
(1995) 08 BOM CK 0033

In the Bombay High Court

Case No : Family Court Appeal No. 123 of 1993

Kanchan Amar Asrani

APPELLANT

Vs

Amar Vishindas Asrani

RESPONDENT

Date of Decision : 11-08-1995

Acts Referred:

Evidence Act, 1872 — Section 101, 114, 115, 3, 59
Hindu Marriage Act, 1955 — Section 13(1), 23(1)

Citation : (1996) 1 BomCR 685 : (1995) 97 BOMLR 687

Hon'ble Judges : P.S. Patankar, J;A.V. Savant, J

Bench : Division Bench

Advocate : U.J. Makhija, for the Appellant; A.K. Abhyankar, for the Respondent

Judgement

A.V. Savant, J.—Heard both the learned Counsel at length viz. Mr. Makhija for the appellate-wife and Mr. A.K Abhyankar for the respondent-husband.

2. This is an appeal by the wife against the judgment and decree dated 15th October, 1993 passed by the Family Court, Bombay, in M.J. Petition No. 597 of 1986. By the said Decree, the husband's petition for divorce on the ground of cruelty and desertion by the wife has been allowed. Consequently, the marriage has been dissolved by a decree for divorce. Admittedly, the only child son Vishal is all along with the respondent-father since 15th July, 1983. The wife has been held entitled to the maintenance of Rs. 700/- per month from the date of the passing of the order. No order for return of ornaments was made since there was no specific claim in the form of a counter-claim nor was any Court fees paid therefore. It is this judgment which is challenged before us in appeal. After the matter was heard initially, we had suggested to the counsel to explore the possibility of a settlement and hence the matter was adjourned more than once. However, the learned Counsel have expressed their inability to arrive at any conciliation. Unfortunately, the parties are living separate from each other since 14th July, 1983. Under the circumstances, we are left with no alternative but to decide the matter on the basis of the evidence on record.

3. A few facts necessary for the disposal of the appeal may be stated as under : The spouses were married on 8th December, 1978 at Bombay according to Hindu Vedic Rites. A son named Vishal was born on 18th April, 1980. In his petition filed on 9th June, 1986, the husband Amar has alleged that the appellant-wife was of a quarrelsome nature and he referred to the conduct of the wife which, according to him, amounts to cruelty in matrimonial law. The first of such incident was in June, 1980 when the wife is alleged to have left the matrimonial home which is at Khar, Bombay and gone to her parent's house which is at Chembur, Bombay. However, she came back after 2-3 days and stayed in the matrimonial home. Then it is alleged that there was a quarrel in January, 1981 and after this, in March 1981, as a result of a dispute over the wife breaking her fast there was a quarrel which resulted in the alleged attempt by the wife to swallow a diamond from her ear-ring after which she went to her parents at Chembur. Admittedly, she returned after two weeks and stayed in the matrimonial home. The pleadings and the evidence is clear on one point that after the March, 1981 incident till 14th July, 1983 the spouses lived happily without any signs of strained relationship. However, the husband alleges that on 14th July, 1983, the wife deserted the matrimonial home and again went back to her parent's house at Chembur. This, according to the husband, constitutes desertion in matrimonial law and this was accompanied by the necessary factum and animus deserendi on the part of the appellant-wife.

4. On these two grounds of cruelty between June, 1980 and March, 1981 and desertion on 14th July, 1983, the husband filed the petition for divorce on 9th June, 1986. The wife filed her written statement on 6th December, 1986 denying the alleged incidents between June, 1980 and March, 1981. She denied that the said incidents amount to cruelty in matrimonial law. She gave her own version of each of these incidents. She justified her conduct and claimed that she was entitled to visit her parents occasionally in the same city. She categorically denied the alleged attempt to swallow a diamond out of her ear-ring. While admitting that she stayed happily in the matrimonial home between March, 1981 and July, 1983, she contended that as a result of the husband's conduct and the insults meted out to her, she was forced to leave the matrimonial home on 14th July, 1983 and that there was no desertion on her part. It was on account of the conduct of the husband Amar that the wife was required to leave, the matrimonial home as per her contention.

5. The petition was initially filed in the City Civil Court at Bombay in October, 1989. It was transferred to the Family Court, Bombay and the Family Court, Bombay on January 20, 1990 passed an ex-parte decree on the ground of desertion alone. The application by the wife for setting aside the ex-parte decree was rejected on November, 1990. The wife appealed to this Court which set aside the ex-parte decree on 7th December, 1990 and remanded the matter back to the Family Court for a fresh trial in accordance with law.

6. On the earlier occasion, when there was an ex-parte decree, the husband had

examined himself. After the matter was remanded, the husband further examined himself and examined 4 more witnesses including his father Vishindas Mulchand Asrani. The wife examined herself but led no other evidence. On the basis of the evidence that was led, the Family Court has come to the conclusion that the husband had proved that the wife had treated him with cruelty. It has been further held that the wife was guilty of desertion on 14th July, 1983. Unfortunately, no issue was framed nor is there any discussion in the judgment on the question of the condonation of the act of cruelty as a result of the admitted peaceful cohabitation between March, 1981 and 14th July, 1983 nor is there any discussion on the question of revival of the acts of cruelty as a result of the subsequent matrimonial wrong, viz., desertion on 14th July, 1983. In view of these findings, the learned Judge decreed the suit of the husband and, as indicated above, passed an order of dissolution of marriage and of maintenance.

7. In this appeal by the wife, the husband has filed cross-objections obviously limited to the question of maintenance of Rs. 700/- per month awarded to the wife. As stated at the out-set, we have heard both the learned Counsel at length.

11th August, 1995.

8. Mr. Makhija appearing for the appellant-wife contended, in the first instance that, the incidents of June 1980, January 1981 and March 1981 have not been proved by sufficient evidence. His further contention was that even if said incidents are held proved, they constitute the daily wear and tear of matrimonial life and cannot amount to cruelty under the matrimonial law. Reliance was sought to be placed on the discrepancy between the pleadings and the evidence that was led in respect of these 3 incidents of June 1980, January 1981 and March 1981. It was then contended that even assuming that this Court comes to the conclusion that the above mentioned 3 incidents amount to cruelty in matrimonial law, in the facts of the present case, there was clear condonation on the part of the husband when the wife was staying in the matrimonial home for more than two years and 3 months i.e. from March 1981 till 4th July 1983. Reliance is placed on the averments in the petition of the husband and on his evidence to show that between March 1981 and 14th July, 1983 the parties led a happy matrimonial life and there was no dispute between them. Mr. Makhija, therefore, contended that this is a clear case where the husband has condoned the acts of cruelty within the meaning of Clause (b) of sub-section (1) of section 23 of the Hindu Marriage Act, 1955. His grievance is that the learned trial Judge has neither framed any issue nor considered the question of condonation. On the question of desertion within the meaning of Clause (ib) of sub-section (1) of section 13, Mr. Makhija contended that the incident of 14th July, 1983 did not take place in the manner as alleged by the husband but because of the dispute between the parties, the wife was driven out of the house on 14th July, 1983. His contention is that there is no desertion at all and what happened on 14th July, 1983 was that the wife was driven out of the matrimonial home at Khar and had, therefore, to stay with her parents at Chembur. Finally, Mr. Makhija contended

that this is not a case of irretrievable break down of the marriage and if no ground is made out u/s 13 of the Hindu Marriage Act, namely, neither cruelty nor desertion, then the husband's petition was liable to be dismissed and the appeal must be allowed.

9. As against the above contentions raised on behalf of the wife, Mr. Abhyankar on behalf of the respondent/husband contended that the evidence on record was sufficient to hold the incidents of June 1980, January 1981 and March 1981 proved. If these three incidents were held proved, they would amount to cruelty in matrimonial law, sufficient to grant a divorce under Clause (ia) of sub-section (1) of section 13 of the said Act. He fairly stated that unfortunately there was no issue framed in the trial Court on the question of condonation u/s 23(1)(b) nor was there any discussion in the judgment. Mr. Abhyankar went to the extent of saying that if the evidence that the spouses lived happily together between March 1981 and 14th July, 1983 was to be accepted, then it would undoubtedly amount to condonation on the part of the husband of the acts of cruelty committed by the wife between June, 1980 and March, 1981. However, what Mr. Abhyankar contended was that by the subsequent wrong of desertion committed by the wife on 14th July, 1983, there would be a revival of the earlier acts of cruelty. Indeed it was suggested by Mr. Makhija that for revival, the act or conduct alleged must be of a similar nature as the earlier wrong, namely, cruelty in the facts of the present case. However, Mr. Abhyankar has invited our attention to three English decisions and the decision of our Supreme Court in *Dr. N.G. Dastane Vs. Mrs. S. Dastane*, , and contended that for revival, it is not necessary that the conduct or wrong must be similar to the one earlier committed which is sought to be revived. On the question of desertion, Mr. Abhyankar contended that the evidence on record led by the husband was clear that the wife was entirely at fault in leaving the matrimonial home on 14th July, 1983 and there was no justification on the part of the wife nor was the husband responsible for her leaving the matrimonial home. He criticized the wife's evidence as wholly discrepant and contended that corroboration could have been available in the evidence of her parents or the evidence of her brother which was conspicuously absent.

10. In view of the above, the following points arise for our determination :

- i) Has the appellant-wife treated the respondent-husband with cruelty within the meaning of Clause (ia) of sub-section (1) of section 13 of the Hindu Marriage Act, 1955?
- ii) If answer to the above point is in the affirmative, was there a condonation on the part of the husband as a result of the spouses cohabiting together between March, 1981 and 14th July, 1983.
- iii) Did the appellant-wife desert the respondent-husband for a continuous period of not less than two years immediately preceding the presentation of the petition and is the husband entitled for divorce u/s 13(1)(ib) of the Act?

iv) Depending upon the answer to point No. (ii) above, is there a revival of the earlier wrong of cruelty as a result of the subsequent wrong of desertion committed by the wife on 14th July, 1983.

11. We must also refer to the cross-objections filed by the respondent-husband where he had disputed the quantum of maintenance of Rs. 700/- p.m. granted to the wife. In view of the said cross-objections the fifth point which would arise for consideration would be as under :

v) What would be the appropriate amount of maintenance to be awarded to the wife if she is held entitled to maintenance?

12. We have been taken through the pleadings and the entire evidence by both the learned Counsel. As far as the first point relating to the ground of cruelty is concerned, the averments and evidence centre round 3 incidents of June 1980, January 1981 and March 1981. It is no doubt true that the husband has described the wife as some what irritable and a quarrelsome person. It does appear that since her parents are living in the same city at Chembur, she was prompted to often visit her parents at Chembur. As far as these incidents are concerned, the evidence consists of the deposition of the husband Amar himself, witness No. 2 Suresh Panjabi, witness No. 3 Kavita Bijlani, witness No. 4 Murli Sambhavani and witness No. 5 father of the husband, namely, Vishindas Asrani. The main evidence consists of the husband himself. All that the evidence of the husband discloses is that as a result of some quarrels, the wife used to leave the house for a short-while- say a day or two, go to her parents at Chembur and come back. This happened in June 1980 when the wife left with her child, stayed with her parents for 2-3 days and returned. There did not appear to be any serious dispute between the spouses. It may be that some minor disagreement took place between the spouses provoking the wife to go to her parent's place since they are very much in the same city and she returned to the matrimonial home after a short gap of 2-3 days. There is not much in the evidence of witness No. 2 Suresh Panjabi or witness No. 3 Kavita Bijlani on this point excepting referring to some minor disagreement between the spouses. The evidence of Murli Sambhavani witness No. 4 and of the husband's father Vishindas Asrani is more relevant to the question of alleged attempt to commit suicide which is the third incident to which we will refer to little later.

13. As far as the wife is concerned, she referred to the minor bickerings which took place between the spouses. She has referred to her visits to her parents at Chembur for a brief spell after which she returned to the matrimonial home. We do not find that the two incidents of June 1980 and January 1981 are such as to amount to cruelty in matrimonial law. In our view, this represents the normal wear and tear of matrimonial life. The pleadings and evidence in this behalf is not sufficient to accept the husband's version.

14. It is true that as far as the alleged attempt to commit suicide in March, 1981 is concerned some details have been deposed to by the husband as also by Murli

Sambhavani and by the husband's father Vishindas Asrani. What is alleged is that the wife was to observe fast on Mondays and on breaking her fast, she would take food. However, since on an earlier occasion the husband had not eaten anything at the house of the parents of the wife at Chembur, the wife refused to eat and break her fast on a Monday in the month of March, 1981. It is alleged that the husband and his parents tried to force the wife to eat some food and the wife did not appreciate the idea of her being forced to eat. She is alleged to have threatened to commit suicide by swallowing the diamond from her ear-ring. In the written statement, the wife has categorically denied this incident. She denied that there was any refusal on the part of the husband to enjoy the hospitality at her parents' place and, therefore, there was no question of her not eating on a Monday on her breaking her fast. She has categorically denied any attempt to take the diamond out of her ear-ring and to swallow it. We have perused the evidence of the husband and the two witnesses named above on this point. The presence of Murli Sambhavani is not even referred to in the petition by the husband. Even in his examination in chief, the husband has not referred to the presence of Murli Sambhavani when such an incident had occurred. The claim of Murli Sambhavani that there was some hue and cry and he went to the house of the spouses and found the wife with a ear-ring in her hand is, in our view, highly exaggerated. This is not the version in the petition filed by the husband nor in his examination-in-chief. Indeed, the presence of Murli Sambhavani is not even referred to earlier by the husband. Having perused the evidence of the husband and the wife as also the two witnesses on this point, namely, witness No. 4 Murli Sambhavani and the husband's father Vishindas Asrani, we are not satisfied about the alleged attempt to swallow the diamond from the ear-ring. What is alleged is that the wife attempted to swallow the diamond. There are no details of the alleged attempt either in the petition or in the evidence of the husband himself. Under the circumstances, in our view, there is no satisfactory evidence in respect of any of these three incidents between June, 1980 and March, 1981 on the basis of which the claim for divorce on the ground of cruelty is based. We are, therefore, of the view that the husband has not discharged the burden of proof to make out a case of the wife having treated him with cruelty within the meaning of Clause (ia) of sub-section (1) of section 13 of the Act. The answer on point (i) is, therefore, in the negative.

15. Points No. (ii) and (iv) : Condonation and Revival :

Since our answer on point No. (i) is in the negative, it is infact not necessary for us to consider the question as to whether there was any condonation of cruelty as contended by Mr. Makhija. However, if one were to hold that the three acts mentioned above amounted to cruelty, we would have had no hesitation in holding that as a result of the cohabitation between March 1981 and 14th July, 1983, the husband had condoned the wife's conduct and her acts of cruelty. It is clear from the pleadings and evidence that between March, 1981 and July, 1983, the parties lived happily. It is true that the husband has his own version as to why the wife behaved in this fashion. His case is that the wife's sister was to get

married and the wife did not want an impression in the community that there was something wrong with her own marriage which would have adversely affected her sister's marriage prospects. Her sister got married in May, 1983 and according to the husband once the wife's sister got married, she reverted to her old nature and committed a fresh wrong on 14th July, 1983 when she deserted the matrimonial home.

16. On the question of revival of cruelty, it is not necessary for us to discuss the case law in details since we have come to the conclusion that the wife's conduct did not amount to cruelty and hence there is no question of condonation of such acts of cruelty or revival thereof as a result of subsequent conduct of the wife on 14th July, 1983. We, however, must make a brief reference to the argument in this behalf. Mr. Abhyankar contended that for revival of the cruelty, it is not necessary that the wrong committed subsequently must be the same or of, a similar nature. This was in reply to Mr. Makhija's contention that in order to amount to revival the subsequent matrimonial wrong must be of a similar nature as the earlier one, namely, cruelty in the facts of the present case. Mr. Abhyankar has placed reliance on 3 English decisions which say that for revival of the earlier wrong, it is not necessary that the subsequent wrong must be of a similar nature. If the subsequent matrimonial mis-conduct was sufficiently serious for the Court to regard it as a breach of conjugal duty, it would revive the condoned matrimonial offence even if such misconduct would not in itself be sufficient to justify a decree of divorce. The three English decisions cited are as under :

- i) *Beard v. Beard*, reported at 1945(2) All England Law Reports page 306;
- ii) *Richardson v. Richardson*, reported at 1949(2) All E L R 330 where it was held that while the commission by the respondent of a matrimonial offence less than legal cruelty is sufficient to revive condoned adultery, the conduct complained of must be of such as, if persisted in, will make married life impossible;
- iii) *Beale v. Beale*, reported at 1950(2) All E L R 539 where a similar view has been expressed following the above two decisions in the case of *Beard v. Beard* and *Richardson v. Richardson*.

17. Finally, Mr. Abhyankar placed reliance on the leading Supreme Court decision in the case of *Dr. N.G. Dastane Vs. Mrs. S. Dastane*, on the question of revival and contended that 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. 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". Since the condition of forgiveness is that no further matrimonial offence shall occur, it is not necessary that the fresh offence should be ejusdem generis with the original offence. Condoned cruelty can, therefore, be revived, say, by desertion or adultery. (See para 57 page 1546 of the report).

We need not elaborate this point any further since, in our view, the husband has failed to make out a case that the wife's conduct between June, 1980 and March, 1981 amounted to cruelty. It is, therefore, not necessary for us to consider the question of either condonation or revival. Points No. (ii) and (iv) are answered accordingly.

18. Point No. (iii) : Desertion :

Coming to the most important aspect viz. the incident of 14th July, 1983, which according to the husband amounts to desertion, the case made out by the husband in the petition is that he wanted to give a present to his friend's child and had, therefore, asked his wife to buy a silver trinklet. The wife claims to have bought it at Khar on 14th July, 1983 itself but when she came home, the husband's father thought that the wife had paid an excessive amount. Her version is that as a result of this dispute she was driven out of the home on that day. In his evidence the husband had deposed that as a result of the quarrel which ensued on that day, the wife left the home for her parent's house alongwith son Vishal. In his cross-examination, he has elaborated the incident which took place on that day. He has referred to the telephonic call which he received from his specifically contended that when she was reached to her parent's house on 14th July, 1983 at night by her husband and his father Vishindas, her parents entreated her father-in-law Vishindas not to drive the wife out of the matrimonial home. The wife's evidence is silent on this point. The wife's parents and her brother were at home when she was supposedly reached by her husband and her father-in-law to Chembur late in the evening on 14th July, 1983. Surprisingly none of the parents of the wife nor even her brother has been examined. It is difficult to believe that when the husband and his father went to the house of the wife's parents, there was no discussion between them on the question. In the first place, looking to the pleadings and the evidence, we are inclined to take a view that the wife deserted the matrimonial home in the absence of her husband and the father-in-law. Assuming that she waited till late in the evening for the return of her husband and father-in-law from their respective jobs and then a quarrel ensued resulting in her being driven out and reached to her parents' house late in the evening, there would have been some corroboration to this statement of the wife and the natural corroboration available would be that of her parents and her brother. None has been examined and there is no explanation given as to why nobody was examined.

20. That apart, the wife wants us to believe that when she was reached at her parents' house on 14th July, 1983 by her husband and father-in-law there was no talk between her parents and her husband's parents. What is worse is that when the husband came on the next day to Chembur to take Vishal, the wife claims to have quietly handed over the custody of the child without any whisper whatsoever. Vishal was barely aged 3 years at that time. He was born on 18th April, 1980 and the desertion is of 14th July, 1983. Wife wants us to believe that when the husband came to her parents' house on 15th July, 1983, she quietly,

without the slightest protest, handed over the child of tender age of 3 years to her husband. Neither she nor her parents nor anyone else discussed the incident of 14th July, 1983 when the wife is supposed to have been driven out of the matrimonial home with a child of tender age at odd hours. In our view, the evidence of the husband, Amar, and of his father Vishindas as to what transpired on 14th July, 1983 appears to be more probable and inspires greater confidence. It may be that in the absence of the husband, the father-in-law of the appellant ought not to have found fault with her paying Rs. 110/- if the father-in-law thought that the price was excessive. But this, in our view, does not justify the wife deserting the matrimonial home. In our view, such differences of opinion, and perhaps insults, are a part of day to day wear and tear of matrimonial life. The father-in-law might have honestly believed that the price paid was excessive. The question is does such an incident justify the wife deserting the matrimonial home even without waiting for the husband to return home. We are inclined to accept the husband's version that when his wife phoned him in the afternoon of 14th July, 1983 he requested the appellant not to leave the matrimonial home. The wife was in the habit of leaving the matrimonial home and as we have indicated earlier, she had repeatedly gone to her parent's house at Chembur but that was for a short while for few days, after which she returned. After 14th July, 1983 she seems to have reconciled herself to stay with her parents without bothering about her husband. There could have been some evidence of the parents of the wife to show what attempts they made to reconcile the differences between the spouses. There is not a whisper of any attempt to talk to the husband when he came to take Vishal on 15th July, 1983. The best persons to try to bring about the reconciliation would be the parents of the wife. They could have deposed that some efforts were made between 14th July, 1983 and 9th June, 1986. Such evidence is conspicuously absent in the present case and we are at a loss to understand the attitude of the wife and her parents. The story of 15th July, 1983 as deposed to by the wife herself leaves no doubt in our mind that the wife left the matrimonial home on her own accord without any justification and did not hesitate to hand over the custody of the child to her husband on 15th July, 1983. There is no dispute before us that the child of tender age of just 3 years all along continued to live with the father and is still living with the father. The wife has not bothered much even to get the custody of the child at any time.

21. It is true that the wife did attempt to go to the school and meet the child. It is also true that the husband made a complaint of attempt by the wife to kidnap the child. It may be that there was no justification for the husband to complain against the wife.

22. Mr. Makhija no doubt invited our attention to the Supreme Court decision in the case of Lachman Utamchand Kirpalani Vs. Meena alias Mota, . Relying upon the Supreme Court decision, Mr. Makhija contended that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total

repudiation of the obligations of marriage. As held by the Supreme Court in the above case, 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 (i) the factum of separation and (ii) the intention to bring cohabitation permanently to an end (*animus deserendi*). Looking to the evidence on the two spouses and the father of the husband Vishindas we have no doubt in our mind that there is clear evidence of factum of separation and of the intention to bring cohabitation permanently to an end. Conduct of the wife as also the conduct of her parents in not bothering to bring about any reconciliation leaves us with no choice but to conclude that the wife had deserted the matrimonial home with an intention to bring cohabitation permanently to an end. She willingly parted company of her son Vishal on 15th July, 1983 though the child was of a tender age of just 3 years and needed the mother's care most. The Supreme Court has further observed in Lachman Kirpalani's case (*supra*) that so far as the deserted spouse is concerned two elements are essential (i) the absence of consent and (ii) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid, namely, *animus deserendi*. On the evidence before us we have no doubt that there is no consent on the part of the husband and the husband is not guilty of any conduct, which gave reasonable cause to the wife to leave the matrimonial home. If the husband's father had disagreed with the appellant and had expressed his disapproval of the purchase of silver trinklet at an excessive price which was the only incident which occurred on 14th July, 1983, that, in our view, was not sufficient for the wife to leave the matrimonial home for ever. It is true that desertion is a matter of inference to be drawn from the facts and circumstances of each case, as stated by the Supreme Court in Lachman Kirpalani's case. It is also true that if in fact there has been separation the essential question always is whether that was accompanied by the *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. In the present case we have no manner of doubt that both the condition existed on 14th July, 1983 namely the factum of separation and the intention to bring cohabitation permanently to an end. Hence, applying the ratio of the decision of the Supreme Court in Lachman Kirpalani's case we are of the view that the appellant-wife is guilty of desertion and this would be a ground for the husband to obtain divorce under Clause (ib) of sub-section (1) of section 13 of the Hindu Marriage Act. We, answer point No. (iii) in the affirmative.

23. In the view that we have taken though we set aside the findings of the learned trial Judge on the question of cruelty, we are inclined to agree with him on the question of desertion and we hold that the respondent husband is entitled

to a decree for divorce. In our view, there is an irretrievable break down of the marriage. We further hold that the husband is not in any way taking advantage of his own wrong within the meaning of section 23(1)(a) of the Hindu Marriage Act.

24. There is no dispute before us that the spouses are living separately from 14th July, 1983 i.e. for more than 12 years now. All along Vishal has been in the custody of his father. There is no dispute before us about the welfare of the child being secured with the father. As indicated above, it is a somewhat disturbing feature that the wife never tried to get back the custody of her only child of tender age soon after 14th July, 1983. Apart from the failure on her part and on the part of her parents to bring about any reconciliation, there, admittedly, was no attempt to get the custody of the child of tender age who needed the mother's care most. That apart, during the course of hearing of this appeal, we adjourned the matter more than once with a view to ascertaining whether any reconciliation was possible. However, both the learned Counsel have frankly stated that no reconciliation is possible at all. We are thus left with a situation that not only is the wife guilty of matrimonial wrong of desertion on 14th July, 1983 but there is an irretrievable break down of the marriage between the spouses. In the result, the wife's appeal is liable to be dismissed and though the finding on the question of cruelty is set aside, decree for divorce on the ground of desertion must be upheld.

25. It was not disputed before us by both the learned Counsel that the wife's belongings whatever they may be, are in a cupboard in the matrimonial home. Mr. Makhija appearing for the wife has expressed a desire that the wife must get the said belongings back immediately. Mr. Abhyankar appearing for the husband has no objection to this being done as early as possible. Both the learned Counsel are agreed before us that the appellant-wife will go to the respondent's place between 11.00 a.m. and 12.00 noon on Tuesday the 15th August, 1995 and she has the option of either removing the entire cupboard in which her belongings are kept or have the cupboard opened and remove the belongings. Statements made by both the learned Counsel in this behalf are accepted and the wife is permitted to visit the husband's residence between 11.00 a.m. and 12.00 noon or soon thereafter on Tuesday the 15th August, 1995 for the purpose of taking possession of either the entire cupboard containing her belongings or the belongings simpliciter.

26. Point No. (v) : Maintenance payable to the wife :

On the question of maintenance it was disputed before us that the wife is not earning anything. Husband is earning approximately Rs. 4,000/- p.m. and his carry home salary is approximately Rs. 3,500/-. He is a manager in Private Plastic Manufacturing Company. He is maintaining the child all along and there is no dispute about it. The learned trial Judge has granted maintenance of Rs. 700/- p.m. There was some dispute before us whether the amount of Rs. 700/- p.m. payable to the wife has been fully paid or not. However, today, both the

learned Counsel state that maintenance upto July, 1995 has been paid. Commencing with the month of August, 1995 we direct the respondent-husband to pay to the appellant-wife a sum of Rs. 1,000/- p.m. towards her maintenance. This amount will be paid to the wife directly by demand draft on or before 15th day of each month commencing from 15th August, 1995. In view of the above, following order is made :

27. ORDER :

i) Appeal filed by the wife succeeds but only partly in so far as the finding as to cruelty is concerned. The said finding recorded by the learned trial Judge in his judgment order dated 15th October, 1983 is set aside. The finding recorded on the point of desertion, is, however, affirmed. The respondent/husband is entitled to a decree for divorce on the ground of desertion u/s 13(1)(ib) of Hindu Marriage Act. Custody of the child Vishal will remain with the respondent. However, both Mr. Makhija and Mr. Abhyankar have agreed before us that the wife or her brother Vijay Chhabria will be permitted to go to the respondent's house every Saturday around 5.00 O'clock in the evening, take the child out and bring him back by 9.00 p.m. on the same day. This is subject to the mutual variation which the parties may mutually arrive at.

ii) The respondent-husband is directed to pay to the wife future maintenance at the rate of Rs. 1,000/- p.m. with effect from the month of August, 1995. Payment for each month to be made by 15th of each month commencing with 15th August, 1995.

iii) The wife is permitted to visit the respondent's house on Tuesday the 15th August, 1995 between 11.00 a.m. to 12.00 noon or soon thereafter to collect her belongings with or without the cupboard in which they have been stored.

28. Appeal and cross-objections disposed of as above with no order as to costs.

29. At this stage Miss Shah for the wife prays for an injunction restraining the respondent-husband from remarrying for a period of 3 months from today. In the facts and circumstances of the case, we think that the prayer is reasonable. Hence, the respondent Amar is restrained from remarrying for a period of 3 months from today.

30. Issuance of certified copy expedited.

Appeal partly allowed.