hand, it is not understandable as to why the ground of irretrievable break down is not being recognized as one of the grounds, when the parties are living separately for so many years and in some cases, for decades together.

38. In so many cases, the matrimonial life between the parties is only for the namesake, whereas factually the marriage has become totally unworkable and emotionally dead, even if respondent is insisting upon carrying on with such emotionally dead relationship. It is only for this reason recognizing ground realities of such dead relationship, it is being consistently felt by the Hon'ble Apex Court that continuance of such unworkable matrimonial ties is nothing but mental cruelty on the parties and atleast on the petitioner, even when the divorce petition is being opposed by the other side. To our mind, irretrievable break down is an assessment of circumstances prevailing in lives of the parties to the marriage and if proved, would amount to mental cruelty.

39. Reverting back to the facts of the case and the discussion made hereinabove, we find that the marriage has irretrievably been broken down. Hence, as held by the Apex Court, certainly this case has to be construed as a case of 'mental cruelty' on the appellant as the marriage is totally unworkable and emotionally dead. On that note, divorce can be granted.

40. Accordingly, the judgment, order and decree dated 18.10.2019 passed by Principal Judge, Family Court, Moradabad in Case No. 492 of 2015 is set aside. The appeal is **allowed**.

41. We hereby grant a decree of divorce in favour of the appellant-husband Col. Manoj Kumar Gupta against Smt. Sangeeta, the respondent-wife herein.

42. We direct the Registrar (Compliance) to send a copy of this judgment to Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India and Law Commission to consider the matter in view of the observations of the Hon'ble Apex Court in the case of **Naveen Kohli (supra)** and other judgments**.**

43. Learned A.S.G.I. is also directed to forward a copy of this judgment to the authorities noted above for serious consideration.

Order Date :- 29.02.2024

Noman