

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE SIDE
APPELLATE SIDE**

Present:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS**

**FAT 539 of 2014
IA No. CAN 2 of 2017
(Old No. CAN 72 of 2017)**

**Mridula Sikdar
Vs.
Jitendra Nath Sikdar**

Appearance:

For the Appellant : Ms. Chandreyi Alam, Adv.

For the Respondent : Mr. Saurav Chaudhuri, Adv.

Judgment On : **12.09.2023**

Harish Tandon, J.:

1. The present appeal is at the instance of a wife assailing the judgment and decree dated 29th August, 2014 passed by the learned Additional District & Sessions Judge, 3rd Court, Barrackpore in Matrimonial Suit No. 1 of 2008 by which the decree for dissolution of marriage was granted in favour of the husband on the ground of cruelty and desertion.

2. An application for dissolution of marriage was founded not only the allegation of cruelty and desertion but several allegations have been made against the wife pertaining to her extra marital affairs with several persons named therein. Although, in the preamble of the said application it is indicated that the aforesaid application is filed under Section 13 (1) (ia) and (ib) of the Hindu Marriage Act, 1955 but the averments made therein also includes the allegation of adultery of the wife without impleading the persons having alleged adulterous relation with the wife.

3. It is necessary to adumbrate the salient facts emerged from the said application filed by the husband-respondent touching upon the aforesaid allegations before we proceed to decide the appeal on the points canvassed before us by the respective counsels. Admittedly, the parties were married under the Hindu rituals and rights on 3rd December, 1990 at the parental aunt's house of the appellant. After the solemnization of the marriage, the parties started living at the house of the respondent and the marriage was duly consummated and a female child was born on the said wedlock on 30th August, 1992. A precursor to the solemnisation of the marriage is extensively narrated in the said application that the wife who was studying at a relevant point of time and admitted into a coaching centre run by the husband respondent developed the emotional liking as the respondent supported her to pursue her studies upto the Bachelor Degree course. On disclosure of such emotions have borne in the mind of the appellant, the respondent advised to disclose the same to her parents who in turn to disclose the same to his parents and ultimately on such advice both the

families agreed to give marriage which was solemnised on the date as indicated hereinabove.

4. The allegation proceeds to the extent that immediately after the marriage the appellant being an obstinate, headstrong, suspicious lady started burning the conjugal life raising a unbold and unsubstantiated allegation of having relation with the maid servant and started using unwanted and unacceptable languages castigating the prestige and the position of the husband-respondent. It is further alleged that on the eve of the six months of the marriage, the appellant inflicted a systematic pressure on the issue of separate living in separate mess and having denied to accept the same, the annoyance on the part of the appellant and misbehaviour aggravated by chiding the various vulgar and defamatory languages having lowered the reputation and the prestige which the family had in the society. It is further alleged that on 04.01.1992 the appellant threatened the husband-respondent to commit suicide if her demands are not met. The allegation as to ill-treatment with the husband-respondent with the extreme cruelty as and when the respondent interacts with any lady customer visiting the shop of his father in course of business transaction on some false acquisition obviously guided by a suspicious mentality having a negative impact not on the business and the customer avoiding to visiting the said shop but also tarnishing the image and prestige of the family. The allegations run further to the extent that the appellant was leaving the house at her sweet will without taking prior consent of the permission of the respondent and coming late in the house and on being asked in this regard she replied in a rude manner which

shows that the appellant has a scant respect towards the respondent which amounts to cruelty.

5. Astonishingly, an allegation is also made against the appellant having an extra-marital affair with the person named therein; even disclosing the name of a person who witnessed such act of the appellant. In a subsequent paragraph of the said application several other names have been divulged apart from the name disclosed in paragraph 19 thereof who have an extra-marital affair with the appellant and some of the incidences have also been vividly averred therein corroborating the aforesaid allegations. It is also alleged that the wife forcibly took the possession of the STD booth belonging to the respondents when he was taken in the custody in connection with a false allegation and took away a substantial amount therefrom and since then she is having control thereof. Several allegations relating to perpetration of the threat at the behest of the appellant as well as her relatives are also narrated in the said application. It is further alleged that a landed property at Durgapur which was purchased by the respondent in the name of the appellant has been disposed of in the year 2005 by the wife and the entire consideration money has been deposited in her account. Further allegation as to withdrawal of the money from the joint account of the appellant and her father-in-law is also alleged in the said application as an element of cruelty inflicted upon the respondent. The respondent has further averred that there is no co-habitation between them since 2003 as the appellant started living in a separate room with their daughter in the same house and such disassociation without any reason and rhyme constitute a desertion.

6. The wife-appellant contested the said matrimonial proceedings by filing the written statement denying all the allegations made therein. The appellant took a stand that few days after the birth of the only daughter, the husband-respondent developed an extra-marital affair with the lady and on protest not only by the appellant but the family members of the respondent, the respondent became indifferent and started inhuman physical and mental torture upon the appellant. It is further averred despite the same, the appellant tried to restore the happy conjugal life with the hope of a better future not only of her but also her daughter, but the respondent did not pay any heed to such request. Astonishingly the respondent married another lady, the name whereof is disclosed in paragraph 16 of the written statement, on 27.03.2006 which was registered before the Marriage Registrar. It is a specific stand of the appellant that the respondent on and from 27.03.2006 voluntarily withdrew himself from the association of the appellant which compelled her to leave in a separate room along with their daughter in the same house. Several attempts were made to restore such relation with the intervention of the respected and reputed peoples of the society and the family but there was a complete refusal on the part of the respondent. The respondent even stopped bearing the expenses of the appellant and the educational expenses of the daughter. She has further disclosed the income of the husband-respondent from various businesses and the rent received by him from the tenants of his other houses including the kerosene dealership business which initially stood in the name of the father-in-law and upon his death in the name of the respondent. She has categorically averred in the written

statement that despite the respondent having contracted the second marriage she is still willing to live with him and lead a happy conjugal life.

7. On the basis of the aforesaid pleadings of the respective parties, the evidence was adduced by them only and not a single witness was called in support of the allegations relating to the extra-marital affairs alleged by both the parties. However, the wife produced the certified copy of the notice of intending marriage and the certificate of marriage contracted by the respondent with another lady during the subsistence of the marriage. On the other hand, respondent has filed the complaint alleged by the appellant with the police station and the certified copy of the judgment passed by the Court in Matrimonial Suit no. 54 of 2007 in support of his stand that the second marriage was declared a nullity and ultimately annulled.

8. The Trial Court while deliberating on the ground of cruelty envisaged under Section 13 (1) (ia) of the said Act extensively narrated the concept of cruelty as recognised in a judicial parlance and held that the moment the wife-appellant has withdrawn the money from the joint account held in the bank with the father-in-law without any intimation to the respondent constitute the element of cruelty. The Trial Court further found that the second marriage with the lady which was dissolved by a decree passed by the Competent Court itself proved that there was no co-habitation between them and, therefore, the allegation of the wife in this regard cannot be held to be of such nature which would invite the disassociation from the conjugal life. Even being conscious of the proposition of law that irretrievable breakdown of the marriage is not recognised as a ground for granting dissolution of marriage under Section 13 of the said Act, the Trial

Court took note of the same and held that the conduct of the appellant is such that she does not care for the respondent nor could restore a confidence, which may constitute a cruelty. The another ground of cruelty which has been held by the Trial Court relates to the withdrawal of money from the joint bank account and the sale of the property which admittedly stood in the name of the wife without the consent and concurrence of the respondent. Interestingly, the Trial Court held that even if the wife-appellant wanted to continue the marital life forgetting and forgiving all the act of the respondent in the past but if the parties are allowed to continue or directed to continue a marital life it would constitute a cruelty on the respondent.

9. The Counsel for the appellant submits that there is convincing materials produced before the Court in support of the averments made in the written statement more particularly the second marriage contracted by the respondent but the Trial Court misconstrued the aforesaid incidents and held that the conduct of the respondent cannot be such which constrained the disassociation. It is submitted that even thereafter the respondent all along intended to restore the conjugal life and the respondent himself has deserted the appellant and, therefore, the decree on the ground of desertion is not sustainable. It is further submitted that several allegations relating to extra-marital affairs of the appellant is pleaded in the application as well as in the evidence but not a single witness or the person named therein was cited as witness and, therefore, such allegation shall be deemed to not have been proved. The Counsel further submits that the aforesaid persons have not been impleaded as

party in the proceeding and, therefore, such allegation cannot constitute a cruelty nor a ground of adultery. She vociferously submits that the allegation of cruelty has not been proved by the respondent and if the respondent himself is found to have perpetrated cruelty by contracting a second marriage, he is not entitled to get a decree against the appellant. In support of the contention that allegation made by the wife on contracting the second marriage having been proved by producing the notice intending marriage and in fact the marriage was not denied as the respondent-husband produced the certified copy of the decree passed in a matrimonial suit filed by the said lady, such allegation cannot be construed as a blatant lie and, therefore, no element of cruelty can be perceived therefrom. Reliance is placed upon a judgment of the Division Bench of this Court in case of ***Ratna Banerjee vs. Chandra Madhab Banerjee*** reported in ***(2007) 1 CHN 503***. It is submitted that though serious allegation is levelled against the appellant in the said application filed by the respondent having not proved it can at best may constitute a cruelty upon the appellant and for such act the respondent cannot get a decree for cruelty. It is thus submitted that the appellant despite the aforesaid allegations having made against her still have a cherish and desire to continue with the conjugal life condoning all the act of the respondent.

10. On the other hand, the Counsel for the respondent submits that the conduct of the wife in making false allegation constituted a cruelty and there is no infirmity and/or illegality in the impugned judgment passed by the Trial Court. It is vehemently submitted that the wife not only sold the property purchased by the respondent in her name without seeking any

permission or a prior approval but also withdrew substantial amount of money from the joint bank account held with his father for which the several suits are filed by his mother and the elder brother. It is arduously submitted that the wife voluntarily deserted the respondent since 2003 and living in a separate room with daughter which amounts to a desertion apart from mental cruelty. It is thus submitted that the decree annulling the marriage at the behest of the lady would indicate that there was no conjugal relation with them and, therefore, the allegation of the appellant in this regard is untenable. It is further submitted that the conduct of the appellant in treating the respondent as well as the family members is such that it renders himself to live together with the part of the respondent as there is a sense of insecurity having developed in the mind of the respondent. It is vociferously submitted that the parties have been living separately since 2003 and the marriage has broken down irretrievable and there is no possibility of the restoration thereof and, therefore, it is better to sever such marital tie than to compel the parties to live in such matrimonial institution.

11. On the backdrop of the aforesaid pleadings and the submissions advanced before us, whether the judgment and decree of the High Court on the ground of cruelty and desertion can be sustained.

12. The cruelty has not been defined under the Hindu Marriage Act, 1955. The seminal point involved in the instant case is to ascertain the meaning and the definition of the word 'cruelty' in the perspective of a matrimonial offence under the aforesaid Act. Though the cruelty is included under Section 13 as one of the ground for dissolution of marriage

but the same has not been defined in the said Act nor any explanation has been appended thereto throwing light on the meaning and the tenet of the said word. Section 13 (1)(ia) of the Act postulates that the marriage can be dissolved by a decree of divorce if the petitioner of the said application is treated with cruelty by the other party. The aforesaid Section does not restrict the right only on her husband but recognises the right of both the husband and wife to seek the dissolution of marriage by the decree of divorce on the ground of cruelty provided such cruelty is proved that he or she is treated with cruelty by the other party. The intention behind the incorporation of the expressions and/or languages used therein is laudable in the sense that a person be a husband or a wife can present the said application alleging the cruelty having perpetrated upon him/her by the other side which necessarily implies that the person who himself treated the other side with cruelty is not entitled to get the decree of divorce. The obvious reason is that a person who is a wrongdoer cannot reap the benefit of his own wrong. Since the cruelty has not been defined in the said Act, there is no ambiguity in holding that it includes both mental and the physical cruelty. Presumably the legislature avoided to define the word 'cruelty' in the said statute because of its nature and the degree in relation to a matrimonial discord. The English Courts attempted to define the cruelty which is also accepted by the Indian Courts that the conduct of such character as to have caused danger to life, limb or health (bodily or mentally), so as to give rise to a reasonable apprehension of such danger may be one of the factors to be borne in mind while extending the meaning of the expression 'treated the petitioner with cruelty'. The reason of not

defining the cruelty is presumable to understand both exclusive or inclusive dependent upon the nuances of every act or the incident or the conduct of the respective parties in the perspective of the Indian culture or the Indian society. The mindset of a man or woman in the Indian society have diverse colours or so varied and/or infinite that it is merely impossible to define the said word 'cruelty' with precession. What may constitute a cruelty in one circumstance may not be a cruelty in the other and, therefore, the legislature in their wisdom have not squeezed the concept of cruelty by defining it in the statute. The Apex Court in case of **Parveen Mehta vs. Inderjit Mehta**, reported in **(2002) 5 SCC 706** attempted to explain the concept of cruelty for the purpose of Section 13 (1) (ia) of the said Act as a behaviour of one man towards the other which may cause a reasonable apprehension in the mind of the other with regard to his safety in continuing with the matrimonial relationship. It is further held that the cruelty in relation to a mental cruelty is a state of mind and a feeling which either of the spouses has because of the behaviour or the behavioural pattern of another. The Apex Court was conscious that in case of physical cruelty the manner of proving is somewhat easier than in case of mental cruelty which is more difficult and complex in the following:

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

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

13. In **A. Jayachandra vs. Aneel Kaur**, reported in **(2005) 2 SCC 22** the Apex Court has expanded the horizon of the concept of cruelty not only to a danger to life, limb or health, bodily or mentally but to be decided on the parameters of a particular society to which the party belonged including the social values, the social status the environment in which they lived together. The Apex Court further held that the cruelty in relation to a criminal case which is to be decided on the basis of a proof beyond the shadow of doubt cannot be imported in case of a matrimonial disputes relating to a dissolution of marriage in the following:

“10. The expression “cruelty” has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of

such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in the view that one has to consider the evidence in matrimonial disputes.

11. The expression "cruelty" has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in

respect of matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the court will have no problem in determining it. It is a question of fact and degree. If it is mental, the problem presents difficulties. First, the enquiry must begin as to the nature of cruel treatment, second the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or 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. (See Shobha Rani v. Madhukar Reddi.)

12. To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute

cruelty. It must be of the type as to satisfy the conscience of the court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.”

14. The Division Bench of this Court in ***Ratna Banerjee vs. Chandra Madhab Banerjee***, reported in ***(2007) 1 CHN 503*** has taken into account the various wear and tear of the matrimonial relations and held that even if the wife has a dissenting view to the husband or his family that itself cannot tantamount to an act of cruelty as such disagreement is a normal human behaviour and in absence of any cogent evidence that there is any misbehaviour or the conduct is such which would render the husband or his family members impossible to live together, the divorce on such ground should not be granted. It is further held that in order to prove that the wife is quarrelsome there must be some witnesses or the evidence to be adduced in this regard, even though in the common parlance such quarrel if there be any involves at least two parties. It is thus held mere alleging of misbehaviour without any corroborative proof shall not constitute cruelty in the following:

“14. The next allegation is that the wife used to quarrel with the members of the in-law’s family including the husband. The specific case of the husband is that she used to quarrel with his father. The father or the mother or the sister of the husband has not come forward to depose against the wife. Only the brother has given evidence and has alleged that the appellant used to quarrel with his father. Whenever we mention of a quarrel, there must be at least two parties to such incident and a reason for the disagreement. In this case, the PW-4 has not disclosed the reason of altercation between his father and the appellant. Every wife has right to resist improper demand of the in-laws and in the process, if she protests against such unacceptable demand, she cannot be held to be guilty of showing disrespect to her in-laws. Therefore, unless evidence is adduced indicating the reason of altercation between the appellant and her father-in-law, we are unable to come to any conclusion as to whether the conduct of the wife was abominable. As regards the allegation of the PW-4 that the appellant misbehaved with him, we are not in a position to rely upon such statement unless the actual nature of misbehaviour is brought to the notice of the Court. By simply alleging misbehaviour without giving instances thereof, the charge of misbehaviour against the wife has not been proved at the instance of the PW-4. We, thus, find that the husband has failed to prove allegation of misbehaviour of the appellant with his parents, brother and sister.”

15. What emerged from the above noted decision that to constitute cruelty under the aforesaid provision of the Act it should be of such

magnitude and must weigh in the mind of the reasonable person that it would not be reasonably possible to live together as the sense of insecurity not only to life or limb, bodily or mentally must be inbred and deeply rooted in the mind in absence of any definition assigned in the statute to the cruelty. It has to be considered on the various aspects including the behaviour, their social status, education and the environment in which they live. Hindu Mythology propagates the marriage between the two Hindus as sacred and made in heaven, trifling or irritation developed in the marital tie is a normal wear and tear of a human behaviour and it would be dangerous to constitute the same as cruelty as two persons grown up in a different atmosphere having decided to live together may always have a disagreement in various aspects but such menial disagreement may not constitute a cruelty. With the changing society and the education having imparted to them may bring a disagreement as the perception of one may not be a perception of other which is a normal human behaviour. Every individual has a right to percolate his understanding of a subject which may bring disagreement to an idea or the conception of a subject which cannot be construed as a cruelty in the Indian society.

16. As held in **A. Jayachandra (supra)** the foundation of a sound marriage is tolerance, adjustment and respecting to one another; petty quarrels, trifling differences should not be exaggerated and magnified to destroy the matrimonial relationship. It is further held that two technical and hyper technical approaches may be counter-productive to the institution of marriage as the Court never expects to deal with ideal husband and ideal wife. The Apex Court has succinctly laid down that in

order to constitute the conduct of any of the party to be called as cruelty it must touch a certain speech of severity and it is a ardent duty of Court to weigh the gravity on the parameter as to whether the conduct was such that no reasonable person would tolerate on the ratio as laid down in the above noted case.

17. The onerous duty of this Court is to determine whether the allegation made by the husband-respondent in the petition as well as the evidence have been proved and may constitute a cruelty against him under the aforesaid provisions of law. The petition running into several pages vividly narrates the incidents which the husband-respondent construed as a cruelty upon him but not a single independent witness has been brought in support thereof. It is alleged that within few days of solemnisation of marriage the wife being a lady of suspicious mind made an allegation against the petitioner having a relation with the maid servant but no such maid servant was brought as an witness to corroborate the aforesaid allegation; furthermore the conjugal relationship continued even after such allegation alleged to have been made by the appellant and a daughter is born on the eve of the two years of marriage. Even if we construed such allegation to have been made by the wife by the act of the husband the same is condoned as they continued establishing the physical relation which resulted in the form of blessing bestowed upon them by giving birth to a daughter. Apart from the same the Trial Court has not held the same as cruelty upon the petitioner as the cruelty was perceived solely on the ground that the wife forcibly took control of the STD Booth business and

also sold the property without the concurrence and permission of husband-respondent.

18. Admittedly, the property at Durgapur was purchased in the name of wife. It is alleged that the consideration money was paid by the husband-respondent but not a single iota piece of evidence was produced in this regard. It is held by the Trial Court that the wife has deposed that she did not have any income before the marriage which leads to a presumption that the consideration was paid by the husband-respondent. Even if the aforesaid fact is considered to be true which does not appear to have been proved, for the sake of argument, indubitably the property stands in the name of the wife-appellant. The wife cannot be regarded as a property of the husband nor she is expected to seek any permission from the husband to do any act or a thing which she decided to do in her life. The mindset of the husband-respondent is evident that he wanted the wife to remain a passive companion having no freedom of mind nor to take any decision of her life without his permission or concurrence. Such mindset cannot be accepted in a changing behaviour of the society nor the wife is considered to be subservient to the husband incapable of taking any independent decision in her life. It appears that both are educated and if the wife decided to sell the property standing in her name without seeking approval or permission from the husband-respondent, it shall not constitute the cruelty. The dominance of male over the female is not acceptable to the present society nor the framers of our Constitution ever inculcated such sense. There cannot be any bias on gender as both male and female have equal right and if the husband can sell the property without the approval

and permission of wife we are unaware to comprehend that the property standing in the name of the wife cannot be sold by her without the permission and/or approval of her husband. We have to eradicate the mindset of gender inequality and therefore the finding of the learned Judge in the Trial Court is unacceptable and untenable.

19. The second element of cruelty held by the Trial Court that the wife withdrew the money from the joint bank account held with the father-in-law after his death is also not tenable nor can be brought within the purview of cruelty. The Trial Court ought to have considered the case from a different angle, it is a categorical allegation of a husband-respondent that within 15 days of marriage the wife was indifferent, quarrelsome as raising various suspicion against the husband of a relation with the maid servant and also misbehaved with the family members yet the father-in-law opened a bank account with the appellant and put a substantial amount of money therein. It leads to an inescapable conclusion that the father-in-law had reposed confidence on the wife-appellant in opening the bank account with her which leads to destroying the allegation made by the husband against the wife-appellant. Whether the withdrawal of money after the death of the father-in-law is a matter to be decided in a civil suit filed by the mother-in-law and the elder brother-in-law and, therefore, we do not intend to make any comment thereupon. The wife has categorically admitted to have withdrawn the said amount in her evidence and have given an explanation that since the husband-respondent was not providing any money to sustain her or the daughter, such amount was necessary. Though it has not been said in clear precession but an impression can be gathered from

the evidence from the deposition of the wife if read in its entirety. It is far-fetched to constitute a cruelty on withdrawal of the money from the joint bank account and the decree for divorce is granted thereupon.

20. The finding of the Trial Court that since the inception of the marriage the parties were not happy does not appear to have been corroborated by any evidence. The Trial Court surreptitiously jumped to such conclusion solely on the ground that the wife withdrew the money from the joint bank account overlooking the fact that within two years of marriage the parties were blessed with the daughter and, therefore, it cannot be said that since the inception of the marriage they were not happy. Though it is held that the parties are not leading a conjugal life nor there is any consummation since 2003 which amounts not only to desertion but a cruelty on the husband-respondent but we do not find any findings returned on the concept of desertion. In order to constitute a desertion which is very difficult to give a comprehensive definition as one of the paramount ingredients is the intention of a party to put an end to the co-habitation permanently. There must be an element of *animus deserendi* as mere justifiable separation may not come within the purview of the desertion.

21. The Apex Court in case of ***Adhyatma Bhattar Alwar vs. Adhyatma Bhattar Sri Devi***, reported in ***(2002) 1 SCC 308*** succinctly narrated the essential ingredients which may constitute desertion in the following:

“The clause lays down the rule that desertion to amount to a matrimonial offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition. This clause has to be read with the Explanation. The Explanation has widened the definition of desertion to include ‘wilful neglect’ of

the petitioning spouse by the respondent. It states that to amount to a matrimonial offence desertion must be without reasonable cause and without the consent or against the wish of the petitioner. From the Explanation it is abundantly clear that the legislature intended to give to the expression a wide import which includes wilful neglect of the petitioner by the other party to the marriage. Therefore, for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly, two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petition for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period.”

22. What appears from the ration laid down in the above judgment that by insertion of an explanation the scope of understanding the desertion has been expanded and/or widened even to include a wilful neglect and/or disassociation from the company of another without any reasonable cause and above all there must be a permanent intention to bring an end to cohabitation. It admits no ambiguity that mere avoiding the company of another or living separately may not constitute desertion simplicitor unless the aforesaid ingredients are proved by the cogent evidence. In the event, the explanation is offered leading to such separation or disassociation if may not be considered as desertion which can be forfeited from the

judgment of the Apex Court in case of ***Bipinchandra Jaisinghbai Shah vs. Prabhavati*** reported in ***AIR 1957 SC 176***.

10. What is desertion? “Rayden on Divorce” which is a standard work on the subject a p. 128 (6th Edn.) has summarised the case-law on the subject in these terms:-

“Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act or departure by one spouse does not necessarily make that spouse the deserting party”.

The legal position has been admirably summarised in paras 453 and 454 at pp. 241 to 243 of Halsbury’s Laws of England (3rd Edn.), Vol. 12, in the following words;-

“In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, ‘the home’. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

The person who actually withdraws from cohabitation is not necessarily the deserted party. The fact that a husband makes an allowance to wife whom he has abandoned is no answer to charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years

immediately preceding the presentation of the petition or where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete. But s inchoate, until the suit is constituted. Desertion is a continuing offence.

Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law is enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances of

each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as of the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the

plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard, C.J. in the case of Lawson v. Lawson , 1955-1 All E R 341 at p. 342 (A), may be referred to :-

“These cases are not cases in which corroboration is required as a matter of law. It is required as matter of precaution” .

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

21. But it is not necessary that at the time the wife left her husband’s home she should have at the same time the animus deserendi. Let us therefore examine the question whether the defendant in this case, even if she had no such intention at the time she left Bombay, subsequently decided to put an end to the matrimonial tie. This is in consonance with the latest pronouncement of the Judicial Committee of the Privy Council in the case of 1955 A.C. 402 at p. 417 (F) in an appeal from the decision of the High Court of Australia, to the following effect:-

‘Both in England and in Australia, to establish desertion two things must be proved: first, certain outward and visible conduct-the ‘factum’ of desertion; secondly, the

'animus deserendi' – the intention underlying this conduct to bring the matrimonial union to an end.

In ordinary desertion the factum is simple; it is the act of the absconding party in leaving the matrimonial home. The contest in such a case will be almost entirely as to the 'animus'. Was the intention of the party leaving the home to break up for good, or something short of, or different from that?"

23. In the present case both the parties are living in the same house though it is admitted that they are living in a separate room. The wife-appellant has categorically stated and deposed that she wanted to restore the matrimonial relationship and also co-habitation yet the husband respondent has no intention to resurrect such relationship. The requirement under the law is that thus petitioner must prove with the cogent evidence that the other party has deserted him/her but does not recognise that the petitioner who himself is guilty of deserting the other party should succeed on the ground of desertion. Even though the parties have not established the co-habitation since 2003 but it is found from the evidence that the husband in fact did not intend to co-habit with the wife-appellant. Although the learned Judge in the Trial Court has held that since there was no co-habitation between the parties since 2003 it tantamounts to irretrievable breakdown of the marriage which is not a ground for passing a decree for dissolution of marriage but held the same not only a cruelty perpetuated upon the husband-respondent but the desertion at the behest of the wife appellant. Refusal to co-habit under the marriage institution may sometimes constitute a cruelty which is also

required to be proved by a person that such refusal is at the behest of the other side.

24. We are not unmindful of the fact that even in course of the proceedings any bald allegation as to the character of a husband is made by the wife, there is no fetter on the part of the Court to grant decree on the ground of cruelty provided such allegation is not proved by cogent evidence. The wife has alleged that the husband-respondent has contracted a second marriage which she proved by producing the certificate of marriage with another lady which are marked exhibit in the said suit. In turn, the husband has produced a decree annulling the said marriage to substantiate his stand that it was mere a paper marriage but the Court can draw a inference from the findings rendered by the Court in the said proceeding. The suit was filed by the lady seeking declaration that the marriage is a nullity and be annulled on the ground that it is a mere paper marriage and there was no consummation ever happened. Interestingly, the husband-respondent appeared in the said matter and filed the written statement admitting that the marriage was not consummated and later on did not participate therein which led the *ex-parte* decree to be passed on the basis of such stand taken by the husband therein. The marriage is not denied which is proved by the wife by exhibiting the certificate issued by the marriage registrar. The allegation made by the lady in the said suit has to be seen wherein she stated that the husband-respondent was persisting her to get married with him and on her refusal he could manage certain blank papers duly signed by her which is converted into an application to be filed before the Special Marriage Registrar. Such allegation goes

uncontroverted as the husband-respondent in the written statement admitted not only the marriage being registered before the marriage registrar but his role and the conduct in getting the said marriage registered under the Act. The intention of the husband-respondent is evident from the aforesaid stand that despite having married with the appellant he has declared himself as unmarried and it would not be wrong to presume that he wanted to get rid of the present appellant and intend to establish another relationship with the said lady.

25. On the discussion has made hereinabove, we find that the judgment and decree passed by the Trial Court cannot be sustained. The judgement and decree impugned in the instant appeal is hereby set aside. The matrimonial suit no. 54 of 2007 is dismissed.

26. However, there shall be no order as to costs.

27. Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)