
(2013) 09 AHC CK 0137
In the Allahabad High Court
Case No : First Appeal No. 417 of 2007

Anurag Bajpai

APPELLANT

Vs

Indira Bajpai

RESPONDENT

Date of Decision : 02-09-2013

Acts Referred:

Family Courts Act, 1984 — Section 10(1), 14, 19
Hindu Marriage Act, 1955 — Section 13(1)(ia)
Penal Code, 1860 (IPC) — Section 498A, 506

Citation : (2013) 09 AHC CK 0137

Hon'ble Judges : Ashok Bhushan, J and Abhinava Upadhyaya, J

Final Decision : Dismissed

Judgement

Abhinava Upadhyaya, J.

This is an Appeal filed under Section 19 of the Family Courts Act, 1984 (in short the Act) against the judgment of the court below dated 12.10.2007 passed in Matrimonial Case No. 79 of 2001 rejecting the plaintiffappellant's petition preferred under Section 13 (1) (ia) of the Hindu Marriage Act, 1955 (in short the Act of 1955) for dissolution of marriage.

Before proceeding further it is to be noted that the present appeal was admitted by this Court on 31.7.2008 issuing notice to the sole defendantwife. On 5.8.2008 notices were sent fixing 8.9.2008 for putting in appearance. On 16.10.2008 the Registry reported that the notice has been duly served upon the defendantoppositeparty. None appeared on behalf of the defendant. On 26.2.2009 this Court directed to call for the records of the case from the court below. The records were received on 8.9.2009. When nobody put in appearance on behalf of the sole defendant, this Court vide order dated 3.12.2010 directed issuance of fresh notice upon the defendant. On 10.12.2010 fresh notice was sent fixing 12.1.2011 as the date for appearance. Still no one appeared. The Registry again reported vide its report dated 16.4.2011 that the notices were sent but neither the acknowledgement nor the undelivered cover has been

returned. Under the Rules of the Court such a notice is deemed to be sufficient. Explanation II Rule 12 under Chapter VIII of the Rules of the Court provides that if the acknowledgement and undelivered cover is not returned the party will be deemed to have been served. This Court again taking a lenient view directed for publication of notice in newspaper vide order dated 18.4.2011. Pursuant to the said order the notice was published in the newspaper "Hindustan" on 1.5.2011. In spite of publication and report of the office of this Court dated 16.10.2008 that the notices have been served personally on the defendant yet when non appeared vide order dated 13.7.2011, this Court directed to proceed further with the matter as the notice upon the defendant was deemed sufficient.

Under the aforesaid circumstances, in spite of fresh notice none has appeared on behalf of the defendant, we have no other option but to hear Sri Shesh Kumar, learned counsel appearing for the appellant and deliver the judgment.

A suit for dissolution of marriage under Section 13(1)(ia) of the Act was preferred by the appellant before the Family Court, Varanasi seeking dissolution of marriage on the ground of cruelty and desertion by the defendant wife.

The case in the plaint of the plaintiff was that he married the defendant opposite party on 17.4.1992 in Varanasi according to Hindu custom, rites and religion. Out of the said wedlock a daughter Km. Anushree was born on 20.6.1993. The family of the appellant consisted of the appellant himself, his mother, father and two brothers. The father of the appellant died on 16.12.1995. It is submitted that both the brothers of the plaintiff appellant are in service and are staying outside Varanasi but they used to visit appellant's house to see their mother from time to time and also during festivals. The plaint allegation is, that the defendant lost all affection and attachment with the family of the appellant and her behaviour deteriorated and she became jealous and rude. She used to abuse the plaintiff appellant and his family members and constantly threatened to commit suicide by jumping into "GANGA". The behaviour of the defendant was not good towards her own daughter. She used to constantly beat her up and due to lack of affection and care, the daughter became weak and sickly. The defendant opposite party constantly coaxed the appellant to live separately leaving his old mother behind. She also used to abuse the appellant's old mother and threatened to commit suicide by pouring kerosene oil on herself. She had no interest in the house hold work which resulted in the appellant's mother doing the daily household chores beyond her physical capacity, which led to various diseases and illness. She used foul and abusive language towards the appellant and his mother even in the presence of other relatives and guests. She had no love, affection or even consideration for the appellant. Whenever he used to come back from out of station visits in connection with his work and he came late in the night, the door would not be opened without creating a hue and cry and after much effort when the door was opened, she would go back to her bedroom without exchanging basic courtesies much less asking and offering dinner.

It is alleged in the plaint that for the last more than one year, i.e., 1999, the

defendantopposite party even stopped talking to the plaintiffappellant. She continuously neglected the appellant, his daughter and his mother. A specific allegation has been made in paragraph24 of the plaint that the defendant refused to share bed with the plaintiffappellant and there is no physical relationship between them for the last five years. It is also alleged that in spite of repeated request and cajoling the defendantopposite party refused to change her attitude and her behaviour towards the appellant and his mother.

It is submitted that out of the several occasions, once at a family function of the nephew, the defendantopposite party misbehaved and insulted the plaintiff in the presence of relatives and guests. On 9.7.2008 the defendantopposite party left the house of the plaintiffappellant without any information along with her ornaments and other articles leaving behind her daughter. The defendant's behaviour towards the plaintiff has been so cruel and so insulting that it became impossible for the plaintiffappellant to live with the defendantopposite party. Right from 11.5.1992 upto 4.10.2000 due to unpardonable behaviour of the defendantopposite party and her constant threats of suicide led to the filing of various complaints to the Police authorities upon the apprehension of false implication of the appellant and his entire family in criminal cases but nothing seemed to have worked. Despite repeated request with the involvement of other elders of the family, the defendantopposite party refused to change her behaviour or attitude and continued to inflict emotional pain and social embarrassment upon the appellant. Upon these allegations, as highlighted in the plaint, the suit for dissolution of marriage on the ground of cruelty was filed by the plaintiffappellant.

The defendant contested the suit by filing her written statement denying the allegation made in the plaint and accusing the appellant and his family members that she was pressurized for dowry to bring Rs. 50,000/ (Rs. Fifty Thousand). She has been tortured and abused for demand of dowry. She was not given full meal for her sustenance. Due to hostile conduct of the appellant and his family, she had to file an FIR against the plaintiffappellant and his family under Sections 498A and 506 IPC and Section 3 and 4 of Dowry Prohibition Act, at Mahila Police Station on 13.2.2001. In paragraph49 of the written statement, it is categorically stated that it was not possible for her to live with the plaintiff appellant any more. The further allegation made in the written statement was that the plaintiffappellant used to abuse the defendantappellant and beat her up even in front of friends and relatives of the defendant and also threatened to mutilate her face by throwing acid on it. It is alleged that she has done a course in Music and the plaintiffappellant never allowed her to practice music at home. Finally, on 9.7.2000 on the pretext of taking her out on a "joy ride" in his car, the appellant left the defendant at her father's house. In the end of the plaint a list of articles has been given. In paragraph54 of her written statement she has asked for Rs. 5, 00,000/ (Rs. Five Lacs) as maintenance along with the return of articles mentioned in the plaint.

Replication was filed by the husbandappellant denying the allegation made in the written statement and additional statement and further alleging that the defendant is running a Mahila Grih Udyog and also doing private tuition and earning sufficiently for her livelihood.

The plaintiffappellant in support of his case examined himself as PW1, his mother Sudha Bajpayee as PW2, his neighbour Mr. Vijai Shanker Pandey as PW3 and a colleague of appellant's father Sri P.K.Bhargava as PW4. The appellant filed paper no.21Ga to 30Ga which were kept under sealed cover vide order of the Court dated 3.4.2003 and the photostat copies of the same were kept on record for ready reference. On behalf of the defendant Smt. Indira Bajpai examined herself as DW1 and one Rakesh Awasthi @ Sharman (brother of defendant) DW2.

Upon the aforesaid plaint allegations and counter allegations in the written statement and the additional statement the court below framed the following issues.

1. Whether the defendant by misbehaving with the plaintiff and his family members using foul language and by threatening to commit suicide has committed cruelty as has been stated in the plaint ?
2. Whether the defendant has pressurized the plaintiff for living separately from the family and on his refusal used filthy and foul language and threatened to get him and his mother sent to jail by threatening to commit suicide, as has been stated in the plaint?
3. Whether the defendant has deserted the plaintiff without any reasonable basis as has been stated in the plaint?
4. Whether the plaintiff pressurised the defendant to arrange for Rs.50,000/ and on her refusal the plaintiff tortured the defendant?
5. Whether the plaintiff's behaviour was cruel towards the defendant, as has been stated in the written statement ?
6. Whether the plaintiff's behaviour was cruel towards the defendant, as has been stated in the written statement?
7. Whether the articles and money as stated in the written statement is with the plaintiff and whether the defendant is entitled to get back the articles and in lieu thereof Rupees five lakh?
8. What reliefs plaintiff is entitled to get?

Issue nos.1 and 2 have been decided together and against the plaintiff in favour of the defendant.

Issue nos. 3 and 6 have been decided together. While issue no.3 has been decided against the plaintiff in favour of the defendant, issue no.6 has been decided in favour of the plaintiff against the defendant.

Issue no.4 has been decided against the defendant in favour of the plaintiff.

Issue no.5 has been decided against the defendant in favour of the plaintiff.

Issue no.7 has been decided against the defendant in favour of the plaintiff.

Issue no.8 has been decided against the plaintiff in favour of the defendant.

The main question for consideration before us is to consider issue nos. 1, 2, 3 and 8 which have been decided against the plaintiff in favour of the defendant. From the averment made in the plaint and in the memo of appeal as well as the arguments raised by the learned counsel for the appellant, issue nos. 1,2 and 3 are being considered simultaneously.

In the aforesaid background, we have been called upon to consider, whether the court below has appreciated the evidence before it in its true perspective while deciding the question that the defendant by her behaviour and her foul language and constant threat of suicide as well as mounting pressure on the plaintiff to live separately from his parents has committed cruelty upon the plaintiff justifying for grant of decree of divorce ? And also whether the defendant deserted the plaintiff which may merit grant of decree of divorce under the Hindu Marriage Act ?

The case of the plaintiff throughout has been that the defendant after her marriage came to the house of the plaintiff with a prejudiced mindset and total apathy towards the family custom and traditions. She insisted upon leading a life on her own terms, irrespective of likes and dislikes and convenience of other family members. Instead of merging with the lifestyle and the tradition of the family in which she was married, she had her own peculiar code of conduct and wanted everybody else to follow her whims and fancy. With this kind of attitude, by 4.8.1995 the situation in the family became so grim that the elder brother of the plaintiff Sri Ashok Bajpayee had to approach the Police for intervention and to initiate some amicable settlement between the defendant and other family members of the plaintiff. For the said purpose the plaintiff relied upon paper no.23Ga and paper No.22Ga, which are applications to the SSP, Varanasi dated 4.8.1995 and application to the Womens, Police Station, Varanasi dated 8.8.1995. In application dated 8.8.1995 paper no.22Ga it has been mentioned that although the defendant regretted her mistake and had earlier promised not to repeat the same yet no perceptible change has occurred in her behaviour.

The allegation of the plaintiff throughout has been that the the conduct of the defendant was far from proper and was hostile towards the mother, father and brothers of the plaintiff. She was foul mouthed and without any provocation, abusive towards his parents which ultimately resulted in the death of his father on 16.12.1995. Further allegation was that out of wedlock, on 20.6.1993, their daughter Anushree was born but she neglected the child which resulted in her being weak and uncared for. Her unbecoming behaviour was even more pronounced in presence of other friend and relatives of the family. Her constant threat of committing suicide either by jumping in "GANGA" or into the well or by

pouring kerosene oil on herself became increasingly worrisome and a constant source of apprehension of any untoward incident happening. Therefore, time to time Police authorities were also informed. Once in February, 2000 without any provocation, on an imaginary pretext, she left the house with the threat never to come back to her in laws house. Due to intervention of respectable and senior members of the neighborhood and friends of the family she was requested to come back. Considering the request of elder members of her own family as well as members of the family of the plaintiff and well wishers, on 21.3.2000 in the presence of PW4 Sri P.K.Bhargava, who was the colleague of the deceased father of the plaintiff and DW2 who was the brother of the defendant, she wrote a letter confessing and regretting her past conduct and promising not to repeat the same. The said letter has been filed as paper no.24 Ga signed by the defendant herself, her brother DW2 and Sri P.K.Bhargava PW4.

The further allegation made by the plaintiff is that even after writing the aforesaid letter at the residence of her father after which she agreed to come back to defendant's house, she continued her unruly behaviour. She continued to be neglectful towards her own daughter and did not stop foul language against the mother and neglected the defendant also. She had no sympathy for the mother of plaintiff or love for her own daughter or any consideration for her husbandappellant. The plaintiffappellant was deprived of pleasure of the cohabitation and marriage. She did not have any sexual or mental connection with the appellant and total disregard for family custom and tradition and its reputation. Finally, on 9.7.2000 when the plaintiff was away she along with all her belongings, without any information to any of the family members, leaving behind 7 years old daughter, went away to her parents' house. Upon enquiry it was revealed by the neighbours that she loaded her articles and belongings on trolleys and was seen going away from defendant's house. It is also alleged that even after the letter dated 21.3.2000 written by the defendant and signed by her brother and Sri P.K.Bhargava, PW4 it became clear that the defendant is bent upon making the life of the plaintiff and her daughter miserable. There was no other recourse open but to go to the Police and thus on 10.11.2000 an application was filed before the DIG, Varanasi, SSP, Varanasi and also a letter to the Chief Minister intimating them of exploitive and intimidating conduct of the defendant. Thereafter, again on 7.2.2001 another letter was sent to the SP, Varanasi. These documents have been listed as 25 Ga, 26 Ga, 27 Ga and 28 Ga. It is alleged that her cruel conduct against the plaintiff is further revealed by lodging false cases against the plaintiff by the defendant by lodging an FIR on 9.7.2000 and crime case being registered as Case No. 6 of 2001 under Sections 498A and 506 IPC and Section 3/4 of Dowry Prohibition Act. The said case was filed against the defendant, his mother Smt. Sudha Bajpayee, his brothers Ashok Bajpayee and Ashish Bajpayee. The plaintiff had to obtain interim order from this Court by which proceedings and arrest under the aforesaid Case Crime No. 6 of 2001 has been stayed by this Court. Another complaint is said to have been filed by the defendant being paper no.29 Ga/5 before the Station Officer, Women

Police Station, Varanasi dated 3.2.2001 by which she claimed her "Stridhan" mentioned in the list along with the complaint. Not only this, thereafter again a case being Case No. 67 of 2002 is said to have been filed on 17.1.2002 under Section 406 IPC before Police Station Lanka, District Varanasi. The said Case No. 67 of 2002 her statement was recorded under Section 224 Cr.P.C on 7.2.2004. In the said statement she had clearly claimed that the said case was filed in order to obtain lump sum amount from her husband in order to live separately from her husband. The said Case No. 67 of 2002 was decided vide judgment dated 25.2.2004 and is filed as paper no.84 Ga. The plaintiff was acquitted of all the charges by the court below. It has also been asserted that in the statement of DW1 defendant dated 21.12.2005 before the court below it has been accepted by the defendant herself that she has complete faith in the plaintiff regarding the upbringing of her daughter. It has also been asserted that in her cross examination she made a statement on 22.11.2006 accepting the statement made in paragraph 49 of the written statement and further asserted that even if the plaintiff is ready to keep me as his wife yet I am not ready to stay with him and I have no objection to the dissolution of marriage. Both these statements have been brought on record by way of annexure 1 to the supplementary affidavit. It has also been submitted that paper nos. 21Ga to 30Ga were filed in original and was kept under sealed cover by the order of the court dated 3.4.2003.

Upon such allegation it was claimed that the act of the defendant was an act of cruelty and desertion, especially in the light of her statement dated 22.11.2006 wherein the defendant herself stated that she does not wish to live with the husband and has no objection if the marriage is dissolved. Accordingly, it is claimed that the aforesaid documents and the statement recorded before the court below clearly established the case of cruelty and desertion on the part of the defendant which renders coexistence of the plaintiff and the defendant as husband and wife impossible and the decree of divorce has thus been sought.

The court below while deciding issue nos. 1 and 2 has held that the documents relied upon by the plaintiff are the photocopies and, therefore, inadmissible in evidence. It further held that even if these documents are to be considered they do not make out a case of cruelty even though the said papers have been proved by the plaintiff and PW4 Mr. P.K.Bhargava. It further held that although Vijai Shanker Pandey, who was the neighbour, had made a statement that on 9.7.2000 he saw the goods of the house being loaded on trolley and was taken away by the defendant yet this would not amount to desertion. It further held that the question of cruelty regarding incidents prior to 21.3.2000 would stand condoned by the plaintiff when the defendant DW1 along with her brother DW2 and PW4 P.K.Bhargava signed the letter dated 21.3.2000 (paper no.24Ga) accepting her past conduct and promising not to repeat the same again as thereafter the plaintiff allowed her in his residence and she continued to stay till 9.7.2000, when according to the plaintiff himself, she left his house, abandoning her 7 years old daughter, to her parents house. The court below disbelieved the

applications dated 4.8.1995 and 8.8.1995 (23Ga and 22Ga) stating that the complaints regarding the conduct of the defendant was made by the brother of the plaintiff and not plaintiff himself. Therefore, the alleged act of cruelty of the defendant was not proved.

The court below has relied upon various decisions holding that minor family quarrel would not amount to cruelty. It further relied upon a decision reported in 1991 (2) Patna LJR 642 (648) wherein it has been held that where there is an allegation of cruelty and they stay together after such an allegation then it would be deemed that the act of cruelty has been condoned and the marriage cannot be dissolved on the basis of such an allegation of cruelty.

So far as the issue no.3 is concerned, the court held that on 21.3.2000 when the plaintiff brought back the defendant to his house, the defendant stayed with him till 9.7.2000, i.e., for about 4 months, prior to the expiry of two years from the date of desertion which in the present case is said to be 9.7.2000, no suit would lie on the ground of desertion.

For proper appreciation of evidence on record supporting allegation of cruelty and desertion first of all the court below has not accepted the documents as admissible in evidence on the ground that they were the photo copies. It further held that even if the said documents are considered they do not constitute cruelty. In our considered view, in matrimonial dispute strict adherence to the laws of evidence is not required as the court below is neither holding a trial for establishing offences nor is trying to determine question of title. All that is required is any material which can substantiate the allegation, especially when the document sought to be read in evidence have not been denied by the opposite party, the same cannot be ignored only because it is inadmissible in evidence as per the provisions of Evidence Act.

In this regard we may look into certain provisions of the Family Courts Act, 1984. It is a Special Act enacted to provide for establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith. Section 10(1) provides as under:

"10. Procedure generally.(1) Subject to other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings (other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974), before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil Court and shall have all the powers of such Court.

(2).....

(3)Nothing in subsection (1) or subsection(2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of

the subjectmatter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other."

Section 14 of the said Act is relevant for the present dispute and is quoted hereinbelow:

"An application of Indian Evidence Act, 1872. A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872)."

A plain reading of the aforesaid provision clearly indicates that the court below can look into any material which may not specifically be admissible in evidence under the Evidence Act. Therefore, in our considered view, that court below was not right in not accepting paper nos. 21Ga to 30Ga filed by the plaintiff. So far the court below has held that the application dated 4.8.1995 and 8.8.1985, paper nos. 23Ga and 22Ga does not disclose cruelty as the same were not made by the plaintiff but by his elder brother. We are unable to accept the view of the learned Judge as the aforesaid applications thus highlighted the conduct of the defendant to an extent that the elders in the family had to approach the executive authorities for bringing about an amicable settlement and also informing the authorities with regard to the threat of suicide extended by the defendant. It is a legitimate apprehension that if the defendant carries on the threat the family members would be accused of not informing the authorities if such threats were made on earlier occasion also. Therefore, in our view, the aforesaid paper nos. 22Ga and 23Ga, i.e., application dated 4.8.1995 and 8.8.1995 made by the brother of the defendant to SSP, Varanasi was a relevant piece of evidence which ought to have been gone into. The said two documents also gain relevance when on subsequent dates, i.e., other application dated 10.11.2000 was moved by the plaintiff to the DIG, Varanasi, SSP, Varanasi and also the Chief Minister and also an application dated 7.2.2001 moved by the plaintiff to the SSP, Varanasi with regard to the continuing threat and cruelty by the defendant. These documents have been listed as 25Ga, 26Ga, 27Ga and 28Ga. These documents have also been dismissed as not admissible in evidence as they were only the photocopies. Therefore, the paper nos. 22Ga and 23Ga which were application dated 4.8.1995 and 8.8.1995 to the executive authorities becomes relevant to indicate that the plaintiff and his family members were constantly ever since 1995 were alleging threat of the defendant and apprehending some untoward incident and the court below erred in law in arriving at different conclusion.

So far as the finding of the court below with regard to the condonation by the plaintiff with regard to the alleged cruelty inflicted by the defendant is concerned, it has held that once paper no. 24Ga, i.e., confession of the defendant dated 21.3.2000 signed by her and her brother DW2 and PW4 and the plaintiff brought back the defendant to his house and allowed her to stay till 9.7.2000, therefore,

condoned the act of cruelty, if any of the past.

We are yet again unable to accept the aforesaid finding on the ground that if any act is condoned and thereafter similar act is committed in future then such condonation would not preclude the defendant from alleging the continuous cruelty of the past again. For the aforesaid purpose it is relevant to consider the subsequent act of the defendant. On 9.7.2000 when she finally left her matrimonial house, an FIR was filed and a crime case was registered as Case Crime No. 6 of 2001 filed under Section 498A and 506 IPC and Section 3/4 of Dowry Prohibition Act. The said case was filed against the defendant, his mother and his brothers. The proceeding of the aforesaid case was stayed by intervention of this Court (Paper No. 29Ga/5). Then another Case No. 67 of 2002 was filed on 17.1.2002, under Section 406 IPC but the same was dismissed vide judgment dated 25.2.2004. If filing of malicious and false criminal cases fall in the category of committing cruelty then the allegation of the plaintiff stand proved that since 1995 upto the dismissal of Case No. 67 of 2002 in 2004, the defendant's attitude towards her husband was cruel.

In our view, paper nos. 25Ga, 26Ga, 27Ga, 28Ga and 29Ga have incorrectly been ignored and, therefore, principle of the condonation of cruelty is misapplied. If at all, there was any condonation then such condonation was condonation of cruelty of the past conduct and not of the future conduct. The lodging of the complaint by the plaintiff vide complaint dated 10.11.2000 and 7.2.2001 to the executive authorities including the Chief Minister as well as lodging of FIR and registering falls Case No. 6 of 2000 and 67 of 2002 by the defendant is sufficient evidence of future conduct of the defendant which ought to have been gone into. This Court through a Division Bench in the case of Smt. Abha Agarwal Vs. Sunil Agrawal reported in 2000 (4) AWC 2912 in paragraph 22 has held as under:

"22. The law laid down by the Supreme Court on the principle of condonation in the case of Dastane v. Dastane, referred to above should be taken note of. It has been held that even though the condonation is not pleaded as defence by the respondent, it is Court's duty in view of the provisions of Section 23(1) (b) to find whether the cruelty was condoned by the appellant. That section casts an obligation on the Court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The "condonation" means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation, there must be, therefore, two things: forgiveness and restoration. Condonation of matrimonial offence is not to be likened to a full Presidential Pardon under Article 72 of the Constitution which, once granted, wipes out the guilt beyond the possibility of revival. The condonation is always subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence, either of the same variety as the one condoned or of any other variety. No matrimonial offence is erased by condonation. It is obscured, but not obliterated."

In view of the aforesaid decision, the essential ingredients of condonation is forgiveness and restoration by the subsequent event after the confessional letter dated 21.3.2000(24Ga) were relevant to be examined. The act on the part of the parties with regard to future conduct do not disclose any element of forgiveness or restoration for the application of the principles of condonation.

The Hon''ble Supreme Court in a judgment dated 22.2.2013 in the case of Srinivas Rao, K. Vs. Deepa, D.A. reported in Indian Law Reports 2013 (1) Kerala page 813 relying upon a decision in the case of Samar Ghosh Vs. Jaya Ghosh, 2007 (4) SCC 511 has explained what amounts to cruelty. Paragraphs 10 and 11 of the said judgment are quoted hereinbelow:

"10. Under Section 13(1)(ia) of the Hindu Marriage Act, 1955, a marriage can be dissolved by a decree of divorce on a petition presented either by the husband or the wife on the ground that the other party has, after solemnization of the marriage, treated the petitioner with cruelty. In a series of judgments this Court has repeatedly stated the meaning and outlined the scope of the term ""cruelty". Cruelty is evident where one spouse has so treated the other and manifested such feelings towards her or him as to cause in her or his mind reasonable apprehension that it will be harmful or injurious to live with the other spouse. Cruelty may be physical or mental.

11. In Samar Ghosh this Court set out illustrative cases where inference of ""mental cruelty" can be drawn. This list is obviously not exhaustive because each case presents it's own peculiar factual matrix and existence or otherwise of mental cruelty will have to be judged after applying mind to it. We must quote the relevant paragraph of Samar Ghosh. We have reproduced only the instances which are relevant to the present case.

"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) xxx xxx xxx

(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) xxx xxx xxx

(viii) xxx xxx xxx

(ix) xxx xxx xxx

(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) xxx xxx xxx

(xii) xxx xxx xxx

(xiii) xxx xxx xxx

(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."

It is pertinent to note that in this case the husband and wife had lived separately for more than sixteen and a half years. This fact was taken into consideration along with other facts as leading to the conclusion that matrimonial bond had been ruptured beyond repair because of the mental cruelty caused by the wife. Similar view was taken in Naveen Kohli's case."

As in the above case, it would be relevant to note that the husband and wife have now lived separately since 2000 and the allegation in the plaint is that there were discord between the spouses from right after the marriage since 1995 when first complaint was made by the brother of the plaintiff to the police vide paper nos. 22Ga and 23Ga.

Looking into the totality of the incidents and conduct of the defendant, which is also reflected from filing of various complaints by the plaintiff and his family members with the executive authorities regarding the threats extended by the defendant for committing suicide would amount to mental cruelty. It would be extremely difficult for any spouse or its family members to live in constant threat

of suicide. The court below has held that there is no material available on record which establishes the aforesaid fact is also not correct. The confession of the defendant in her letter 24Ga was a relevant piece of evidence to be considered but the same has been rejected on the ground that it is a photo copy and also on the ground that the plaintiff by allowing the defendant after 21.3.2000 to reside with him have condoned her past conduct. Again, without taking into account the subsequent complaints filed by the husband in 2001 and the case being filed by the defendant under Sections 498A and 506 IPC and Section 3/4 of Dowry Prohibition Act and Section 406 IPC will surely disclose the intention of the defendant that she does not wish to live with the plaintiff. At the time of passing of the judgment impugned although the case under Section 498A IPC was still pending but the Case No. 67 of 2002, whereby the defendant claimed that her "Stridhan" and other articles were kept by her husband and was not returned in spite of asking, has been rejected vide judgment dated 12.10.2007 holding that the allegation made by the defendant in the said case was baseless. Therefore, in our view, filing of false cases against the defendant and his family members, thus fall within the ambit of cruelty.

Considering the circumstances and the evidence on record, it can safely be concluded that the matrimonial bond has been ruptured beyond repair because of mental cruelty caused by the defendant.

So far the allegation of the plaintiff as has been dealt under issue no.2, that the wife constantly coaxed him to live separately from his family, it was substantially proved by her own statement made in Case No. 67 of 2002 dated 7.2.2004 wherein she specifically stated that the aforesaid case was filed for the sole purpose of getting some lump sum amount from the plaintiff in order to stay separately from the family of the husband. That apart, in her own statement dated 22.11.2006, she had specifically stated that even if husband/plaintiff is ready to keep her yet she is not interested in staying with him and have no objection if the marriage is dissolved.

Upon the aforesaid facts and circumstances, issue nos. 1 and 2 are decided in favour of the plaintiff and against the defendant.

Issue no.3 is with regard to desertion. The allegation of the plaintiff in the plaint is that for the last five years he had no physical or sexual relationship with the wife. If such allegation is proved then the act of the defendant would be of cruelty as well as desertion. The courts have held that merely by living under the same roof, cannot be the sole reason to negate the allegation of the husband of desertion by the wife. If there is no emotional or sexual bonding between the parties, it would also amount to desertion, even though the parties are living under the same roof. This view is also endorsed by the Hon"ble Supreme Court in the case of Savitri Pandey Vs. Prem Chandra Pandey, reported in 2002(1) AWC 472 (SC).

Paragraph nos.8 and 10 of the said judgment are hereinquoted below:

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

"10.To prove desertion in matrimonial matter it is not always necessary that one of the spouse should have left the company of the other as desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage. Desertion may also be constructive which can be inferred from the attending circumstances. It has always to be kept in mind that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case."

Further, in the present case, the allegation of the plaintiff is that on 9.7.2000 the defendant left the house of the plaintiff without informing anyone else in the family along with her belongings. The aforesaid fact was corroborated by PW3 Vijai Shanker Pandey, who is the neighbour of the plaintiff, in his statement. Against the aforesaid statement of PW3, no other material has been brought forward by the defendant to counter the said statement. Therefore, by her act of leaving the house of the plaintiff without there being any apparent reason, would also amount to desertion particularly in view of the fact that since 2000 till date she is living separately.

It is not disputed between the parties that the defendant is staying away from the plaintiff and his family since 9.7.2000. More than 13 years have passed since then and in the light of the statement of the wife that she does not wish to live with her husband even if he is ready to keep her and has no objection to divorce being granted, is a clear case of desertion by the wife. As such, issue no.3 is also decided in favour of the plaintiff and against the defendant.

The Hon"ble Supreme Court in the case of Srinivas Rao, K. (supra) has held that irretrievable break down of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But has held that if the marriage is dead and the parties are not willing, it will not be proper to force them to stay together by a decree of the court. Paragraphs no.25 and 26 of the said judgment are quoted hereinbelow:

"25. It is also to be noted that the appellanthusband and the respondent wife are staying apart from 2741999. Thus, they are living separately for more than ten

years. This separation has created an unbridgeable distance between the two. As held in Samar Ghosh's case, if we refuse to sever the tie, it may lead to mental cruelty.

26. We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree."

Upon the facts and circumstances stated above, in our view, the marriage appears to be completely broken and it would be inflicting further cruelty upon both the parties to force them to stay together. Out of 21 years of marriage, admittedly, the parties are living separately, at least for the past 13 years. The appellant husband has made out a case for grant of decree of divorce and, therefore, issue no.8 is decided against the defendant and in favour of the plaintiff.

Before concluding we may observe that although the defendant opposite party is not before us, in spite of due service of notice upon her nor any claim is made before us with regard to alimony, however, in her written statement she has claimed alimony of Rs. 5,00,000/ (Rs. Five Lacs) in lieu of her "Stridhan" and for maintenance. Considering the facts that her case with regard to claim of "Stridhan" being Case No. 67 of 2000 having been decided against her, yet it would be in the interest of justice if she is allowed permanent one time alimony of Rs. 3,00,000/ to be given by the appellant by way of bank draft drawn in favour of the defendant opposite party. It is further provided that now the daughter Anushree has since attained majority, it is her free will to allow defendant to meet her, visit her at her choice.

In view of the aforesaid, the judgment of the court below dated 12.10.2007 is set aside and the marriage between the appellant and the opposite party now stands dissolved. The appellant is entitled for decree of divorce. Subject to the payment of alimony as determined, within a period of three months, the aforesaid suit no. 79 of 2001 is decreed.

The appeal is, accordingly, allowed.